THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 109/22

In the matter between:

MEDIA 24 (PTY) LTD **APPELLANT**

and

NKOSINATHI NHLEKO **FIRST RESPONDENT**

DR NONCEBO MTHEMBU **SECOND RESPONDENT**

Neutral citation: *Media 24 (Pty) Ltd v Nhleko & Another* (Case no 109/22) [2023] ZASCA 77 (29 May 2023)

Coram: NICHOLLS, GORVEN, HUGHES and GOOSEN JJA and UNTERHALTER AJA

Heard: This appeal was disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: 29 May 2023

Summary: Civil procedure - application for leave to amend plea - dismissal based on wrong principles of law - appeal upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Thulare J, sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'1 The applicant is granted leave to amend its plea within ten days of this order.

2 The respondents are liable to pay the costs on an attorney client scale.'

JUDGMENT

Nicholls JA (Gorven, Hughes and Goosen JJA and Unterhalter AJA concurring)

[1] This appeal concerns the dismissal of an application to amend a plea. On 27 November 2016, Media 24 (Pty) Ltd (Media 24) published an article on the front page of the City Press Newspaper, under the heading 'Nhleko's R30 m blessing.' The article stated that Mr Nkosinathi Nhleko (Mr Nhleko), who was the Minister of Police at the time, had been 'implicated for signing off millions of rands for work done by his love interest – and for going all out to reinstate charges against Ipid head Robert McBride.' The love interest was

a reference to his partner, Dr Nomcebo Mthembu (Dr Mthembu), who according to the article, 'scored more than R30 million for providing services which the police ministry officials claim that they could have received for free.' The article stated that the police ministry paid R30.8 million to Indoni, the non-profit organisation run by Dr Mthembu.

[2] Mr Nhleko and Dr Mthembu sued for defamation claiming R15 million each, for damages which they allegedly suffered. Media 24 admitted the publication of the article but denied the meaning attributed to it, and that it was defamatory. In the alternative, Media 24 pleaded that it had established the defences of (a) truth in the public interest; (b) protected comment; and (c) reasonable publication.

[3] In response to the plea, Mr Nhleko and Dr Mthembu filed a rule 30A notice, in terms of the uniform rules of court, objecting to the plea on the grounds that it constituted a bare denial, it was evasive, and did not clearly and concisely state the material facts on which Media 24 relied for its defence. It was further alleged that the plea did not answer the point of substance and did not comply with the uniform rules of court. In order to address some of the objections, Media 24 filed a notice of intention to amend its plea. Again, an objection was raised in which it was asserted that the proposed amendment was an 'elaborate lie with the sole purpose of misleading the court' and was an 'insult to the integrity and intelligence' of Mr Nhleko and Dr Mthembu. It was contended that Media 24 had failed to justify statements in the article. This led Media 24 to bring an application for leave to amend. This was opposed.

[4] The Western Cape Division of the High Court, Cape Town (high court), per Thulare AJ, after an extensive analysis of the pleadings and the objection, stated that the case was premised on two points, namely the role, if any, played by Mr Nhleko in regard to the payment of more than R30 million, and the payment itself. The court then went on to conclude that '[t]his mast of direct involvement of [Mr Nhleko] hoisted in the article, in giving Indoni the work, appear to have been blown away by the winds of a change of front by [Media 24] in its plea.' The high court found that the 'bleeding edge' of the article was the payment to his love interest, whilst the 'chase' was the payment and Media 24 had failed 'to cut to the chase'.

[5] The high court gave the following order:

'(a) Leave to effect the amendment to the Applicant's plea on the furnished particulars of amendment as envisaged in this notice of motion is not authorized.

(b) The Applicant is granted leave to make consequential adjustments to the furnished particulars of amendment of the plea as envisaged in this notice of motion.

(c) The Applicant is granted leave to deliver its consequential adjusted particulars of amendment of the plea within twenty (20) days of this order.

(d) The Applicant to pay the costs, including costs occasioned by any consequential adjusted particulars of the plea.'

[6] The high court granted leave to appeal to this Court. Mr Nhleko and Dr Mthembu have not participated in the appeal. Their attorneys, as did those of Media 24, indicated that they had no objection to the matter being disposed of in terms of s 19*(a)* of the Superior Courts Act 10 of 2013, without an oral hearing.

[7] In its judgment granting leave to appeal to this Court, the high court stated that the substantive issue was whether Media 24 could plead a bare denial in a defamation case involving an admitted publication of an alleged payment in the first page headline of a leading Sunday paper. It explained its reasoning thus in paragraphs 11 and 12:

'In my view, a bare denial should not be a form of gatekeeping by the applicant, a mass media player in the arena of public communication. In the circumstances, there is a duty to publicly justify a mass publication, for the applicant to remain a trusted and legitimate source of public information and an authoritative source of information. Media 24 should not be allowed to be a fundamental problem for society by being what appears to be a springboard and source for the scope, spread and reach of misinformation, especially against the State or its functionaries. There is no doubt that reports about corruption, especially by our political leaders, affect the confidence of our people in the political system and our democracy. Fake news about our democratic institutions and players are a threat to the stability of our nation and should not be tolerated by all peace loving South Africans and their friends.

It is necessary that it becomes clear whether Media 24 is not party of any group who thrive on fake news for ideological purposes and the advancement of a political campaign and agenda, as the respondents harbour. When the time to account for its headlines comes, Media 24 cannot become voiceless in substance. Media 24 cannot be a utility that control the view of the people [of] South Africa by facilitating what appears to be misinformation and play dumb when confronted. To curb fake news and misinformation, transparency is not only a need but a mandate. Those reported on, and those reported to, have a legitimate expectation to the data upon which the applicant relied when it reported on the country's leader. This is simply because democracy envisages engaged participation by informed and thoughtful voters. The applicant cannot evade judicial scrutiny by refusing the judicial light to streak in its dark corner of fact checking.'

[8] The high court misunderstood what a defendant in a defamation action is required to plead. In the first instance, it should be understood that it is not the article itself which has to be justified, but the defamatory statements that are alleged to have been published. The first hurdle a defendant has to overcome is whether the words attributed to it are defamatory, and then only those portions of the article that are alleged to be defamatory need to be dealt with in the plea. A defendant has no duty to plead to allegations that do not form part of the pleaded defamation. Once a publication is shown to be defamatory, a presumption of wrongfulness then arises and the onus is on the defendant to rebut it by showing that its publication was justified. A media defendant who cannot establish the truth of a defamatory statement, may rely on the reasonableness of the publication as a defence.[1] The defendant must allege and prove that it had reason to believe the truth of the statement and took reasonable steps to verify its correctness. Therefore, its publication was reasonable in the circumstances.

[9] Whether a plea constitutes an impermissible bare denial will depend upon what averment is being dealt with. A plea to what is alleged to be defamatory will require no more than a denial unless a special meaning or sting is alleged. A defence of justification may require some elaboration because where the onus rests on a party it must allege the facts on which the defence rests.

[10] In its unamended plea, Media 24 denied that the statements had the defamatory meaning attributed to them; alternatively it put up the justification

[1] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A).

that the article was true or substantially true; that the publication thereof was in the public interest; that the article was published in the good faith belief of its truthfulness; and, that it was reasonable to do so. Media 24 was satisfied that no more was required, but introduced the amendment in order to obviate any interlocutory skirmishes that may arise as a result of the notice of objection. It therefore sought to amend its plea by amplifying the denials and fleshing out its original plea.

[11] The high court characterised the inquiry as one in which Media 24 had to justify the allegations in the article and whether it had run a front page story relying on 'false Ministry corridors' gossip' regarding an alleged payment. The high court formulated the question thus: 'Are you a gossip monger driving publicity stunts or a professional news reporter?'[2] It concluded that from Media 24's plea '. . . one does not know if it had or did not have any money trail to ground its truth.' Therefore, it held that Media 24's case was ambiguous, vague, evasive and lacking clarity and the amended plea did not facilitate the proper ventilation of the true dispute between the parties.

[12] Media 24 was required to plead to allegations made in the particulars of claim. It was not obliged to verify or justify the allegations made in the article that were not pleaded to constitute the defamation. The amended plea made various admissions as well as providing details of the denials and the basis for them, where appropriate. Where the particulars of claim contained allegations which were irrelevant to the main issue, a bare denial of these was not objectionable.

[2] This was a translation in the high court judgment of the Setswana expression: 'O Maratahelele kgotsa o Mmegadikgang'.

[13] Instead of focusing on the pleaded case before it, the learned judge based his findings on his personal interpretation of the article and what he believed the issue should be, namely the role of the media in a democratic society. He concluded that the judiciary has 'a responsibility to seek solutions which enhance a conversation, or information exchange between equals, in pleadings before them . . .'. This being so, 'a bare denial should not be a form of gate keeping a mass media player in the arena of public communication'. To grant the amendment would therefore be 'highly prejudicial' to Mr Nhleko and Dr Mthembu whose position would be made worse by the proposed amendment as they would be no closer to determining what role Mr Nhleko played in facilitating the R30 million payment to Indoni.

[14] It is difficult to understand how there could be any prejudice to the plaintiffs by the proposed plea, which merely sought to amplify the denials in the original plea. Again, this finding was based on an incorrect understanding of the defences to a defamation action and the nature of a plea. The allegations concerning Mr Nhleko's role in facilitating the payment to Indoni, are not allegations in the particulars of claim to which Media 24 was obliged to respond.

[15] The far reaching utterances of the high court on the role of the media and the judiciary are completely misplaced. By pleading a bare denial to the allegation of defamation, in these circumstances, the litigant was not attempting to 'evade judicial scrutiny'. It is at the trial that these denials will be tested, not in the pleadings.

[16] In coming to its conclusion to refuse the application for amendment, the high court paid scant regard to the purpose of pleadings, which is to define the issues between the parties. Because the primary role of pleadings is to ensure that the real dispute between litigants is adjudicated upon, courts are loathe to deny parties the right to amend their pleadings, sometimes right up until judgment is granted. An exception is made when the amendment is *mala fides* or will result in an injustice which cannot be cured by a costs order.[3] Thus, the power of a court to refuse amendments is confined to considerations of prejudice or injustice to the opponent.

[17] Even where an amendment has led to the re-opening of a case, this has been allowed where the reason was the state of the pleading rather than deliberate conduct on the part of an applicant.[4] Prejudice has been found to occur only in situations where the opponent is worse off than he was at the time of the amendment, for example the withdrawal of an admission can have a detrimental effect in certain circumstances. The fact that an amendment may lead to the defeat of the other party is not the type of prejudice to be taken into account.[5] Here the court refused the amendment because it did not go into sufficient detail. That could only be a ground for objection if it fails to comply with the rules as to pleadings or is otherwise excipiable.

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[3] *Moolman v Estate Moolman* 1927 CPD 27 at 29. This principle has been confirmed in numerous cases including the constitutional court in *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.
[4] *Myers v Abramson* 1951(3) SA 438 (C) at 450A-B.
[5] *GMF Konstrakteurs EDMS (BPK) and Another v Pretoria City council* 1978 (2) SA 219 (T) at 226D; [1978] 2 All SA 407 (T) at 411; *Trans Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D).

[18] It is not for the courts to impose their views as to the true nature of the case. It is the pleadings, and the pleadings alone, that define and determine the issues upon which the court will adjudicate. The sole requirement of the application for amendment was to ensure that the plea advanced encapsulates the defence to the particulars of claim, not to the article itself. As has often been stated by our courts, it is the *facta probanda* that must be pleaded, not the *facta probantia*. A litigant is not required to prove its case in the pleadings, nor to describe the evidence to be led, but to state the material facts on which it relies and which it intends to prove at the trial.

[19] Trial courts are reminded that an adherence to the fundamental principles of pleadings should be observed and parties should be allowed to ventilate their case as they determine, within the bounds of these well understood principles.

[20] It is necessary to comment on the appealability of the order. In the first place, this order is predicated on entirely incorrect principles of law and cannot be allowed to stand. In the second place, it is not clear whether the order is enforceable or indeed what would constitute compliance with the order. The order requires Media 24 to answer a different case from that which was pleaded and to address allegations which were contained in the article rather than the particulars of claim. To refuse the application to amend would deprive Media 24 of the opportunity of advancing its defence and as such would be final in effect. Such an outcome would be entirely at odds with parties' right to litigate on the issues as they see them, and not those identified by the court.

[21] As regards the costs of the application for amendment, these are usually borne by the applicant. In this matter, Media 24 sought punitive costs on an attorney own client scale on the basis that the objection was reckless and vexatious. It is evident that some of the allegations in the notice of objection went beyond what is reasonably acceptable. For example, it was alleged that the application to amend had been sought to mislead the court, the public and the plaintiffs; that Media 24 had lied to the court and was using the amendment to defeat the ends of justice and was using the rules of court as a 'cover up' for its unlawful conduct and 'dirty tricks campaign'; it was an attempt to 'bully the plaintiffs into abandoning their claim'. The proposed amendments were described as 'a desperate attempt to clutch on straws' in an attempt to justify its unlawful conduct. These intemperate and ill-founded remarks are deserving of censure. That they appear to have secured some unwarranted endorsement from the high court does not render the conduct any less problematic. In the circumstances, a punitive costs order is justified against the respondents in the high court application. Since the respondents did not oppose the appeal, it is appropriate that no costs order be made in respect of the appeal.

[22] The following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'1 The applicant is granted leave to amend its plea within ten days of this order.

2 The respondents are liable to pay the costs on an attorney client scale.'

C HEATON NICHOLLS JA

JUDGE OF APPEAL

Appearances

For appellant:	S Budlender SC
Instructed by:	Willem De Klerk Attorneys, Johannesburg
	Honey Attorneys, Bloemfontein