THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Julius Sello Malema v Thembinkosi Rawula (139/2020) [2021] ZASCA 88 (23 June 2021)

On 18 April 2019, the appellant, Mr Julius Malema, applied to the Eastern Cape Division of the High Court, Port Elizabeth (the high court) for an order declaring that a Facebook post published on 5 April 2019 by the respondent, Mr Thembinkosi Rawula, was defamatory. He also sought an order interdicting the respondent from publishing any further defamatory statements and directing him to pay damages in the sum of R1 million. The respondent is a former member of the Economic Freedom Fighters (EFF), who served on its highest decision-making body, the Central Command Team (CCT). The high court dismissed the application.

The Supreme Court of Appeal (SCA) today dismissed the appeal against the high court's order. The statements in the Facebook post alleged to be defamatory of the appellant were that funds received by the EFF were centralised under the 'control, abuse and dictatorship' of the appellant and the Deputy President of the EFF, Mr Floyd Shivambu, who had made it clear that the EFF was their organisation; that they had used training providers who inflated costs to the EFF and in the absence of financial reports (which had not been tabled before the CCT since 2014), the respondent was forced to conclude that they had pocketed the difference; and that the appellant, in a meeting of the CCT had admitted to receiving money from VBS Bank, saying 'sometimes we are forced to kiss dogs or the devil to get funding'. These statements, the appellant said, were understood to mean or imply that he is corrupt; is stealing money; conducted himself in an unlawful and undemocratic manner; and is of base moral character.

The majority judgment of the SCA (Petse AP, Dambuza and Schippers JJA and Ledwaba AJA) held that the respondent, an unrepresented litigant in person, had established a sustainable foundation by way of evidence that a defence of truth and public interest or fair comment was available to be pursued. There was nothing in the evidence to gainsay his claim that he had obtained access to privileged information because he served on the CCT. When the appellant received the money from VBS, he knew that it was the subject of corruption and said that it could not be paid into the EFF's account and that he had to 'devise other means' to receive the money. Further, the fact that he or the EFF had received VBS money – which he denied in the papers – and that the appellant had personally benefited from it were in the

public domain in September 2018 already. It was telling that the applicant had taken no action against the print or electronic media for any injury to his good name or reputation.

The statement that the EFF 'was their organisation', when considered in the context of the Facebook post as a whole was an example of a recurring theme: a lack of accountability and abuse of funds on the part of the leadership of the EFF. It received levies from 61 members of Parliament and provincial legislatures of not less than R6 800 each and 852 councillors contributed at least R2 000 a month. It had a million members who each paid R10. The EFF received not less than R25 million per quarter from the National Assembly and provincial legislatures. All these funds were centralised 'under the control, abuse and dictatorship' of the appellant and Mr Shivambu. As to the inflation of costs, the respondent alleged that at a function of the EFF held in Pretoria, they could not purchase alcohol, because its price had been inflated threefold. The majority judgment held that his inability to cite further examples of the inflation of costs by service providers was potentially at least the product of the secrecy regarding the accounts of the EFF, which was not rebutted. The position has been that a final interdict for defamation cannot be granted unless a respondent has no defence. The high court had thus rightly concluded that the appellant did not make out a case for a final interdict. Moreover, since the appellant accepted that there was no risk of future re-publication by the respondent, an interdict could not be granted, as there was nothing left to restrain and no risk of future injury. The appeal was accordingly dismissed.

In a minority judgment by Rogers AJA, it was found that the appellant had failed to show that the respondent acted unlawfully by publishing statements that the appellant's conduct as leader of the EFF was undemocratic and unlawful. However, the minority judgment held that the respondent did not put up admissible evidence in support of his allegations that the appellant was corrupt, stole money or was of base moral character. This was essentially for the following reasons: There was no evidence that when the appellant received the money from VBS, it was the subject of scandal or known to be fleecing its depositors. The newspaper article which the respondent had put up to show that the applicant had received VBS money and had benefited from it could not be produced as evidence of the truth of what the journalist had written. The facts concerning the inflation of the price of alcohol were hearsay and inadmissible evidence, that the appellant had instructed the supplier to inflate prices or did so in order to steal the difference. Rogers AJA would thus have upheld the appeal in part.

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