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

Case No: **1050/2023**

In the matter between:

SIBUSISO MPENDULO Applicant

and

GROUNDUP First Respondent

MEDIA 24 Second Respondent

Coram: Justice J Cloete

Heard: 10 October 2023

Delivered electronically: 24 October 2023

JUDGMENT

CLOETE J:

[1] The applicant, who appeared in person, seeks orders directing the first and second respondents to retract and publicly apologise for what he considers to be a defamatory article published about him on 10 October 2022 by the first respondent, and subsequently by the second respondent under a syndication agreement with

the first respondent.[1] Costs are also sought since the application is opposed. The defences raised by the respondents on the merits are in essence: (a) truth and in the public interest; (b) reasonable publication; (c) fair comment; and (d) qualified privilege. Put differently there is a material dispute of fact as to whether the applicant is entitled to any relief.

[2] What is important is that in prayers 2 and 3 of his notice of motion the applicant also sought payment of damages of R9 million by each of the respondents for alleged reputational harm. It is clear from the papers that he has not abandoned these claims since he stated:

2.1 In his replying affidavit, that the court *'will consider the merits of this application and give directions on how to proceed with the financial claim''*; and

2.2 In his heads of argument, that the application *'precludes paragraph 2 and paragraph 3 of the Notice of Motion, for which the Applicant will institute an alternative action suit'.*

[3] Accordingly the applicant's claim for payment of damages, from his perspective, is still very much alive, and although it is neither permissible nor appropriate for this court to give directions on how he should pursue these claims, given that they are not before me for determination, his stance impacts directly on whether it is

[1] The article was subsequently corrected in part on 7 February 2023.

competent for me to grant the retraction and apology relief even if I were to have been persuaded on the merits.

[4] In his Practice Note the applicant furthermore stated that: (a) his case for a retraction and apology would be heard only on the papers; (b) he would not give oral evidence; and (c) he would not call witnesses. The complete answer to requiring this court to decide the retraction and apology relief on application is found in the Supreme Court of Appeal decision in *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators*[2] by which I am of course bound. The relevant paragraphs thereof read as follows:

> *'[19] Akani was only entitled to a single global remedy against NBC to remedy all the harm occasioned to it by the publication of the letter. In general the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords them upon such a cause.[3] Akani was not entitled to separate its claim for the publication of a retraction from its claim for a permanent interdict and any possible claim for damages. This is well illustrated by the two Constitutional Court cases in which the problem has been considered. In one[4] an apology was ordered as an adjunct to an award of damages. In the other damages were ordered, but the court declined to order an apology.[5] As pointed out in* ***EFF v Manuel****,[6]* *which of these different remedies should be granted and in what combination, requires a single exercise of judicial discretion at the close of the case. For that reason this court held that the claims for damages and an apology could only be resolved after hearing oral evidence on damages.*
>
> *[20] I can see no basis for distinguishing this case from* ***EFF v Manuel****, so far as these principles are concerned. That would have been so even if Akani had*

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2 [2021] 4 All SA 652 (SCA).
3 *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 471H-472F.
4 *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at paras [199], [202] and [203].
5 *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at para [134].
6 *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA) at paras [128] to [130].

expressly eschewed any claim for further relief beyond the published retraction. The relief being claimed would still have been relief directed at compensating it for harm caused by the publication of the letter and its defamatory contents. It made no difference whether that relief was couched in monetary terms or was claimed on some other basis. The purpose it served remained the same. It was to compensate the claimant for the harm caused by the defamation and the same factors were relevant to the relief whatever form it took. The facts in regard to that harm were disputed. How then was the court to determine whether the publication of a retraction was an appropriate remedy? In order to determine what was appropriate it had to know what harm had been caused by the publication and its impact on Akani's reputation…'

[21] A claim for damages for defamation, whether general or special, was always unliquidated and the damages could only be determined by proceedings by way of action, or possibly in special circumstances after hearing oral evidence in application proceedings. The position has not changed as a result of courts now being empowered to grant other compensatory remedies, either in addition to, or to the exclusion of, a claim for damages. Relief such as an apology or the publication of a retraction remains compensatory relief and for that reason requires oral evidence in the same way as a claim for damages requires oral evidence. That is inevitably so when the facts concerning the claimant's allegedly damaged reputation are disputed…'

[22] … Where the proceedings start by way of application the evidence has already been led. If the matter proceeds on the papers and the damage to the applicant's reputation has been placed in issue, no relief can be granted, because there is a dispute of fact on the papers and the rules governing the resolution of disputes of fact on paper apply… [referring to the trite *Plascon-Evans* rule].[7]

(Emphasis supplied).

[5] I make it clear that, in following *NBC Holdings*, I neither express a view nor make any finding on the merits of the applicant's claims and the defences raised by the

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5.

respondents. The point is simply that I am precluded from considering the relief sought by the applicant for a retraction and apology in circumstances where he has elected to proceed by way of application (i.e. on motion); and in addition has not withdrawn his claims for payment of damages. It follows that the application must fail on this ground.

[6] As far as costs are concerned it is undisputed that the business of the first respondent is operated by a non-profit company, GroundUp News NPC. It therefore does not generate any profit and its funding is derived substantially from donor organisations. It is also undisputed that the second respondent only published the article about which the applicant complains as a consequence of its syndication agreement with the first respondent. In these circumstances there is no reason why costs should not follow the result.

[7] **The following order is made:**

'The application is dismissed with costs on the scale as between party and party, including any reserved costs orders as well as the costs of counsel; provided that this order does not preclude the applicant from instituting action against the respondents for relief based on alleged defamation should he so elect.'

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J I CLOETE

For applicant: in person
Instructed by:

For respondents: Adv Mitchell **De Beer**
Instructed by: Lionel Murray Schwormstedt & Louw, Mr J Louw