



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

Case Number: 494 /
2020

In the matter between:

MAMODUPI MOHLALA MULAUDZI

Plaintiff

and

EMMA LOUISE POWELL

Defendant

Coram: Wille, J

Heard: 18th of March 2021

Delivered: 26th of March 2021

JUDGMENT

WILLE, J:**INTRODUCTION**

[1] Before me for determination are two opposed applications to compel further discovery. Both these applications are at the instance of the defendant. The two applications are interlocutory to a defamation action that the plaintiff has instituted against the defendant. The parties shall, for the purposes of clarity and convenience, be referred to as the plaintiff and the defendant.

[2] The plaintiff has sued the defendant for defamation in that it is alleged that the defendant posted a 'tweet' to the effect that the plaintiff had gone rogue. The plaintiff was at the time the Chief Executive Officer¹, of the Estate Agency Affairs Board.² The defendant at that time was a parliamentary member. The claim is for damages in the sum of R1,5 million. The defendant admits to posting the tweet but avers that same is not defamatory of the plaintiff.

[3] In the alternative, it is pleaded that the content of the tweet was in the public benefit, was true, was fair and pertained to a matter of public interest. In the further alternative, it is pleaded that the tweet was not published with malice and is the subject of quasi-privilege because it was published as part of the defendant's duty to alert members of the public in connection with an alleged abuse of power. As a final alternative, a shield is put up to the effect that the tweet was reasonable because the defendant made reasonable enquiries as to the veracity of the content of the tweet and its publication was accordingly equitable in the circumstances.

¹ The 'CEO'

² The 'EAAB'

[4] The defendant in the first application to compel³, seeks an order requiring the discovery of the documents specified in the defendant's first discovery notice dated the 30th of July 2020.⁴ Whilst, in the second application to compel⁵, the defendant seeks an order requiring the discovery of the documents specified in the defendant's second notice in terms of rule 35(3)⁶, together with compliance of the defendant's notice in terms of rule 35(12) dated the 13th of October 2020.

THE FACTUAL MATRIX

[5] The plaintiff's case in the action proceedings is that the following tweet is defamatory of the plaintiff:

'Today, a meeting between EAAB management and NEHAWU shop stewards was terminated when increasingly rogue CEO Mohlala-Mulaudzi's husband / partner allegedly walked onto state-entity's premises and produced a firearm'

[6] It is common cause that the defendant published the tweet. It is also common cause that the reference to the 'rogue CEO Mohlala-Mulaudzi' is a reference to the plaintiff. The essence of the defendant's defence is that the tweet was not wrongful because there was nothing unlawful about the tweet, this because the tweet was the truth and was in the public benefit.

THE PLAINTIFF'S INITIAL DISCOVERY

³ In terms of rule 35(7) of the 'Uniform' rules of court

⁴ The first discovery notice filed in terms of rule 35(3)

⁵ This, brought in terms of both rules 35(7) and rule 30A

⁶ Dated the 26th of August 2020

[7] The plaintiff's initial discovery consisted mostly of the documents that she had annexed to her particulars of claim which consisted of the following: a copy of the tweet: an investigation report into the allegations made in the tweet: a letter of demand and a series of tweets made in response to the tweet. She also discovered a retraction in a newspaper⁷, regarding the events described in the tweet.

THE FIRST APPLICATION TO COMPEL

[8] The alleged lack of proper initial discovery by the plaintiff, no doubt triggered the defendant to serve a notice in terms of rule 35(3) requiring further and better discovery.⁸ The plaintiff refused to discover any of the documents requested in this first notice. An application to compel accordingly followed.⁹ Some of the documents as sought by the defendant were subsequently obtained. The defendant nevertheless persists in seeking the following documentation for production namely: certain minutes of the board meetings of the EAAB since the plaintiff's appointment as its CEO: copies of all written complaints directed against the plaintiff relating to her performance and conduct as the CEO and copies of her salary slips exhibiting proof of all board fees paid to her by the SABC.¹⁰ This, while she was the CEO of the EAAB.

THE SECOND APPLICATION TO COMPEL

[9] When the plaintiff opposed the application in connection with the first rule 35(3) notice, she filed as an annexure exhibiting portion of a pleading in a defamation action she

⁷ The '*Rapport*'

⁸ The first rule 35 (3) notice

⁹ The first application to compel

¹⁰ The 'South African Broadcasting Corporation'

had instituted against Ms Kula-Ameyaw.¹¹ This, for the latter's alleged complaint to the Minister of Human Settlements, Water and Sanitation, regarding the plaintiff. The defendant contends for relevancy in this connection on the basis, *inter alia*, that the leader of an organisation should be amenable to tolerate criticism from other members of her organisation and not drag them to court for it.

[10] Subsequently, the defendant served a notice in terms of rule 35(3)¹², demanding discovery of all the relevant court papers in the Kula-Ameyaw action including: the summons and particulars of claim: the plea and any further pleadings in that action. Besides, the defendant served a notice in terms of rule 35(12)¹³, requiring the plaintiff to produce for inspection a copy of the complete particulars of claim in the Kula-Ameyaw action. This on the basis that the filing of the annexure by the plaintiff now constituted a document¹⁴, as referred to in the plaintiff's affidavit opposing the initial rule 35(3) notice. The plaintiff did not comply with these notices.

[11] Finally, the defendant then served a second application to compel, in which she seeks compliance both with the second rule 35(3) notice¹⁵, as well as compliance with the rule 35(12) notice. This, also in terms of rule 30A.¹⁶

DISCUSSION

¹¹ A fellow board member

¹² The second rule 35(3) notice

¹³ The rule 35 (12) notice

¹⁴ This, in accordance with the specific reference to 'document' in rule 35 (12).

¹⁵ In terms of rule 35(7)

¹⁶ For 'non-compliance' with the court rules

[12] The defendant submits that in order to understand why the documents sought in the first application to compel are relevant to the defendant's defence, it is necessary to understand that there was a considerable amount of coverage¹⁷, about the plaintiff's tenure as the CEO of the EAAB, which was allegedly beset with controversy, discord and mismanagement.

[13] Some of this coverage included: that it was reported that the plaintiff was receiving board fees for sitting on the board of the SABC, whilst she was a paid employee of the government and she was accordingly precluded from receiving these additional board fees. In effect, it was alleged that she was receiving (2) salaries from (2) organs of state and was doing so, unlawfully: that it was reported that certain of her staff had accused her of bullying and arbitrarily cutting their benefits: that it had been reported that Eugenia Kula-Ameyaw, a fellow board member, had written to Lindiwe Sisulu¹⁸, complaining about the plaintiff's alleged governance violations.

[14] Finally, it was reported that certain of the SABC's senior executives had threatened to resign over the alleged interference on their own board, solely attributed to the actions of the plaintiff. This was specifically in connection with an alleged demand for an interview on one of the SABC's flagship news programmes. The defendant understands that this demand was made by the CEO of the EAAB and would possibly violate corporate governance protocols.

[15] The plaintiff contends that the minutes of the board meetings sought by the defendant are irrelevant. In contrast, the defendant takes the position that the board minutes would

¹⁷ In the public domain

¹⁸ The Minister of Human Settlements, Water and Sanitation

reflect on the plaintiff's conduct in connection with the position that she holds and thus whether she was truthfully and fairly described in the tweet. In my view, the requested board minutes are certainly most likely to contain information relevant to any allegations of misconduct and mismanagement which had surfaced against the plaintiff. Thus, these are very relevant to the defences raised by the defendant.

[16] As far as the complaint documentation is concerned, the following: the plaintiff refused to discover any of these documents but significantly has not denied that they exist: the plaintiff concedes that the complaint by Ms Kula-Ameyaw exists, but claims that she is not required to produce the documents requested because these documents relate to pending litigation. It is trite that this does not excuse discovery as these documents are not *per se* privileged. In relation to the complaint by Mr Motsepe, the plaintiff refers the defendant to the EAAB. This in turn, as a matter of logic, must mean that the plaintiff is in possession of the complaint as the CEO of the EAAB.

[17] The plaintiff avers that the complaints against her are not relevant. In contrast, the defendant contends for relevance on the basis that the complaints against the plaintiff, by virtue of the position that she holds, are relevant as to whether she was truthfully and fairly described in the tweet.

[18] Furthermore, the defendant seeks, by way of the discovery process, copies of the salary slips, or the proof of payment slips of board fees paid to the plaintiff by the SABC, whilst she was the CEO of the EAAB.

[19] Similarly, the defendant refused to produce these documents. Again, she has not denied that they exist or that they are not in her possession but, asserts instead that they are

not relevant. The defendant contends for relevance on the basis that the tweet may very well be described as true and fair in the event that the plaintiff did receive (2) salary payments from (2) governmental enterprises at the same time.

[20] The plaintiff puts up some further shields to the defendant's applications which may be dealt with swiftly. The plaintiff asserts that the documents pertaining to her conduct in the position that she holds are irrelevant to her action because she has instituted the action in her personal capacity. I disagree, because at issue is not the capacity in which the plaintiff is suing the defendant, but rather, the enquiry is whether the tweet is true or fair comment taking into account the context of the tweet, together with the factual position that the plaintiff was the CEO of the EAAB.

[21] Further, the plaintiff claims that the documents sought are not relevant because the defendant only became aware of these documents subsequent to the institution of proceedings. Thus, it is argued that this information would not have been in her knowledge at the time of making the defamatory comments and therefore cannot assist the defendant in her defences. Again, I disagree because in relation to the defence of truth, all that matters is whether the tweet was objectively substantially true and published to the benefit of the public.

[22] If the two requirements are met, the defence is established, and the publication is not wrongful.¹⁹ It must be so that the publication of true material to the benefit of the public is a competent defence in a defamation action. What the defendant may or may not have known at the time of publication is accordingly irrelevant.

¹⁹ *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA)

[23] The position in our law on this score was clearly set out in *Modiri*, as follows:

*'In their plea the media respondents relied on a number of recognised grounds of justification, including truth and public benefit...The one that found favour with the court a quo was that of truth and public benefit. If that finding were to be upheld, it would be the end of the matter. I therefore turn to that enquiry. In this regard the appellant's contentions as to why the court a quo erred in upholding the defence of truth and public benefit were essentially threefold. First, that the media respondents did not lead any evidence in rebuttal of the presumption of wrongfulness...Third, that the media respondents could not rely on the information of the appellant's alleged criminal activities testified to by the police witnesses, because it had not been demonstrated that the article was based on that information'*²⁰

[24] The documents sought by the defendant largely pertain to the plaintiff's alleged conduct that occurred prior to the posting of the tweet, namely: the unlawful payments she allegedly received are recorded to have ended in September 2019: the article in which the plaintiff was accused of misconduct was published on the 10th of December 2019: the Kula-Ameyaw complaint was made in October 2019 and the incident in which the plaintiff allegedly meddled with the SABC's board was reported on, as early as September 2019. All this information is relevant in establishing as to whether the tweet was objectively substantially true and published to the benefit of the public.

[25] In *Swissborough*²¹, the court made the following findings in connection with the relevance in dealing with the issue relating to the discovery of documents:

²⁰ *Modiri* para 11

²¹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 316

*'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words either directly or indirectly because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences'*²²

[26] Disputed discovery issues in connection with relevance in matters involving actions for defamation have recently received more scrutiny and attention in the *Mkhwebane*²³ matter. Writing for the full court, Navsa ADP went on to make the following penchant observations:

*In the present case we are dealing with defamatory statements and defences such as truth and public interest or fair comment that might be raised. The question to be addressed is whether the documents sought might have evidentiary value and might assist the appellants in their defence to the relief claimed in the main case'*²⁴

[27] In my view, the documents sought in the first application to compel are clearly relevant and the plaintiff has no lawful reason to withhold them. The documents sought in terms of the second application are also relevant and accordingly fall to be discovered in terms of the rule 35(3) notice. Accordingly, there is no need for me to deal with any issues surrounding the rule 35 (12) notice.

²² *Swissborough* at 316 F - H

²³ *Democratic Alliance and Others v Mkhwebane and Another* (1370/2019) [2021] ZASCA 18 (11 March 2021)

²⁴ *Mkhwebane* at 23 para 41

IN PASSING AND OBITER

[28] Another reason why, in any event, the rule 35(12) notice needs to be complied with is because the documents requested are specifically referred to by way of an annexure to the plaintiff's affidavit opposing the first rule 35(3) notice. It is so that the plaintiff avers that this was in error. In my view this makes no difference to the enquiry.

[29] The test for 'relevancy' in this connection must be at a very low threshold. I say this because this document was specifically referred to by the plaintiff. How it now lies in the mouth of the plaintiff to say the documents are not relevant, escapes me. Thankfully, for the reasons set out in this judgment, I am relieved of making a definitive finding in this connection.

[30] It is so that when an attorney signs a pleading, not as an individual, but on behalf of a firm representing a litigant, it is incumbent upon that attorney to sign the pleading twice. The attorney must sign once in his capacity as the certified attorney and then once again on behalf of the firm of attorneys. The reference to section 4(2)²⁵, should also now be read with reference to section 25(3) of the Legal Practice Act.²⁶

[31] I accept that I may attract some criticism for raising the issue of the potential defect in the plaintiff's particulars of claim which was not an issue before me for adjudication. The position on this score has recently been eloquently formulated by Schippers JA, in the *Gun Owners*²⁷ case, as follows:

²⁵ Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995)

²⁶ Section 119 (3) of Act 28 of 2014

²⁷ *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88 (23 July 2020)

‘...in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the judge remains neutral and aloof to the fray. This court, has on more than one occasion emphasised that the adjudication of a case is confined to the issues before court’²⁸

[32] This is undoubtedly the correct legal position and that is precisely why my remarks in this connection are obiter. The particulars of claim as filed by the plaintiff are signed only by an attorney. The particulars of claim are clearly a pleading and therefore fall to be signed by both an advocate and an attorney or by an attorney enjoying the requisite certified rights of appearance. The particulars of claim in this matter are not signed by an attorney who exhibits that he or she has the necessary certified rights of appearance, nor are they signed by an advocate.

[33] The particulars of claim may very well be fatally defective. This issue has not been addressed by either party and I again emphasize that this is not an issue before me for my adjudication. The parties submit that no objection has been taken in this connection and the defendant has in any event taken further steps in the process by, inter alia, the filing of a plea.

[34] I was also belatedly referred to the decision in *Fortune*²⁹, which is cited as ostensible authority for the fact that this defect may be subject to condonation. No such application has been made by either party. In any event, the particulars of claim in this matter have only been signed once, seemingly on behalf of the firm of attorneys representing the plaintiff. I

²⁸ *Gun Owners* at 16 para 26

²⁹ *Fortune v Fortune* 1996 (2) SA 550 (C) – It was held: - ‘That the basis for condonation ought no longer to prevail’

am not by any means persuaded that this is satisfactory in the circumstances. Put in another way, you cannot 'hang something' on nothing.

[35] In the result, the following order is granted:

1. That the plaintiff shall within (10) court days of date of this order discover and make available for inspection in accordance with rule 35(6) the following documentation:
 - 1.1 the minutes of every meeting of the board of directors of the Estate Agency Affairs Board of South Africa since the plaintiff's appointment as Chief Executive Officer of the Estate Agency Affairs Board of South Africa.
 - 1.2 all written complaints from: members of the board of directors of the Estate Agency Affairs Board of South Africa: employees of the Estate Agency Affairs Board of South Africa: or any other person affiliated with the board of directors: - relating to the plaintiff's performance or conduct as the Chief Executive Officer, including without limitation the following documents:
 - 1.2.1 the complaint, written by Eugenia Kula-Ameyaw in October, to Minister Lindiwe Sisulu; and
 - 1.2.2 the complaint written by Tumisho Motsepe; and
 - 1.2.3 all letters of complaint directed at the plaintiff.

- 1.3 all salary slips or proof of payment of board fees or any other fees or emoluments paid to the plaintiff by the South African Broadcasting Corporation while she has been the Chief Executive Officer of the Estate Agency Affairs Board of South Africa.
- 1.4 all court papers pertaining to the plaintiff's action against Ms Eugenia Kula-Ameyaw for defamation arising from a letter Ms Kula-Ameyaw wrote to the Minister of Human Settlements, Water and Sanitation in October 2019, including without any limitation the following documentation:
 - 1.4.1 the summons and particulars of claim
 - 1.4.2 the plea, and
 - 1.4.3 any further pleadings.
2. That in the event that the plaintiff fails to comply with any of the orders contained in paragraphs 1 to 1.4.3 above (inclusive), then in that event, the defendant is authorised to apply on these papers, duly supplemented as may be necessary, for an order dismissing the plaintiff's claim against the defendant, together with the appropriate order for costs.
3. That the plaintiff is hereby ordered to pay the costs of an incidental to the *applications* to compel, on the scale as between party and party, as taxed or agreed.

E. D. WILLE

(Judge of the High Court)