THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 399/2020

In the matter between:

NBC HOLDINGS (PTY) LTD **APPELLANT**

and

AKANI RETIREMENT FUND ADMINSTRATORS (PTY) LTD **RESPONDENT**

Neutral citation: *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd* (299/2020) 2021 ZASCA 136 (6 October 2021)

Coram: WALLIS, MAKGOKA, SCHIPPERS, PLASKET and CARELSE JJA

Heard: 3 September 2021

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Summary: Defamation – application proceedings – relief directed at compensating the claimant for harm caused by publication of defamatory material – such relief, whether damages, an apology or a retraction cannot

be claimed in motion proceedings where there are disputes of fact, but requires evidence to be led.

Discretion of judge in granting relief in defamation case – factors to be taken into account

Interpretation of allegedly defamatory material – approach of reasonable reader – statement that findings had been made in judgment of the existence of strong evidence of corruption – thrust of defamation lies in the implication of corruption, not that it was a finding by a judge – respondent leading evidence of corruption – such evidence relevant to support possible defences of truth and public interest or privilege – no order can be made in motion proceedings where respondent produces evidence in support of the existence of a defence.

ORDER

On appeal from: Gauteng Division, Johannesburg of the High Court (Sutherland ADJP, as court of first instance):

1 The application to lead further evidence on appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The appeal is upheld with costs, such costs to include the costs of two counsel.

3 The order of the high court is set aside and replaced by the following: 'The application is dismissed with costs, such costs to include the costs of two counsel.'

JUDGMENT

Wallis JA (Makgoka, Schippers, Plasket and Carelse JJA concurring)

[1] The appellant, NBC Holdings (Pty) Ltd (NBC), and the respondent, Akani Retirement Fund Administrators (Pty) Ltd (Akani), are competitors in the field of pension fund administration. The present dispute arises out of an ultimately successful endeavour by Akani to supplant NBC as the administrator of the Chemical Industries National Provident Fund (the Fund). The threat of this precipitated an urgent application by certain trustees, supported by NBC, to interdict the transfer of the Fund's administration from NBC to Akani. On 27 February 2020 the court ruled that the status quo should be maintained until 10 March 2020 when the urgent review proceedings were to be determined. The urgent application for interim relief was heard on 10 March 2020 and, on 12 March 2020, Vally J granted an interim interdict restraining the respondents, which

included Akani, from implementing Akani's appointment to provide administrative, consulting and actuarial services to the Fund.[1]

[2] The order granted by Vally J was expressly limited in its operation until 31 July 2020, unless extended by the court. The balance of the order was directed at securing that the review proceedings would be finally determined before 31 July 2020. On receipt of the order, NBC addressed a letter dated 12 March 2020 to the employers in relation to the Fund. They referred to the urgent case to interdict the termination of NBC's appointment as fund administrators, consultants and actuaries and said:

'The court handed down judgment today (12 March 2020), having found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful.

The interdict remains in force until 31 July 2020 unless extended by the court of its own accord or upon good cause being shown.'

[3] Shortly after 27 March 2020, and apparently prompted by the publication of an article in a Lesotho based newspaper, Akani launched urgent proceedings against NBC and its Lesotho-based subsidiary for declaratory relief in relation to both the letter and the article.[2] As against NBC it contended that the portion of the letter quoted above was defamatory and it sought extensive relief aimed at 'restoring' Akani's reputation. NBC opposed the application saying, in the first instance, that the passage in the letter was justified by the terms of Vally J's judgment. Apart from that, it contended that the letter contained a statement about the contents of the judgment and was subject to qualified privilege, alternatively was published on a privileged occasion, alternatively was true

[1] There was no official transcript of the judgment and the case proceeded on the basis of what was said to be a transcript of a recording by counsel on his mobile phone of the judgment as it was being delivered *ex tempore*.

[2] An order was granted by the high court against the subsidiary, but that is not the subject of this appeal.

and its publication was in the interest of the members of the public to whom it was directed.

[4] The case was argued and decided by Sutherland ADJP on an urgent basis on the papers. He granted an extensive order declaring that the passage quoted above was a material distortion of Vally J's judgment and was defamatory, wrongful and unlawful. He then granted ancillary relief in paras 3, 4 and 5 of the order, consisting of:

(a) an order that NBC publish to every recipient of the previous letter a statement detailed in the order consisting of three paragraphs, the last one of which contained seven sub-paragraphs;

(b) an order that the statement be published within 10 days of the order and that the Chief Executive Officer of NBC was to depose to an affidavit that to the best of his knowledge it had been distributed as directed;

(c) an order that a copy of the statement and the affidavit be filed with the registrar of the court, uploaded on the Caselines digital platform and sent to Akani's attorney of record.[3]

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[3] Paragraph 3 of the order read as follows:
'The first respondent is ordered to publish to every recipient of the letter of 12 March 2020 the following statement:
3.1 On 11 May 2020 the Gauteng Local (*sic*) Division of the High Court of South Africa ordered us to communicate this statement to you.
3.2 Our letter of 12 March 2020, insofar as it purported to report on the order and judgment of Vally J (the Vally judgment) in the legal proceedings between Akani Retirement Fund Administrators (Pty) Ltd (Akani) and NBC concerning the alleged impropriety of Akani's appointment to manage the CIPF and thereby replace NBC as manager, did not accurately report the meaning and import of the Vally judgment when it stated that:
"[The Court] [h]aving found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful."
3.3 The respects in which the quoted statement did not accurately or fairly convey the meaning and import of the Vally judgment were, in particular, that:
3.3.1. It suggested that a finding of corruption on the part of Akani had been made when there had been no such final finding, and merely that ostensibly plausible evidence had been tendered that could support such an allegation;
3.3.2. It suggested that a finding of unlawful conduct on the part of Akani had been made when there had been no such finding;
3.3.3. It omitted to fairly contextualise the proceedings which were in respect of an application for an interim status quo order to keep NBC in office until such time as the allegations of corruption and unlawful conduct made by NBC were adjudicated in subsequent proceedings;

[5] The present appeal is against that judgment and order with the leave of the high court. The appeal suspended the operation of the order, so that no effect was given to the ancillary relief. An application under s 18 of the Superior Courts Act 10 of 2013 to enforce the order pending the appeal was refused. In the meantime events moved on. The balance of the original review proceedings was heard and disposed of by Vally J before 31 July 2020. He dismissed the application and made no finding in favour of NBC that Akani's behaviour was corrupt. He suggested that the financial authorities were better equipped than a court to investigate these issues and highlighted potential malfeasance on the part of both parties.

Mootness

[6] Arising from this it seemed possible that the high court order had been overtaken by events. In Akani's heads of argument, counsel said in regard to the portions of the order summarised in para 4 that:

'Publishing that correction now would achieve nothing, because Part B has been determined and the judgment therein speaks for itself. No party will now be concerned with the Part A interim order or judgment – or any inaccurate characterisations thereof – in circumstances where Part B has overtaken and discharged the Part A regime.

[7] By reference to this passage in the heads, the court directed the Registrar to address an enquiry to Akani's attorneys asking whether their client was undertaking not to seek to enforce paras 3, 4 and 5 of the high court's order. They confirmed that their client would not seek to enforce

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3.3.4. In proceedings for interim relief a court deals with allegations on affidavit and on the basis thereof, in this case, Vally J had to decide whether it was appropriate, in the interim, to allow the arrangements which exist for the management of the CIPF to remain undisturbed and left in the hands of NBC;

3.3.5. The decision to grant the interim order in favour of NBC was not a final order and the question whether or not the allegations that Akani is corrupt or acted unlawfully, are yet to be decided;

3.3.6. The Vally judgment expressed the view that on the allegations on affidavit presented to the court there was strong evidence alleged that supported the possibility that Akani was corrupt, and that were acts of corruption to be proven in later proceedings, the inference could be drawn that Akani had acted unlawfully in procuring an appointment to manage the CIPF;

3.3.7 A copy of a transcript of the Vally judgment is available and anyone who wants a copy may ask for it to be sent.'

those paragraphs of the order. As it was possible that the issues in the appeal were now of such a nature that the decision sought would have no practical effect or result, we directed that we would first hear argument on that issue. This was in accordance with the established jurisprudence of this court under s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013. At the end of the argument we directed that the parties proceed to argue the remaining issues.

[8] It is unnecessary to traverse the issue of mootness in detail. Counsel for NBC submitted that the case was not moot because the effect of the judgment remained that the statement was defamatory of Akani and that NBC had no defence to a claim based on defamation. There can be no doubt that this was correct. If the judgment remained in place, it would possibly provide a foundation for a claim for damages and could, in any event, be used in the market place to discredit NBC. The submission that NBC was entitled to clear its name by having the judgment overturned was a powerful one, which we accepted. The ensuing debate in court also demonstrated that certain important issues in regard to the conduct of proceedings based on defamation required the attention of this court.

The issues

[9] It was accepted that the statement that a judge had 'found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful' was calculated to damage the esteem in which Akani was held by the recipients of the letter. It was therefore prima facie defamatory and NBC bore the onus of showing either that it was not published unlawfully, or that it was not published with the intent to injure (*animo injuriandi*). The only further question related to the relief to be granted to Akani if successful. Historically relief in a defamation action

consisted of an award of damages and possibly an interdict. The damages were compensation for the loss already caused and the interdict was directed at preventing further loss in the future. Now that remedies other than, or in addition to, the payment of damages, such as apologies, retractions and the publication of corrections, may be given in defamation cases, the determination of appropriate relief has become a potential minefield in such cases.[4]

[10] A good deal of the complexity of this case arose because Akani sought relief by way of urgent motion proceedings and not by way of action. In order to do this, it tied its claim for the publication of a retraction to a vague and general interdict. Furthermore it said that it reserved its right 'to pursue other aspects and relief flowing from NBC's … misconduct at later date', justifying this on the basis that only urgent matter could be traversed in these proceedings. This procedural manoeuvring unravelled as the case proceeded. The judge rightly rejected the claim for an interdict, thereby exposing the true nature of the proceedings as being for final relief to remedy the damage that Akani claimed it had suffered as a result of the publication of the letter. This left lingering in the background the claim to pursue at a later stage such other remedies as it might deem fit.

[11] The outcome of this was a failure by the parties to address the true nature of the proceedings and the proper test to be applied to the assessment of the defences raised by NBC. There was also a failure to appreciate the proper approach to remedies for defamation because of the attempt to engage in the piecemeal disposal of litigation, contrary to long-established procedure. In the result the appeal must succeed for three reasons. First, the

[4] *Economic Freedom Fighters and Others v Manuel* [2021] ZASCA 172; 2021 (3) SA 425 (SCA) paras 128-130 (*EFF v Manuel*).

dispute was not one that could be disposed of in application proceedings without the hearing of oral evidence. Second, the confused procedural approach to the litigation resulted in a misdirection in determining how to exercise the judicial discretion in regard to remedy. Third, on a proper appreciation of the nature of the claim for defamation and the defences raised to it, Akani was not entitled to relief.

Procedural issues

[12] Akani's founding affidavit dealt with the relief being sought under the heading 'The requirements for an interdict are met'. It claimed that an award of damages would not be an adequate remedy for the commercial harm it had suffered by the two offending publications. However, an interdict was only claimed as a secondary remedy to its primary relief of a declaration that the statement in the letter:

'… having found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful';

was false and defamatory of Akani. In addition it sought relief directed at procuring an immediate retraction of those words, by way of a letter of correction addressed to each of the recipients of the letter.

[13] The claim for an interdict following these prayers was couched in general terms, namely:

'Interdicting the respondents from making any further statements of a defamatory nature and effect against the applicant, including but not limited to repeating the statements made in the NBC letter …'

The ostensible aim was to prevent future publication of the same or additional defamatory statements. The interdict was directed at preventing future unlawful conduct and needed to be based on a reasonable

apprehension of future harm.[5] Absent a risk of the defamation being repeated an interdict was unjustified.[6] Granting a prohibitory interdict in respect of conduct that has already occurred is pointless, because the prohibition relates to the future and cannot undo what is past.[7]

[14] The only evidence presented by Akani in support of the notion that there might be further publication of defamatory matter by NBC was a paragraph in the founding affidavit reading in material part:

'There is every reason to believe that NBC … will continue to disseminate their defamatory and false statements if their conduct is not interdicted and they are not required to issue an apology and a retraction.'

There can be little surprise that the response in the answering affidavit, not refuted in reply, was that NBC had not further distributed the letter and would have no reason to do so. It is even less surprising that the learned judge held that the chances of future publication were so slim that no interdict, final or interim, was warranted.

[15] Once the question of an interdict to restrain future unlawful publication of defamatory material fell away, the only remaining issue in regard to remedy was compensation for the harm already done by the publication of the letter. Such compensation is no longer confined to an award of damages as was the case in the past. It has been extended by our courts recognising that an apology, or a publicised retraction of the defamatory slur, may serve a similar purpose to damages, or may be ordered in conjunction with an award of damages. Whether individually or

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[5] *Setlogelo v Setlogelo* 1914 AD 221 at 227. As to what is a reasonable apprehension of harm see *Minister of Law and Order and Others v Nordien and Others* 1987 (2) SA 894 (A) at 896; *End Conscription Campaign and Others v Minister of Defence and Others* [1989] 4 All SA 82 (C) at 110.

[6] *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd and Others* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA), para 36.

[7] *Philip Morris Inc v Marlboro Shirt Co SA* 1991 (2) SA 720 (A) at 735B-C; *Tau v Mashaba and Others* [2020] ZASCA 26; 2020 (5) SA 135 (SCA) para 26.

collectively, these are all directed at the same purpose, namely compensating an injured party for the harm caused by the publication of defamatory matter.

[16] That means that the high court was confronted with the difficulty adverted to in *EFF v Manuel*,[8] where this court said:

'In our view, whether an order for an apology should be made is inextricably bound up with the question of damages.'

The published retraction Akani sought stood on the same footing as the apology in that case, as would any other remediatory measure. But one cannot determine what is appropriate compensatory relief in a piecemeal fashion, granting some now while leaving open the possibility of further relief being claimed and granted later.

[17] Akani purported to reserve its right to 'pursue other aspects and relief' against NBC. On the face of it this included a possible future claim for damages against NBC. The damage it alleged was suffered as a result of the letter's publication was not distinguished from the damage occasioned by the publication of the article in Lesotho. A general allegation was made that it had suffered and would continue to suffer financial loss in the market place as a result of both publications and would lose market share and business opportunities. It sought to justify the claim for urgent relief by alleging that these losses could not be quantified in terms of definite future profits, so that damages would not be an alternative remedy to an interdict.

[8] Op cit, fn 4, para 130. In fairness to both counsel and the learned judge that judgment had not yet been delivered when this case was argued in the high court.

[18] These allegations were vigorously denied and it was not suggested that they could be resolved on the papers. A successful claimant in a defamation action is entitled to an award of general damages to compensate for the damage to its reputation. It is also entitled to claim special damages in the form of financial loss occasioned by the defamatory publication.[9] The alleged difficulties facing Akani in proving that it had suffered special damages as a result of the publication of defamatory matter should not be overstated. In this type of case the court does the best it can on the material placed before it. Its assessment of damages will inevitably be no more than a rough estimate.[10] Had a plausible case for an interdict been made the judge would still have needed to consider whether damages would be a suitable alternative remedy.

[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.[11] 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[12] 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.[13]

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[9] Ibid, para 91.
[10] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 573H-I.
[11] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 471H- 472F. Whether the grant of relief to Akani in these proceedings would debar it from pursuing a claim for damages, in the face of the 'once for all' rule, was not debated before us. As matters stood in the high court there was a real possibility of such an action being brought.
[12] *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC) paras 199, 202 and 203.
[13] *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC) para 134.

As pointed out in *EFF v Manuel*, 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.[14]

[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 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.[15] 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.[16] It would have been highly relevant to hear the reaction of the recipients of the letter to its contents. In consequence of its receipt, did any of them join the parties trying to block the change in administrator of the Fund? Did the employer trustees adopt a more cautious, or even a hostile, attitude to Akani's endeavours to persuade them to move the Fund's administration? We do not know and

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[14] An application for leave to appeal to the Constitutional Court against this order was dismissed.
[15] For present purposes it is assumed that the letter is defamatory of Akani and that NBC had no defence to the claim for defamation, so that the only issue would be that of remedy.
[16] See for example the discussion on what evidence may be led in such cases in *Naylor and Another v Jansen; Jansen v Naylor and Others* 2006 (3) SA 546 (SCA) paras 15 and 16.

nor did the judge, because there was no evidence in this regard. Would a retraction serve any useful point in restoring Akani's reputation, or was its reputation largely untarnished? These are the questions that needed to be asked and answered before the grant of relief in this case, but they were not.

[21] A claim for damages for defamation, whether general or special, was always unliquidated and the damages could only be determined in 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] I fully appreciate that in a trial action the plaintiff may rely solely on the defamatory nature of the publication and the presumption that everyone has a reputation that may be harmed by a defamatory utterance or publication,[17] for the assessment of damages. The plaintiff may give no evidence, relying on the right to lead evidence of rebuttal to refute any evidence from the defendant directed at diminishing the effect of the defamatory publication. But, if the defendant then chooses not to give evidence, the plaintiff loses the opportunity to bolster the damages by giving evidence of the effect of the defamation on their reputation and

[17] *Tuch and Others NNO v Myerson and others NNO* [2009] ZASCA 132; 2010 (2) SA 462 (SCA) para 17.

standing. 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. For that reason it was inappropriate for the high court to grant the order it made in this case. That is the first ground upon which the appeal must succeed.

Judicial discretion

[23] The determination of the appropriate compensatory relief in a defamation case is a matter for the discretion of the judge at first instance and the discretion is a wide one. That proposition requires little citation of authority.[18] However, the nature of the discretion and, if relief were to be granted, how it fell to be exercised in this case, appears not to have attracted any attention in argument and consequently in the high court's judgment. The only paragraphs in the judgment dealing with it read as follows:

'[66] Relief for what has already occurred is appropriate as a clear right has been violated. The irreparable harm is axiomatic. There is no suitable alternative relief obtainable in respect of the misrepresentation of the judgment of Vally J and no more suitable time to say so than now.

[67] In respect of NBC, a letter to correct the misleading letter is the appropriate way to address the harm the first letter causes. The text need not be grovelling; a bland correction in the terms set out in the order suffices.'

[24] Several errors occur in these paragraphs. There was nothing axiomatic about the harm allegedly suffered by Akani. Even assuming that the letter was defamatory of it, for the reasons canvassed in paragraph 20, the nature and extent of that harm was indeterminate. There was a clear dispute of fact on the papers in regard to whether Akani suffered any harm

[18] Ibid para 19.

arising out of this letter. Whether it was substantial, or trivial, or virtually non-existent, could not be decided on these papers.

[25] Second, and also for reasons canvassed in the previous section of this judgment, it was by no means clear that there was no alternative relief available to Akani. One distinct possibility was that they might be vindicated in the forthcoming review litigation, due to be heard within a couple of months. Another was whether any retraction was required. If the harm was exiguous the appropriate remedy might have been the 'damages of one farthing' with which British juries were wont to condemn successful plaintiffs in defamation cases, where they regarded the claim as trivial or otherwise inappropriate.[19] These instances are not purely relics of the Victorian era. In the trial court in the famous case of *Reynolds v Times Newspapers*[20] that led to Mr Reynolds downfall as Taoiseach (Prime Minister) of Ireland, the jury dismissed the newspaper's defence, but awarded nothing by way of damages, an award that the judge altered to one penny.

[26] Third, given the proximity of the hearing in the review, far from 'now' being the appropriate time to grant an order, the caution of waiting should have been considered. The judge accepted that there was no risk of

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[19] In the famous defamation case between the artist James Whistler and the critic John Ruskin over the latter's comment in a review of the exhibition of Whistler's *Nocturnes* - a series of paintings exploring light – that:
'For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen, and heard, much of Cockney impudence before now; but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.'
Whistler won, but the jury awarded him only a farthing – the smallest coin in circulation – as damages and he was refused costs. The result bankrupted him. Similarly in the litigation between *Cadbury Brothers Ltd and Others v Standard Newspapers Ltd* (unreported) the jury awarded the successful plaintiffs one farthing over an article suggesting that it was complicit in using slave labour to produce cocoa in São Tomé and Príncipe.

[20] *Reynolds v Times Newspapers Ltd and Others* [1999] UKHL 45; [2001] 2 AC 127; [1999} 4 All ER 609 (HL).

further publication of the letter. Any harm that it did, had already occurred. A delay would enable feelings to subside and Akani (and the court) to assess whether the letter had indeed done any significant damage. The alleged urgency was based on the need for an interdict to prevent future publication. Once that disappeared there was no need to deal with this litigation urgently. Furthermore, granting an order at that point in time ran the risk that NBC's charges of corruption would be vindicated in the review. In that event an order to correct a 'misrepresentation' of Vally J's judgment would have been pointless, especially as it would have been accompanied by the later judgment vindicating NBC's claims. Lastly under this head, the issues canvassed were of such a nature that they led to feelings on both sides running high, so that there was a risk that the high court's order would be the subject of an appeal, as indeed happened. The result of granting leave was to stultify the order that the court had just made. The immediacy the judge perceived in paragraph 66 of his judgment was removed by his order granting leave to appeal.

[27] None of these considerations were addressed in the judgment. It appears that the learned judge concluded that merely because he upheld Akani's claim he was obliged, given the form of the relief Akani sought, to grant relief in that form, albeit not in the terms they suggested. This resulted in his granting an order in very different terms. Those terms are set out above in a footnote, but their very prolixity should have raised a warning flag that imposing this obligation on NBC might not be appropriate relief. Consideration should have been given to whether any of the addressees would bother to read such a technical description of the contents and effect of Vally J's judgment. And if they were unlikely to do so what was the point of the remedy? In not considering the matters set out above, the learned judge misdirected himself in regard to the remedy. It suffices for

me to say that the order he crafted was not as anodyne or bland as he intended. In view of the misdirection we would have been at large to reconsider the relief he granted. Had matters turned out differently it would have been necessary to consider what order should be made, but as the appeal must succeed in its entirety there is no need to do so.

The merits

[28] This leads directly to the next problem. Akani elected to proceed by way of motion and did not ask for the proceedings to be referred to trial or for the hearing of oral evidence. Where final relief is sought in motion proceedings the *Plascon-Evans* rule provides that the case is determined on the respondent's version of the facts, together with any undisputed facts forming part of the applicant's version. The only exception to this is where the respondent's version is so inherently unworthy of belief that it can be rejected on the papers. The fact that the onus in relation to its defences rested on NBC did not affect the operation of the *Plascon-Evans* rule. The case had to be decided on the evidence advanced by NBC in support of its defences, together with any undisputed evidence from Akani that bore on those defences.[21]

[29] In principle there has never been an objection to pursuing a claim for an interdict against the future publication of defamatory matter by way of an urgent application. This court reaffirmed that in *EFF v Manuel*[22] in saying:

'There is, of course, no problem with persons seeking an interdict, interim or final, against the publication of defamatory statements proceeding by way of motion

[21] *Ngqumba en ń Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259H-263D; *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) paras 13 and 14.
[22] Op cit, fn 4, para 111.

proceedings, on an urgent basis, if necessary. If they satisfy the threshold requirements for that kind of order, they would obtain instant, though not necessarily complete, relief.'

However, the entitlement to proceed in that way is constrained by the fact that in motion proceedings, where the issue is whether the defendant has a defence to a claim based on defamation, it cannot be decided on motion if there is a dispute as to the applicant's right to that relief. As Greenberg J said:[23]

'… if the injury which is sought to be restrained is defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence.'

In *Hix Networkin*g[24] the court emphasised that this did not mean that the mere *ipse dixit* of the respondent would suffice to establish a defence. It must be based on evidence.

[30] A respondent wishing to resist an interdict against the future publication of defamatory material can do so by presenting evidence that provides a sustainable foundation for a defence recognised in law.[25] This may be done not only by way of direct evidence, but also by making the case that at a trial further evidence could be procured and would be available to sustain the defence. A plausible claim by a respondent that, with the advantage of discovery and being able to subpoena witnesses and documents, they will be able at trial to produce evidence to sustain their defence, will ordinarily suffice to establish the requisite foundation for the defences raised.[26] This is well-illustrated by the recent judgment of this

[23] *Heilbron v Blignaut* 1931 WLD 161 at 168-169.
[24] *Hix Networking Technologies v System Publishers (Pty) Ltd & another* 1997 (1) SA 391 (A).
[25] *Herbal* Zone, op cit, fn 6, para 38.
[26] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty Ltd* 1949 (3) SA 1155 (T) at 1163.

court in *Malema v Rawula*[27] where, after analysing the evidence, Schippers JA concluded that:

'These facts comprise not only direct information placed before the court, but material showing other information not in his control but potentially available at a trial in due course, such as the EFF's financial records and documents relating to receipt of VBS funds. All these factors must be weighed up in order to decide whether there is a dispute of fact regarding the existence of a defence.'[28]

[31] It appears that these principles were not drawn to Sutherland ADJP's attention, as they were not referred to in his judgment and counsel did not refer us to them in the heads of argument. The result was that the learned judge embarked upon a detailed analysis, first of Vally J's judgment to determine what it had decided, and then of the letter, where his focus fell upon the words 'having found' as a description of the contents of the judgment. He concluded that the 'commuter on the Parkhurst bus' would have concluded that a final judgment had been made by a court in regard to what followed, namely corruption on the part of Akani and the unlawfulness of Akani's appointment in place of NBC. This so he held was a misrepresentation by NBC and defamatory of Akani.

[32] In my view that was not the correct approach. In the first place it treated the letter as if it stood alone. It did not. It had been preceded by a letter dated 28 February 2020 written shortly after the review was launched and its subject was the same, namely the payment of contributions by employers to the Fund. It read:

'At the end of November 2019 NBC received an email notice from the Chemical Industry National Provident Fund ('the Fund'') purporting to terminate all services rendered to the Fund by NBC, effective 29 February 2020.

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[27] *Malema v Rawula* [2021] ZASCA 88 paras 34 to 64.
[28] Ibid para 64.

A number of Fund members, together with the NBC, lodged an urgent review application with the South Gauteng High Court in Johannesburg on 5 February 2020 in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to have NBC's termination and the appointment of substitute service providers in its place set aside. PAJA is the legislation which protects the constitutional right of persons to administrative action that is lawful, reasonable and procedurally fair.

CONTRIBUTIONS DUE ON OR BEFORE 7 MARCH 2020 (FOR THE MONTH OF FEBRUARY 2020)

The hearing commenced on 26 February 2020, but has not yet completed and it is set to continue on 10 March 2020. Accordingly, on 27 February 2020, the Court ruled that the *status quo* pertaining to Fund service providers is retained until 10 March 2020 or such time as the urgent PAJA proceedings have been adjudicated upon, that is when judgment is delivered. In the circumstances, **please ensure all contributions to the Fund for and on behalf of your employees takes place as normal …**'

[33] Although not addressed specifically to the employers to whom the offending letter was addressed, it appears to have come to their attention because the later letter commenced by referring to it. The letter of 28 February informed its readers that review proceedings had been instituted to prevent NBC being removed as administrators of the Fund. The recipients would presumably have been aware of the intended change of administrator from NBC to Akani. The notice of termination of NBC's appointment had been given at the end of November. Employers, who bore the responsibility of deducting members' contributions from their salaries and adding their own before remitting payment to the administrator, would have needed to know that they would have to adjust their systems accordingly to be ready for the change with effect from 29 February 2020. Documents in the record indicate that issues over NBC's continued appointment had been simmering for several months prior to the notice of termination.

[34] The 28 February letter provides the background to the later letter. It told its readers that the validity of the termination of NBC's appointment was disputed and that NBC claimed that it was unlawful. Given the references to PAJA and the right to administrative action that is lawful, reasonable and fair, they would have understood that this was not a contractual dispute arising from the interpretation of the terms of a contract, but that the source of the alleged unlawfulness lay elsewhere. It is likely that some, and possibly many, of the readers would have realised that charges of untoward behaviour by someone was at issue. They would also have realised that the court might have thought there was some substance in these charges, as it had stopped the transfer of administration from NBC to Akani until the urgent proceedings had been adjudicated upon. In other words there was to be a temporary delay in implementing the transfer.

[35] The hearing continued on 10 March and Vally J handed down his judgment on 12 March. Regrettably the only transcript is one produced from a recording made by counsel attending to note the judgment on behalf of Akani. It does not appear to have been submitted to Vally J for checking and it would not have been available to NBC, although presumably they had someone present to note the judgment and make some record of what the judge said. The result is that what was presented to the high court has had headings and paragraph numbering inserted that are not part of the judgment. Whoever transcribed it also inserted punctuation. The transcript suffers from a malady, with which the judges of this court are familiar, of obvious imperfect hearing and transcription of what was said. Be that as it may the parties accepted it as accurate, notwithstanding its shortcomings.

[36] Vally J granted an interdict restraining the Fund's trustees from implementing the appointment of Akani and two other companies that had played no active part in the litigation from providing administrative, consulting and actuarial services to the Fund. He granted a further order that NBC and an associated company were to continue providing those services until 31 July 2020, unless extended by the court. He had earlier said that if the Fund was dissatisfied with NBC's performance it was not possible to draw the inference that its termination had been engineered for corrupt purposes. Accordingly, these orders were not directed at overturning the termination of NBC's services. They appear to have been directed at avoiding a vacuum in the Fund's administration. Even if the conduct of certain named individuals and Akani was corrupt, that did not, in his view, allow for a conclusion that the Board of the Fund was contaminated by that corruption.

[37] The key passage in the judgment reads as follows:

'With that said then, it cannot be, it cannot nevertheless, on the other hand, be said that the applicants are not entitled to the relief sought. Their case has been that even if the termination of the contract with NBC is allowed to stand, the applicant, uh, the appointment of Akani should not be allowed to stand. This is because Akani is engaged, or is accused of engaging in unlawful conduct, which conduct is a breach of Section 12 of PRECCA.[29] In this they are correct.

The evidence that they, that they have brought before the court indicates evidence of an alleged corrupt relationship between Akani and Messrs Chaane [and] Ginya is very strong. And Akani and the two individuals will have to do better than what they did in these papers to show that the applicants are incorrect in their allegation. This is despite the fact that the allegations presented [are] presently founded on inferential logic. *So strong is the evidence that if no equally strong evidence is forthcoming from them, the inference may well be drawn. In that case the Fund will be legally bound to have no*

[29] The Prevention and Combating of Corrupt Activities Act 12 of 2004.

relationship with them, failing which Board members will be acting in breach of their statutory and common law fiduciary duties. Hence it remains a reasonable prospect that should it be found that Akani, that the appointment … that the relationship between Akani and the two individuals is one that is tainted by corruption, then the appointment of Akani may well be set aside.'(Emphasis added.)

[38] Two further passages are relevant for present purposes. In the one Vally J said that:

'As I said on the basis of these papers it cannot be said that there is a prospect of the appointment of Akani being set aside is relatively high. In the circumstances the most practical and reasonable solution woold be to grant the interdict and to leave NBC, er,[30] and to leave the issue of NBC providing the services as it has been doing over the last few years in place. That will be only until this issue is finalised …'

On the same page of the judgment he added:

'I wish to once again reiterate that [t]his judgment makes no finding that there has been any untoward conduct on the part of the Fund or on the part of CEPPWAWU. At this stage, it is mainly the allegations against Messrs Chaane and Ginya and Akani which leads me to make the following order that I will now make.'

[39] The letter of 12 March that was sent to employers, the Fund, the trade union and Akani was sent the same day as the judgment was handed down. It referred to the earlier letter and the urgent application to interdict the termination of NBC's appointment. It then continued:

'The court handed down judgment today (12 March 2020), having found strong evidence of corruption in the matter at hand and that the appointment of Akani was unlawful.

The interdict remains in force until 31 July 2020 unless extended by the court of its own accord or upon good cause being shown.'

[30] This is typed 'err', but that makes no sense. It seems that what was intended was to convey a hesitation. The Shorter Oxford English Dictionary (6 ed, 2007) gives as the first meaning for 'er': '*interjection* Expr the inarticulate sound made by a speaker who hesitates or is uncertain what to say.'

The letter repeated the earlier letter's admonition that contributions should continue to be paid to it and that matters would continue as in the past.

[40] The primary purpose of both letters was to secure that there was administrative continuity while the litigation progressed. Neither was directed at providing more than a brief update of the litigation. It is important then to consider Akani's complaint. This is set out in the following paragraphs of its founding affidavit:

'[35] The NBC letter, however, entirely misrepresented the true position. It refers only to an urgent case having been brought to secure an interdict, and then states that the Court found that Akani's appointment was unlawful, on the basis of "strong evidence of corruption". *In so doing, NBC has reported the learned judge's preliminary observations as if they were final findings of fact made on an assessment of all the evidence.*

[40] … Akani contends that a reader would understand from the NBC letter that:

40.1 A court has weighed up the evidence in the Review application *and finally determined* that the appointment of Akani to provide services to the [Fund} was unlawful.

40.2 A court has reached the aforementioned conclusion, having considered the allegations of corruption that were relied on by NBC and the members in their papers.

40.33 A Court has found that Akani was itself corrupt or at least party to corruption, and that this corruption rendered its appointment unlawful.'(Emphasis added.)

[41] The affidavit continued to hammer away at the contention that the impression given by the letter was that the judgment was a final judgment. One sees this in the contention that NBC has sought 'to create the impression … that Akani's appointment … has already been finally determined to be unlawful' and that this was based on corruption. The sting of the letter was said to be that Akani 'was corrupt and has been found by a Court to be corrupt'. It was said 'in short' that Akani had lost a significant

client because it secured its appointment through corruption 'and a Court has ruled as much'.

[42] These contentions were based upon the faulty premise that the letter misrepresented the judgment as a final determination of the issues. It did nothing of the sort. The flaw emerges from the sentence recording that the interdict would remain in force until 31 July 2020, unless extended by the court of its own cause or upon good cause being shown. The reasonable reader[31] would readily appreciate that things were therefore not final. The letter said in plain language that the order would expire on 31 July, unless extended. The readers knew, because they were told as much in both letters, that the litigation's purpose was to forestall the termination of NBC's appointment. If the order were to lapse on 31 July, it was obvious that NBC would have lost. Any reasonable reader would realise that. Any doubt was removed by the qualification that the court might of its own volition extend that date, or might do so if good cause was shown for an extension. The impetus for that could only come from NBC and the parties supporting it.

[43] None of this involves imputing to the reasonable reader any knowledge of the subtle distinction between an interim and a final order. Nor does it involve a pedantic parsing of the relevant sentence, something in which both sides engaged in the affidavits, with resort to subtle consideration of the differences between adverbial phrases of time, place, manner and reason, concepts of misplaced modifiers and other linguistic analysis more suited to the classroom than an affidavit. I mean no disrespect to either deponent when I say that these debates were

[31] The reasonable reader is a legal construct by which the potentially defamatory nature of a publication is determined. It is an objective standard and evidence of what any particular reader understood it to mean is inadmissible. *EFF v Manuel*, op cit, fn 4, para 30. Whether the reasonable reader corresponds to the person 'on the Parktown bus' as suggested by the judge, I cannot say.

inappropriate in affidavits and had the appearance of an attempt by the lawyers who drafted them to smuggle argument into what should be limited to evidence. The debate as to whether the expression 'strong evidence' qualified both corruption and the unlawfulness of Akani's appointment was neither here nor there. Sutherland ADJP rightly said that the reasonable reader would not worry about such niceties, but would think that there was serious evidence of corruption and this meant that Akani's appointment was unlawful.[32] After all it was the appointment that was the source of the dispute between the parties.

[44] Once it is accepted that the letter did not convey that the court had made a final and conclusive judgment about anything, the basis for holding it to be a misrepresentation of Vally J's judgment fell away. The judge had made preliminary observations, as Akani said in the passage quoted earlier in paragraph 40. Those observations were clear. Based on the evidence before him and the absence of any adequate response thereto, there was strong evidence of corruption. This involved Akani and two employees of NBC who had been responsible for the Fund and suddenly left their employment and commenced working for an entity connected to Akani. The judge said that if corruption was established the appointment of Akani might well be set aside. That could only be because the appointment of Akani to replace NBC was unlawful because it was tainted by corruption.

[45] No case was made that if the letter referred to proceedings that had not been finalised, a claim for defamation could succeed. On the principles

[32] In the replying affidavit it was said on behalf of Akani that a reader who knew of the basis for the review would understand the allegations of strong evidence of corruption and Akani's appointment as unlawful as being linked and that Akani was guilty of corruption. The reader without that knowledge would also link the corruption to Akani. The central concern was linkage between the evidence of corruption and Akani.

outlined earlier in paragraphs 28 to 30 NBC had clearly produced evidence that might sustain at least one of the three defences it raised specifically. Accordingly Akani's claim for final relief on the papers had to fail.

[46] On any reading of the letter the heart of the defamation was the statement that there was strong evidence of corruption. The addition that a judge had made such a finding would strengthen the reasonable reader's understanding that the evidence of corruption was strong, but it would not alter the essential thrust of the defamation, namely that Akani was a party to corruption. NBC produced some evidence that there had been a corrupt relationship between Akani and the two individuals formerly employed by NBC. It seems to me that this evidence was properly relevant to the defences of truth and public interest and privilege. I leave aside the defence that this was an accurate report of legal proceedings, because it is by no means clear to me that a passing statement in a letter about the contents of a judgment falls within the notion of a report of legal proceedings.

[47] Akani's counsel sought to avoid this conclusion by contending that actual corruption was irrelevant to Akani's claim. He argued that the basis of the claim lay in the statement that a court had found that Akani was corrupt. He submitted that the stress of the defamation lay on the court's finding, not the corruption itself. Therefore, if the description of the court's finding was incorrect, it mattered not whether Akani was in fact corrupt. The complaint was that the letter had communicated findings by Vally J that he had not in fact made at that time. The distinction strikes me as tenuous and artificial. The defamation lay in the content of the alleged finding, not the fact that it had been made by a judge. Any statement to the effect that Akani acted corruptly would be defamatory, irrespective of whether its force was bolstered by saying that a judge had held that there

was strong evidence of the corruption. The fact that a judge was said to have made such a finding might serve to add weight and credibility to the essential charge of corruption, but it cannot alter the fact that the imputation of corruption lay at the heart of the defamation. In both the founding and replying affidavits it was the imputation of corruption that lay at the heart of Akani's case.

[48] Proof that Akani had engaged in corrupt activities was therefore central to the defences that NBC wished to raise. It was also central to other issues such as the nature and extent of any defamation, the extent of the harm suffered by Akani and the nature of any relief to which it was entitled. Even on the basis of the artificial distinction that Akani sought to draw in argument, a factual finding that Akani had acted corruptly would affect the final determination of the case. A misrepresentation that Vally J had made a finding of the existence of strong evidence of corruption would pale into insignificance against actual proof of corruption. One is reminded of the line from Shakespeare's *King Lear*[33] that 'Where the greater malady is fixed, the lesser is scarce felt'.

[49] In summary reasonable readers would not read the offending letter as relating to a final judgment by a court, but would understand that it related to something said by a judge in the course of ongoing and yet to be finalised litigation. They would view the thrust of the sentence in question as saying that there was strong evidence of corruption on Akani's part in relation to it securing its appointment as administrator by the Fund in place of NBC. The unlawfulness of that appointment would flow from the corruption. Proof of actual corruption in that process would, on that reading

[33] William Shakespeare *King Lear* Act 3, Scene 4, line 10.

of the letter be supportive, if not necessarily decisive, of NBC's defences to the claim based on defamation. On its own that meant that Akani's claim could not succeed and, as it chose to proceed on application and not request a reference to trial or oral evidence, it should have been dismissed. Even on its own case as to the meaning of the letter, and its focus on the finding by the court, as opposed to the issue of corruption, that would not assist Akani as proof of corruption would still be relevant to NBC's defences and to the court's appreciation of the nature of the harm occasioned by the defamation; the extent of the damage to Akani's reputation and the determination of the appropriate remedy. For those reasons, on this ground also, the application should not have succeeded.

Result

[50] Before concluding I need to deal with an extensive application by NBC to lead further evidence on appeal. The purpose of the application was to strengthen the evidential basis for its contentions that the relationship between Akani and the two former employees of NBC was corrupt. I do not think the additional evidence tendered by way of this application satisfied the tests for admitting further evidence on appeal. In the light of the proper approach to the determination of the application the additional evidence could not affect the outcome of the appeal. NBC's defence rested on whether it had laid an evidential basis for saying that it had proper grounds to resist Akani's claim. If it had then there was no need for the additional evidence. If it had not it could not remedy that deficiency at the appellate stage. The application must be dismissed.

[51] In the result the following order is made:

1 The application to lead further evidence on appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

2 The appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

3 The order of the high court is set aside and replaced by the following: 'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	C E Watt-Pringle SC (with him K S McLean)
Instructed by:	Shepstone & Wylie, Johannesburg
	McIntyre Van der Post, Bloemfontein
For respondent:	J P V McNally SC (with him B L Manetsa)
Instructed by:	Webber Wentzel, Johannesburg
	Symington De Kok, Bloemfontein.