THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 415/08

In the matter between:

MAANDA MANYATSHE	**APPELLANT**
and	
M & G MEDIA LIMITED	**FIRST RESPONDENT**
FERIAL HAFFEJEE	**SECOND RESPONDENT**
STEFAANS BRUMMER	**THIRD RESPONDENT**
SAM SOLE	**FOURTH RESPONDENT**
MEDIA 24 LTD	**FIFTH RESPONDENT**
NICHOLAS DAWES	**SIXTH RESPONDENT**

Neutral citation: *Manyathse v M & G Media Ltd* (415/2008) [2009] ZASCA 96 (17 September 2009)

CORAM: **Navsa, Brand, Mlambo, Mhlantla JJA *et* Bosielo AJA**

HEARD: **1 September 2009**

DELIVERED: **17 September 2009**

SUMMARY: Appeal against dismissal of application seeking to prevent publication of allegedly defamatory newspaper article – article published prior to hearing of appeal – held that judgment on appeal would have no practical effect – held further that appeal raised no important question of law – consequently appeal dismissed with costs under s 21A of Supreme Court Act 59 of 1959.

ORDER

On appeal from: High Court, Johannesburg
(Snyders J sitting as court of first instance.)

1. By virtue of s 21A of the Supreme Court Act 59 of 1959 the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

BRAND JA (Navsa, Mlambo, Mhlantla JJA *et* Bosielo AJA concurring)

[1] During September 2006 the appellant, Mr Maanda Manyatshe, brought an urgent application in the Johannesburg High Court for an interim interdict, pending a return day, against the publication of an article in the Mail & Guardian which he alleged was defamatory of him. Those cited as the respondents included the owner, editor, distributor and two journalists of the Mail & Guardian. The matter came before Snyders J who dismissed the application with costs. Publication of the article then took place. Despite the fact that publication had in fact taken place, the appellant sought and obtained leave to appeal against that judgment from the court a quo on the basis that the matter involves legal principles of considerable importance concerning the freedom of the press and the administration of justice.

[2] At the time of the application the appellant was the chief executive officer of a major cellular phone company, MTN South Africa (Pty) Ltd. Before that, from 1999 until October 2004, he had been the chief executive officer of the SA Post Office Ltd. The impending offensive article related to his time at the Post Office. It came to his notice when he was presented, shortly before publication, with a questionnaire from the two journalists, containing serious allegations to which he was invited to respond. The questionnaire commenced as follows:

‘It has come to our attention that charges have been laid with the South African Police Service by the chief executive officer of the SA Post Office, Mr Khutso Mampeule, against four entities, Namely:
Miko No 167 t/a Vision Design House whose principals are Mandla Msimang and Joseph Ynclan;
Maanda Manyatshe, former CEO of the Post Office and current CEO of MTN Southern Africa;
Geoffrey Mabote, former head of retail at the Post Office;
Francis Matabane, former head of transformation at the Post Office.'

[3] The questionnaire continued to state that the allegations set out in the complaint by Mampeule were lengthy, but included those that follow. The Post Office, so the story began, had invited tenders for the 'New Image' upgrading of its retail outlets all over the country. Though nineteen bidders were attracted, Vision Design House was not amongst them. Nonetheless, Vision Design House was appointed project manager, without a tender process, to commence with the refurbishing of a whole series of New Image pilot sites. These appointments, so Mr Mampeule alleged, were driven by the appellant, Mr Mabote and Mr Matabane. In the process, various deviations from the normal tender procedure were motivated by Mabote and approved by the appellant. In fact, so Mampeule contended, the appellant and Mabote were so concerned to have Vision Design House appointed that they misrepresented the facts to the Post Office Board and ignored procedure. What is more, the two of them also engaged in a series of piecemeal approvals which were within the limits of the appellant’s spending authority, so as to avoid the tender rules of the Post Office. Eventually the appellant presented the Post Office Board with a draft resolution that would authorise him to use Vision Design House as project manager for the whole of the New Image project, but the resolution was rejected by the Board. As it turned out, so the allegations by Mampeule went, the Post Office received complaints about the high cost and poor quality of the work produced by Vision Design House. Inspections by the Post Office Property Division then found the work generally substandard and completed at a cost of R10 000 per square metre. This was 285 per cent more than the costs of early parts of the project, which was handled by the property division itself. ‘In general’ so the questionnaire stated, ‘the Post Office alleges

that Messrs Manyatshe, Mabote, Matabane and Msimang . . . acted in concert as part of a deliberate scam to perpetrate a massive fraud.' When the appellant resigned as chief executive officer of the Post Office in October 2004, so the questionnaire concluded, the matter was already under investigation.

[4] The appellant declined the invitation to comment. Instead, he launched the urgent application for an interdict. According to his founding affidavit, he had no knowledge of any criminal charges against him. In fact, he said, he telephoned the chairperson of the Post Office Board who told him that she also knew nothing of any criminal charges laid against him by the Board. For the rest, he contented himself with a rather bald and general assertion that 'the allegations in the questionnaire relating to me are untrue, unfounded and irresponsible'.

[5] From the respondents' answering papers it emerged that the contents of the questionnaire derived from an affidavit deposed to by the appellant's successor as chief executive officer of the Post Office, Mr Mampeule. The affidavit had been filed in the Pretoria High Court, in response to a civil claim by way of motion proceedings by Vision Design House against the Post Office. A copy of the affidavit was annexed to the respondents' answering papers in the present case. A further document annexed to the respondents' papers incorporated the findings in a disciplinary enquiry against Mr Geoffrey Mabote, to whom reference is also made in the questionnaire. Although these disciplinary proceedings did not relate to the appellant directly, many of the allegations in Mampeule's affidavit were supported by these findings.

[6] In answer to the appellant's allegation in the present case, that he had no knowledge of criminal charges against him, the respondents annexed a resolution by the Post Office Board with reference to the Vision Design House saga which 'acknowledged the fact that a criminal charge has been laid with the commercial unit of the South African Police Services'. In conjunction with this resolution, the respondents placed before the court a quo an unsigned affidavit by Mampeule, of which, they submitted, a signed version had been

furnished to the police. Though this document had been prepared in the form of a complaint supporting a criminal charge, it is essentially a duplicate of the affidavit that had been filed in response to the Vision Design House claim in the Pretoria High Court referred to in the preceding paragraph. Finally, the respondents annexed a draft article which they intended to publish to their answering papers. It appears to be less venomous than the questionnaire. So for example, the direct allegation that the appellant was part of a massive fraud perpetrated on the Post Office by Vision Design House, was not repeated. On the other hand, it laid greater emphasis on the substantial amounts of money involved in the alleged fraud, for example, that Vision Design House had already made a secret profit of R8 million and that the project as a whole would be worth an estimated R2,5 billion. In the main, however, the content of the draft article was essentially similar to the questionnaire.

[7] Despite the evidence collated by the respondents in support of the allegations in the questionnaire and the draft article, the appellant chose not to deal with any of these allegations in his replying affidavit. All he essentially said, albeit in a rather prolix way, is that he did not concede that all the allegations in Mampeule's affidavit were true; that he reserved the right to deal with these allegations 'in subsequent proceedings'; and that, in any event, these allegations could not reasonably be interpreted to support the imputation in the article sought to be interdicted, that he was involved in a fraudulent scheme.

[8] In *Hix Network Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) at 398I-J this court held that interim interdicts based on defamation are governed by the same well known principles applicable to interim interdicts in general, namely:

(a) a prima facie right;

(b) a well-grounded apprehension of irreparable harm if relief is not granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

[9] As also appears from *Hix* (402F-H), an applicant who shows that the intended publication will be defamatory, will satisfy the requirement of a prima facie right, unless the respondent who relies on some ground of justification laid a sustainable factual foundation for that defence. In determining the balance of convenience, so it was explained in *Hix* (402 C-F), the court should have regard to the consideration that freedom of the press is not to be overridden lightly and weigh that up against the applicant's countervailing constitutional right to protection of his or her reputation. This is essentially how Snyders J approached the matter in the court a quo. She found that the intended publication would be defamatory of the plaintiff. She then identified the grounds of justification relied upon by the respondents as those of truth and public benefit and of reasonable publication, which has become known as the *Bogoshi* defence (with reference to *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)). In evaluating the facts, she came to the conclusion that the respondents had set out a sustainable factual foundation for the defences that they raised. Essentially, her reasons for this conclusion appear to be that, while the allegations in the questionnaire and the draft article were supported by the affidavit of Mampuele and the findings of the disciplinary enquiry against Mabote, they were met by no more than bald and general denials on the part of the appellant. Following the approach in *Hix* she also found that the balance of convenience favoured the respondents. In consequence, the application for an interim interdict was refused.

[10] In this court the respondents raised the preliminary contention that the appeal is moot in that, its outcome will have no practical impact, and that it should for that reason alone be dismissed with costs. The factual basis for the contention was, of course, that the allegations which the appellant sought to keep out of the public domain, have long since been published. Moreover, so the respondents contended, if the appellant suffered any harm as a result of the publication, such harm cannot be undone by reversing the order of the court a quo. If the publication rendered the appellant entitled to any relief, so

the argument went, such relief should have been sought in an action for damages.

[11] The legal basis for the respondents' preliminary contention is to be found in s 21A(1) and (3) of the Supreme Court Act 59 of 1959. It provides:

'(1) When at the hearing of any civil appeal to the [Supreme Court of Appeal] or any Provincial or Local Division of the [High] Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

. . .

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

[12] As has been explained in earlier cases, s 21A is in effect a reformulation of the well established common law principle that courts of law exist for the settlement of live, concrete controversies and not to pronounce on hypothetical or abstract questions of law (see eg *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) at 875A-E; *Rand Water Board v Rotek Industries (Pty)Ltd* 2003 (4) SA 58 (SCA) para 26). On the facts of this case I think it is plain that the appeal has indeed become moot. Even if we should find that on the facts of this case and interim interdict should have been granted, it will not help the appellant because the publication he sought to prevent had taken place. It is water under the bridge. Nor will it assist in the resolution of future factual disputes, because every future case will have to be decided on its own facts (see eg *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 10; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA) para 40).

[13] But, of course, s 21A affords this court a discretion to hear an appeal despite the absence of any practical effect and circumstances. Self-evidently, this discretion will again be exercised with reference to the facts of every case. Efforts to compare or equate the facts of this case to those of reported cases whether the court's discretion had been exercised one way or the other

can therefore only result in a fruitless exercise. As a matter of principle, it can, however, be said on good authority that an appeal will be decided, despite being moot, where it 'raises important questions of law on which there is little authority and [which] are bound to arise again' (per Nugent JA in *Midi Television t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 4).

[14] Whether this is such a case, requires an examination of the contentions raised on appeal. The appellant's first contention relied on the majority judgment by Marais JA, in *Independent Newspapers Holdings Ltd v Suliman* 2005 (7) BCLR 641 (SCA). According to the interpretation of that judgment proffered by the appellant, Marais JA held that, save in exceptional cases, there is a ban on the publication of the identity of a person facing criminal charges until that person has actually appeared in court. On the application of this principle, so the argument went, the publication of the appellant's identity as a person against whom criminal charges had been laid should have been interdicted, because he had not yet appeared in court. Any evaluation of these contentions, clearly requires a closer examination of the *Suliman* case. What is crucial to the judgment of both the majority and the minority in that case, as I see it, is the precise identification of the defamatory nature or the sting of the offending newspaper articles. Both the majority and the minority found the sting of the articles in the allegation that Mr Suliman had been arrested by the police as a suspect in connection with a particularly odious bombing of a restaurant where two lives were lost and many seriously injured (see Marais JA (for the majority) paras 1 and 31; Nugent JA (for the minority) para 75). The minority held that the defamatory allegation was untrue and that in consequence the defence of truth and public benefit relied upon, could not succeed (paras 76-80).

[15] The majority, on the other hand, found that the defamatory words were substantially true (paras 37 and 38). But, so the majority held, the publication of the true statement was not in the public interest. In motivating this finding, Marais JA inter alia said:

'I doubt that it can *never* be in the public interest or for the public benefit for the media to name a suspect and publish a photograph of him or her before any court appearance.'

He then gave some examples (para 46) where, in his view, the public may have an interest in such publication but it is clear that none of these examples have any bearing on this case. After that Marais JA continued with the following statement (para 47) on which the appellant set great store:

'That said, I think that the consequence of a premature disclosure of the identity of a suspect can be so traumatic for and detrimental to the person concerned when he or she may never be charged or appear in court and is, in fact, innocent, that greater weight should be assigned to the protection of the constitutional right to dignity and privacy and the common-law right of reputation, than to the right of the press to freely impart information to the public. It is not as if the press will be permanently deprived of the right to identify the suspect. Once he or she appears in court his or her identity may be disclosed with impunity.'

[16] As I see it, the interpretation of Marais JA's judgment contended for by the appellant is far too wide. What was found to be defamatory was the statement that the plaintiff was arrested by the police as a suspect of a crime. This was defamatory because it would lead the reasonable reader to infer that the police believed, on reasonable grounds, that the arrested person committed the crime for which he was arrested (as appears from the explanation by Nugent JA in para 77). By contrast, the allegation that a criminal charge had been laid against someone would self-evidently, I think, have a lesser impact on the reasonable reader. It follows, in my view, that the reasoning of Marais JA cannot, as the appellant would have it, be extended willy-nilly to prevent the publication of the news that a criminal charge had been laid against an identified person. In any event, I do not believe that the principle formulated by Marais JA was as immutable as contended for by the appellant. On the contrary, he recognised that there may be exceptions. It is true that the examples of such exceptions that he gave do not find application in this case. But that is neither here nor there. Even if the present case were therefore held potentially to be subject to the *Suliman* principle – which in my view it is not - the further enquiry, whether it would constitute an exception to

the principle, would be a question of fact; it does not elevate this appeal to a case which raises important questions of law.

[17] An alternative argument raised by the appellant was that if the matter is not covered by the *Suliman* principle, we should, as a matter of law, extend that principle so as to create a blanket ban against publication of the identity of a person against whom a criminal charge had been laid, until he or she had appeared in court During argument, counsel for the appellant, however, conceded, rightly and fairly in my view, that even a blanket ban on any reference to a criminal charge would not really assist his client. The reason is that the sting of the publication he sought to prevent did not really lie in the allegation that a criminal charge had been laid. The sting of the offending publication was that the appellant had been accused of involvement in tender fraud. The fact that this accusation had been conveyed to the police in the form of a criminal charge was no more than an adjunct to the core allegation. In this light, counsel for the appellant was compelled to argue for a blanket ban against publication of any disclosure that an identified person had been involved in activity that could potentially give rise to a criminal prosecution, even if no pertinent reference was made to a criminal charge.

[18] It strikes me, however, that an immutable rule of such wide import would simply be untenable. Two important pillars of our democracy are the courts and a free press and the latter should not be unduly hindered by the former in the performance of its vital task. The rule contended for by the appellant would ban from publication allegations of any involvement in corruption, dishonesty, graft and so forth. This would bring the rule contended for in direct conflict with the following statement of our law referred to with approval by the Constitutional Court in *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 23:

'It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration . . . . It must advance communication between the governed and those who govern.'

[19] The appellant's second contention on appeal was that publication of the offending article should have been prevented because it would compromise the administration of justice in that it could potentially interfere with his rights as an accused person in a criminal trial. As the legal basis for this contention the appellant sought to rely on the decision of this court in *Midi Television t/a E-TV v Director of Public Prosecutions (Western Cape) (supra)* which was not a defamation case. It emanated from an application by the Director of Public Prosecution to prevent the television broadcasting of an interview by the broadcaster with potential state witnesses in a forthcoming criminal trial. The essential basis of the application was that this could prejudice or interfere with the proper administration of justice. In the event, the appeal against the pre-publication ban granted by the High Court was upheld in this court. The principles underlying to the judgement are conveniently summarised by Nugent HA as follows (in para 19):

'In summary, a publication will be unlawful and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account, but, more important, the interest of every person in having access to information.'

[20] The appellant gave no indication, either in his founding or his replying papers as to how the administration of justice will be prejudicially affected by publication of the article he sought to prevent. In this court it was suggested on his behalf that such publication could potentially interfere with his fundamental rights as an accused person under s 35(3) of the Constitution, eg his right to silence. This, I think, places the appellant’s argument squarely within the category of what Nugent JA described in *Midi Television* (para 19) as mere conjecture or speculation that publication might prejudice the administration of justice. In fact, the appellant’s contention strikes me as so wide that it is tantamount to the proposition that the mere prospect of criminal prosecutions would inevitably lead to a ban on publication of the background

story, a proposition I have already described as unsustainable. As appears from *Midi Television*, the question whether the administration of justice justifies a limitation of press freedom by way of a pre-publication ban in a particular case, is entirely dependent on the facts of that case. It follows that a decision one way or the other on the facts of this case will be of little, if any, consequence in future situations.

[21] The appellant's third was that the court a quo had insufficient regard to two considerations of substantial import. First, to the appellant's high public profile as the chief executive officer of an internationally recognised company and the enormous prejudice he would consequently suffer through publication of the articles. Secondly, to the notion of ubuntu which 'recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be part of' (per Jajbhay J in *Tshabalala-Msimang v Makhanya* 2008 (3) BCLR 338 (W) para 2).

[22] The law of defamation requires a balancing act between two rights, both highly valued, but often in conflict with one another. This has been recognised in numerous cases (see eg *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) 25B-E; *National Media Ltd v Bogoshi (supra)* para 4 and the cases there cited; *Khumalo v Holomisa (supra)* paras 21-28). The two rights involved have since been enshrined in our constitution. They are, of course, on the one hand, the right to freedom of expression, which includes freedom of the press (s 16) and the right to human dignity and privacy (ss 10 and 14), on the other. I think it goes without saying that the high profile of the individual involved should be taken into account in the balancing process. In fact, it could potentially add weight to both sides of the scale. Nor is there any doubt in my mind that considerable recognition should be given to the values embodied in the notion of ubuntu, under the rubric of dignity. But this has already been acknowledged and confirmed, as appears, for example, from the following statement by O'Reagan J in *Khumalo v Holomia (supra)* para 27:

'The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes and affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.'

[23] It seems to me that anything we can say about what should be taken into account in the balancing process that the law of defamation requires, had been said before. Whether the court a quo afforded sufficient weight to the appellant's high profile or whether it had sufficient regard to the notion of ubuntu are clearly questions of fact. Again they do not elevate this appeal to a case which raises important questions of law, as contended for by the appellant. The principles the court below applied in relation to pre-publication interdicts are well-established (eg in *Hix Network Technologies v Systems Publishers (Pty) Ltd (supra)*. It follows that I can find no basis on which this court can exercise the discretion admittedly bestowed upon it by s 21A to decide the merits in this case in a judgment which will have no practical effect.

[24] What remains is the issue of costs. It emerges from a contention raised by the appellant for the first time at the hearing of the appeal and then only in reply. In the result the respondents had been afforded no fair warning nor adequate opportunity to answer. It amounted to this: because the appellant was seeking to protect his constitutional rights, so it was argued, he should not be ordered to pay the respondent’s cost, neither in this court nor tin the court a quo, albeit that he had been unsuccessful in doing so. What the appellant therefore contended for was not that this appeal falls within the narrow ambit of the exception contemplated in s 21A(3), where the court embarks on an adjudication of the merits in order to decide the question of costs. His argument was that, even if the merits were rightly decided against him, he should not be ordered to pay the respondents’ costs; neither in this court nor the court a quo. The answer to this contention regarding the costs in the court a quo is quite simple. The court a quo had a discretion to determine costs. In the exercise of that discretion the court obviously decided that costs

should follow the event. It was never part of the appellant's grounds of appeal that the court had erred in doing so. In consequence it is not open to the appellant to object to that costs order at this belated stage.

[25] As to the costs on appeal, I accept that the respondent sought to protect a constitutional right. But this was not a case against a government agency as contemplated, for example, in *Trustees for the Time Being of the Biowatch Trust v Registrar Genetic Resources CCT* 80/80 [2009] ZACC 14 (3 June 2009) paras 21 et seq. The respondents are private entities who likewise sought to protect their constitutional rights. Nonetheless, the appellant sought a costs order against them, both in the court a quo and on appeal. Moreover, the respondents had consistently maintained that this is an academic appeal which should be dismissed for that reason alone. That did not deter the appellant from his course. The respondents were therefore compelled to continue with their opposition of what they considered an academic appeal to defend the costs order in their favour in the court a quo and at the same time, to avoid a costs order against them on appeal. In these circumstances I do not think it lies in the appellant's mouth to raise the contention that he did. Though the principle that costs should follow the event is not a law of the Medes and the Persians, I can find no reason in this case to deviate from that principle.

[26] It follows that by virtue of s 21A of the Supreme Court Act 59 of 1959 the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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F D J BRAND
JUDGE OF APPEAL

Counsel for Appellant:	V MALEKA SC T MOKABA SC D MPOFU
Instructed by:	LAWLEY SHEIN ATTORNEYS JOHANNESBURG
Correspondents:	MATSEPES ATTORNEYS INC BLOEMFONTEIN
For Respondent:	D I BERGER SC T MANCHU
Instructed By:	CHEADLE THOMPSON & HAYSOM INC JOHANNESBURG
Correspondents:	WEBBERS ATTORNEYS BLOEMFONTEIN