IN THE SABWIL HUMAN RIGHTS COURT

(THULAMELA CHAMBERS, SANDTON)

CASE NO**: 1412 / 16**

In the matter between:

MARKS, CHRIS Applicant

and

SHABANGU, JOYCE Respondent

APPLICANT'S HEADS OF ARGUMENT

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(1). The Applicant seeks an order in the following terms; an order directing the Respondent to remove the blog and twitter posts which read as follows: "*This is the actual statement I made to the police on 30 May 2016*". It then proceeds to explain how the applicant raped the respondent at the offices of Education4Higher on Friday 27 May 2016, after calling her in for a meeting to discuss her students. At the end of the post the respondent says that

> *"despite the fact that this was fully reported and corroborated with medical evidence, as well as the evidence of three other women that have also been attacked by Chris, the police have refused to do anything and told me to just get over it. I have no choice but to tell my story here."*

(2). The applicant also seeks an interdict preventing the respondent from publishing any article about him or his company. He also asks for an order directing the

respondent to publish an apology on Twitter and on her blog. Six principal issues arise in this matter which can be defined as follows;

a. Whether the posts harm the reputation of the Applicant.

b. Whether the defence of Truth and Public Benefit would succeed in favour of the Respondent.

c. Whether the Respondent should be entitled in law to resort to self-help instead of the criminal justice system.

d. Whether the Respondent jeopardised the Applicant's right to a fair trial.

e. An inquiry into the appropriate remedy.

f. Whether a final interdict would be effective and appropriate in the circumstances.

Harm to Reputation and locus standi

(3). Our law recognizes three personality interests; *corpus*, *dignitas* and *fama*. In this instance we are concerned with *fama*, the right to a good name and reputation. *Fama* relates to a person's good name or reputation. It also relates to the status and respect a person enjoys in the eyes of others. Violation of *fama* occurs when; one lowers the public esteem that another person holds or if there is communication or publication of material that lowers the reputation of another person. The right to *fama* is also constitutionally enshrined in s9 of the Constitution which relates to the right to dignity. In this instance, there has been clear lowering of the Applicant's public esteem as well as his reputation because of the posts. It is important to note that the main focus of the law of defamation is to protect the reputation and esteem of persons from unjust attacks. In instances such as the present, the Court has to perform a balancing exercise of the rights to *fama* and the constitutionally entrenched right of freedom of expression as we saw in the case of *Khumalo v Holomisa*, even though there are some fundamental differences of circumstances *in*

casu.[1] Courts are tasked to perform a balancing exercise weighing up these two rights. A determination is made in light of public policy based on what is fair and just in the circumstances. Our submission is that it would be fair and just in the circumstances for the Court to find that the right to *fama*, or dignity should outweigh the right to dignity. However before this determination is made, we need to first determine whether defamation took place. Before we delve into this issue, we would like to submit that the Applicant and his business have the requisite *locus standi* to sue in this matter. In the case of *Dhlomo v Natal Newspapers*[2] and *Argus Printing & Publishing v Inkatha Freedom Party* the Courts stated that it is permissible for juristic persons and political parties to sue for defamation.[3] The position in respect of persons is that they also can sue for defamation or seek any appropriate relief provided they can make out a case.

(4). In making the determination of whether the posts harm the reputation of the Applicant we need first answer whether defamation took place. Defamation is the wrongful intentional publication of words or conduct concerning another person which has the effect of injuring reputation or a good name.[4] This definition was pronounced by O'Regan J in the case of *Khumalo and Others v Holomisa* and it has gone to become the *locus classicus*,[5] finding pronouncement in later cases such as *Cele v Avusa Media Ltd*.[6] In the current instance there was wrongful publication by the Respondent. In the case of *Khumalo v Holomisa* it was stated that wrongfulness relates to an intention to injure a personality interest by a person who is conscious of the wrongful character of his action. In this instance, from the onset, the hashtag '#Rapist4Higher' in and of itself points the intention by the Respondent to lower the public esteem and reputation of the Applicant in an attempt to catch attention on social media. By stating that 'I have no choice but to state my story here' relates to a clear intention on her part, to publish information or material which has the effect of lowering the Applicant's public image, and she foresaw that the publication would have this effect. Intention simply relates to the volition to injure and it has been discussed in conjunction with wrongfulness.

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[1] 2002 (5) SA 401.
[2] 1988 (4) SA 63.
[3] 1992 All SA 185 (A).
[4] 2002 (5) SA 401.
[5] 2002 (5) SA 401.
[6] 2013 ZAGPJHC 15 paras 9 and 10.

(5). Publication relates to the communication of the defamatory material to a third party who understands the defamatory content of what is published. In this instance the communication made on the blog and to the twitter followers of the Respondent. Furthermore, the content published had the effect of lowering the Applicant's public esteem and reputation thereby constituting a violation of his dignity and an infringement of his *fama* because the posts painted him as a rapist even though this has not been tested in Court. In *Isparta v Ritcher* the Court stated that an Applicant must prove that the defamatory statements were directed against him. In the current instance, we humbly submit that there can be no question about this as the Applicant's name was flagged out in both posts.[7]

The last element is defamatory effect. In this respect we would like to humbly advance the test postulated in the case of *Delta Corp Motor Corporation v Van der Merwe* where is was stated that 'Courts consider whether a reasonable person of ordinary intelligence might reasonably understand the words or conduct to convey a meaning that lowers the plaintiff's esteem.[8] In this instance we submit that being labelled a rapist certainly lowers the Applicant's reputation and esteem.

Truth and in the public interest

(6). A question which then arises is whether the Respondent could rely on the defence of Truth and in the Public Interest defence to exclude wrongfulness. In order for this defence to hold in law, what is required is that the allegations must be of facts which are substantially true and the information has to be of significance to society. The issue with this defence is that it is very flexible and depends on the circumstances of a case. We will argue it on favour of the Applicant's case. In the current instance the allegations are not substantially true in that, if they were true, the Respondent would have been motivated to lay charges against the Applicant if she really had confidence in her case. Furthermore, we have not had sight of the Respondents affidavits, however we are confident that nothing in their papers will point to any form of substantial truthful basis in opposing our claim. However the Court will exercise its judicial discretion in assessing that. We advance the case of

[7] 2013 (6) SA 529 (GNP).
[8] 2004 All SA 365 (SCA).

Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others where it was stated that the question of whether the defense of truth and public benefit can be sustained depends on an assessment of the facts and circumstances of a case in relation to time and manner, furthermore, that the occasion of the publication must be thoroughly investigated.[9] Our submission in this respect is that on an assessment of the facts, it would not be fair to allow the defense to succeed simply because the factual background of the posts lack truth and they are uncorroborated furthermore, it would not be in the public interest to allow inaccurate information to be published to the public because this would simply mislead the public. In addition to this *Allie v Foodworld* requires an investigation of the publication.[10] This task is left to the Court.

Lastly, even on a broad interpretation of truth and in the public interest defense, as was advocated for in *Allie v Foodworld* it would be untenable to allow the public to rely on inaccurate and uncorroborated events of the Respondent.[11] Therefore, even a broad interpretation of the defense would not occasion the defense to succeed.

Self-help?

The last issue relates to whether the Respondent was entitled to resort to self-help in order to vindicate herself. Self-help in the sense of a legal doctrine refers to individuals' implementation of their rights without resorting to legal writ or consultation of higher legal authority. In the case of *Barkhuizen v Napier* in paragraph 27 Ngcobo J stated that Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions.[12] The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. Ngobo J reffered to the Courts decision in the case of *Lesapo v North West Agricultural Bank and Another* where it stated that 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos

[9] 2004 (2) SA 433.
[10] *Ibid.*
[11] 2004 (2) SA 433.
[12] 2007 (5) SA 323 (CC).

and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance'.[13] Therefore, the Respondent ought to have tried to resolve the matter in Court in terms of s34. In so doing, she would not risk jeopardizing the Applicant's right to a fair trial.

Does the Respondent's conduct effectively undermine the applicant's right to a fair trial?

It is a Fundamental principle that the accused should be allowed to present his case in court in an effective manner. This will enable him to establish the truth about his guilt or innocence. This right is an expression of the *audi alteram partem* principle and is part and parcel of the right to a fair trial[14]which is entrenched in the constitution in terms of section 35(3).

The Applicant is accused by the respondent of having raped her and she made these allegations on her twitter account and blog post thereby infringing upon his right to a fair trial. Furthermore, the right to be presumed innocent[15] and adduce and challenge evidence[16] has been again infringed by the Respondent by her failure to vindicate her rights through the criminal justice system.

In order for an accused to present his case effectively, he must, *inter alia*, have access to statements of the state witnesses so that he can adduce and challenge evidence effectively[17]..The right to present one's case is also linked to the other rights mentioned in section 35 of the constitution, which again, are the right to

[13] 1999 (12) BCLR 1420.

[14] The 'audi alteram partem' principle literally means 'hear the other side''. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. See S V Suliman supra at 385.The rules of natural justice come into play here.

[15] Section 35(3)(h) of the Constitution of the Republic of South Africa 1996

[16] Section 35(3)(i) of the Constitution

[17] See Shabalala v attorney General, Transvaal supra at 1593.

present one's case via one's legal preventative in terms of section 35(3)(f); the right to remain silent and thus to present one's case in a passive manner in terms of section 35(3)(h); The right to present one's case contains a number of sub rights, which are directly related to the main right. These sub-right find application in the trial phase of the criminal proceedings. They are compromised by the following rights; the right to give and adduce, the right to address the court at the conclusion of evidence and the right to address the court on the issue of sentence. The right to present one's case effectively is fundamental to an accused's right to a fair trial.

The Applicant's submit that failure by the respondent to vindicate her rights through the criminal justice system, not only infringe upon the right to a fair trial owed to the applicant but also the right to equality in terms of section 12(1) which states that everyone is equal before the law and has the right to equal protection and benefit of the law.

What is the appropriate remedy in this matter?

In much case law regarding defamation, we have seen the courts willing to grant an interdict to an applicant once it has b established that the comment was indeed defamatory and unlawful. The next enquiry into the remedy of an interdict is how do the courts grant an interdict to the applicant?

In *Setlogelo v Setlogelo* [18] the requirements for an interdict have well been established.

1. A prima facie right

[18] 1914 AD 221 at 227

2. A well-grounded apprehension of irreparable harm, if interim relief is not granted and ultimate relief is eventually granted

3. The balance of convenience in favour of the granting of the interim relief.

4. The absence of any other adequate ordinary remedy.

In *Herholdt v Wills*[19]' The applicant approached the court seeking an interdict restraining the respondent from posting any information pertaining the applicant on Facebook or any other social media. The court in paragraph 30 held that the first two requirements set out in *Setlogelo v Setlogelo* for an interdict have been met and that in so far as an interdict is concerned , the applicant has a clear right to his privacy and the protection of his reputation and that the applicant has indeed been defamed. The court further held that cases where infringement of privacy takes place in the social media, common law needs to develop. In regard to the developing of common law the court conceded that electronic media were almost certaintly, beyond the imagination of the court when *Setlogelo v Setlogelo* was decided in 1914.

The first interesting case which arose with regard to Facebook and the law is the case of *Dutch Reformed Church v Rayan Sooknunan* which paved the way for 'Facebook litigation' in South African law.[20] This matter related to a dispute arising out a refusal by a land lord to accept an offer for the purchase of immovable property which was being leased by a Glory Divine World Ministries Church from the Dutch Reformed Church.

The Glory Divine World Ministries Church decided to embark on a public campaign in which it sought to pressure the Dutch Reformed Church to sell the property to them and nobody else. This was done by way of a Facebook page created by Glory Divine World Ministries Church where updates and comments were published in an effort to bring about the desired result in collaboration with the Church.

[19] *Heroldt v Wills* 2013 (2) SA 530 (GSJ)
[20] 2012 6 SA 201 (GSJ).

An interdict was sought by the Dutch Reformed Church on the basis that the Facebook posts were defamatory of the church and incited harm. The court held that there is no unlimited right to unfettered freedom to express every thought or viewpoint. It further held that certain statements were found to be injurious and harmful which an interdict was granted to the Church.

Is an interdict appropriate after both the twitter post and the blog post have been live for at least a few days?

The fact that the twitter post and the blog post has been live for a few is not a problem regarding an interdict and this was held again in the case of *Herholdt v Wills*[21] where the court made a distinction between a comment made on social media and a defamatory statements that are published or about to be printed in hardcopy and distributed. The court held that 'not only can items be posted and travel on the electronic media at a click of a computer in a moment, in an instant, at the twinkling of an eye, but also they can, with similar facility, be removed'. The court emphasised that 'this can also be done in at minimal costs'. The situation is qualitatively different from the scenario where newspapers have been or are about to be printed in hardcopy and distributed.

One of the important factors regarding this, which the court stated was that 'the law has to take into account changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people.

In addition to the interdict we submit that an apology would also be appropriate to ease the inflammation caused by the posts.

[21] Heroldt v Wills 2013 (2) SA 530 (GSJ)