Sneller Verbatim/dd

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 9236/05

2005-05-26

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED ✓

DATE 2/6/05 SIGNATURE

In the matter between

SANDI MAJALI 1st Applicant

IMVUME MANAGEMENT (PTY) LTD 2nd Applicant

and

M & G MEDIA LTD, BRUMMER, SOLE & OTHERS Respondents

O R D E R

SONI, AJ: This is an urgent application in which the two applicants seek certain relief in respect of certain reports to be published tomorrow by a weekly newspaper, the Mail and Guardian. The respondents are the company which owns the newspaper, the editor of the newspaper, two reporters of the newspaper and the printer of the newspaper.

At the outset let me say that this application was brought

before me after 17:00 and that it has not been possible for me to give the consideration and time that such an application demands. However, judges are frequently required to decide matters of this nature in view of the fact that consequences would flow if no decision were made immediately the matter is argued. This is, I want to say, not an easy matter to make a decision on. However, I must express my indebtedness to counsel on both sides for the very helpful submissions they have made and for directing my attention to the relevant issues.

The substantive relief sought by the applicants is that the respondents be interdicted from publishing, disclosing or in any manner disseminating information or documentation relating or pertaining to or arising from the first applicant's bank account conducted at a bank in South Africa with a specified account number. The interdict sought would include the disclosure of information on bank statements, cheques or payees of any cheques, or purposes for which the cheques were issued. The applicants also seek to interdict the respondents from publishing an article which the applicants were advised was to be published tomorrow. The article is about certain dealings the respondents may have had with certain public figures, or people closely associated with public figures.

Annexed to the notice of motion is what now transpires to be an abridged version of the article. During his address, Mr Campbell, who appeared for the respondents, made available to me the whole article. The article presented to me by Mr Campbell is annexed to the papers now as annexure A. It gives details not only of certain

transactions that took place between the applicants and the persons I have mentioned but also gives comments from either the persons concerned or their spokespersons.

Mr Cassim, who appears together with Mr Freund for the applicants, indicated in argument that his case rested on an invasion of the applicants' privacy by the respondents. Such invasion, he says, was conducted through unlawful means. Consequently, he says that that information cannot be published unless there were compelling circumstances. He also indicated, perhaps only in reply, that the article was in fact defamatory of the applicants and consequently the reputation of the applicants ought to be protected. He pointed out that what he was seeking at this stage was merely interim relief.

I should just record that Mr Campbell disputed that the article was defamatory, in any sense of the word. Furthermore, he pointed out that in the article, which is now marked A, there is independent verification of the information that had been obtained by the applicants and that such information had been put to the applicants for their comment.

I might add that this matter is being decided on the papers as presented only by the applicants. The respondents have not placed any evidence before this court. They resist the application purely on the basis that the founding papers do not make out a case for the relief sought.

In essence, in my view there are a small number of issues that ought to determine what the decision of this court should be. The

first is what is the test in respect of applications for interim relief of the nature sought by the applicants.

Having regard to the judgment in *Hix Networking Technologies v System Publishers (Proprietary) Limited* 1997(1) SA 391 (A), it appears to me quite clear that that issue has been settled by the Appellate Division. In that case, the argument was made that a "differentiated approach" ought to be adopted when questions of freedom of speech and the right to publish were in issue. At pages 400 to 401 of the judgment, Plewman JA dealt with the various cases and considerations surrounding this issue. I should point out that at that stage the Interim Constitution was in force. The learned judge of appeal took into account its provisions and, having considered the matter, said the following (at 401 E - G):

> "To the extent to which it may be suggested that there have been cases in which a tendency to unduly restrict the freedom of the press to publish (having, so it was argued, a 'chilling effect' upon the enjoyment of free speech), such cases must, in my view, reflect an incorrect weighing up of the countervailing interests of the parties. All that need be said is that the proper recognition of the importance of free speech is a factor which must be given full value in all cases. I would also add the observation that, of course, I am concerned only to examine the principles relevant to interim interdicts and this judgment does not purport to investigate the boundaries of free speech in general."

As I understand the judgment, what the learned judge said is

that the normal considerations applying to interim interdicts would apply even where issues of the right to publish and free speech were in issue. These principles, he pointed out, have been part of our law since at least 1914 when the Appellate Division decided in *Setlogelo v Setlogelo* 1914 (AD) 221 that the requirements are as follows:

"(a) a *prima facie* right;

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

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

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

The respondents claim that in dealing with the requirements one needs to take into account that, for example, as regards the fourth requirement, namely a satisfactory remedy, the applicants in fact have a claim for damages if their contentions are in fact correct.

In my view, it is cold comfort to someone whose privacy has been invaded and whose reputation may lie in tatters to say that where there is an opportunity to stop publication of defamatory material, or material that invades that person's privacy, that the requirements of democracy and in particular free speech, demand that your right to privacy and reputation are not such as to qualify for protection in these circumstances. I do not think that a damages claim is necessarily a satisfactory remedy when compared to an interdict, provided of course that all the other requirements are met.

The second requirement that I want to consider is the apprehension of irreparable harm. In my view, when a person's

privacy is invaded and his reputation is assaulted - I emphasise that every person is entitled to his reputation, dignity and privacy - the harm that necessarily follows from such acts must be regarded as irreparable. It cannot be said that the harm to a person's reputation can always be restored. Often in such matters, the public has a very short memory. If allegations of a serious nature are made against a person it is hardly likely that the public would regard such a person in a more favourable light, even if afterwards circumstances were to prove that the information might not have been correct. Consequently, the question of the harm being irreparable and the apprehension being well founded does not arise in this case.

There are two questions that trouble me about this matter. The first is whether the applicants have established a *prima facie* right. As regards the right to privacy the applicants, in my view, have established that their right to privacy has been invaded. The respondents have been given an opportunity to explain how it came about that such information had in fact been acquired. In a letter dated 23 May, from the applicants' attorneys, the respondents were formally required to explain how it came about that they had acquired such private information. They did not furnish such information. Theire attorneys indicated that they were taking instructions.

In the circumstances, it is safe to infer that there has been an invasion of the applicants' privacy, and that the respondents are not able to explain such an invasion. In my view, if the respondents had a reasonable explanation, having regard to the circumstances of this case, they would have furnished it at latest when this application was

served on them.

Mr Campbell sought to overcome these difficulties by contending that the article that is now annexure A, confirms that the information in the hands of the respondents has been corroborated by third persons, including the applicants and other parties who may have had some dealings with them. All these parties have commented on the allegations and their comments are contained in the article that is to be published.

Mr Cassim's retort to that was to refer me to a passage from the case of *Financial Mail (Proprietary) Limited v Sage Holdings limited* 1993(2) SA 451 (A) which appears at 460 E. There, Corbett CJ said the following:

> "For the reasons which follow I agree that it would have been unlawful for appellants to use information gleaned from the confidential sources in the proposed article. And in stating those reasons I propose to deal first with information derived from the tapes."

The essential question is: what is the meaning of the phrase "to use" in that passage? Does it mean to publish, or does it have a wider meaning: to include using that information to confirm from other sources the correctness of the information? Mr Cassim suggests that it has to be given its wider meaning. I cannot recall if Mr Campbell addressed me on that issue but, presumably, having regard to the context in which that phrase is used, he would want me to give the phrase a narrower meaning, prohibiting only plublication of the information.

Mr Cassim's point is that effectively if one gave the phrase only a narrow meaning, one would in a sense be encouraging journalists to abuse their rather elevated status in society by unlawfully securing information and thereafter confirming it through other persons and claiming that there were independent sources for such information.

I am not sure that the judgment of Corbett CJ necessarily means that the words "to use" must be given the wider meaning. However, it seems to me in principle that that must be correct if only on grounds of public policy. This is because journalists acquire a special status in our society on account of the Constitutional right to exchange of information and the right of freedom of expression and the right to publish. However, if they could bypass the unlawful acquisition of information by saying that the information they in fact published was not from the tainted source, but information that was confirmed by persons other than the tainted source, one would in effect be allowing journalists to taint society as a whole, for it is to society that journalists must be answerable.

In the circumstances, I am of the view, with some diffidence I must concede, that "to use" in the context used by Corbett CJ is "to use" in whatever manner, including using it to try to secure the same information from other sources.

That, however, is not the end of the matter. Whilst it is correct that there may have been an invasion of the applicants' privacy, the question arises: is the article in its present form defamatory of the applicants?

Mr Campbell indicated that no case had been made out for

contending that the article was defamatory: the passages that were allegedly defamatory were not set out, to enable the respondents to contend that the article was not defamatory. In principle, that might well be correct where an action for damages ensues. I am not sure, however, that that necessarily applies in a case where an interdict is sought for publication of defamatory material.

In my view, the article would suggest to the reasonable reader that the first applicant was a person who would not have scruples about trying to influence important public figures by rendering assistance to those close to them so that he and the second applicant would benefit from governmental contracts.

That, in my view, is the thrust of the article. Indeed, but for the fact that that is the nub of the allegation that is made, there cannot be any public interest in the article sought to be published.

On the basis of the aforegoing, in my view the applicants are correct in asserting that two of their fundamental rights are likely to be prejudiced by publication of the article, namely their right to privacy and their right to dignity and reputation.

In the *Financial Mail* (supra) case the question arose whether the very fact that there had been an unlawful infringement of privacy would in itself cause a court to prohibit such publication. At 465 D, Corbett CJ answered the question as follows:

> "Assuming in favour of the appellants that in a case where the information sought to be published was obtained by means of an unlawful intrusion, there may nevertheless still be overriding considerations of public interest which would permit of it being

published. It seems to me that such a case would be a *rara avis* and that the public interest in favour of publication would have to be very cogent indeed."

Mr Cassim says that that basically means that it would have to be a rare bird flying that would be covered by this and therefore the power would have to be exercised most cautiously.

Mr Campbell says that where there are public figures involved public interest necessarily follows. Consequently, the test laid down in the passage I have quoted is met. In other words, because of the public interest in ensuring clean government, in ensuring that public figures conduct themselves and those close to public figures conduct themselves in a manner that engenders confidence in a clean government, if such allegations are made it must be regarded as an overriding consideration of public interest.

The difficulty I have with this issue is the following. I address that issue and the question of balance of convenience together. The article in question was preceded by an article the previous week in which the same respondents had in fact made serious allegations about whether a political party had benefited from, among others, the respondents. Having regard to what is contained in annexure A and comparing it to what was contained in the article last week it is clear that the article last week contained very serious allegations and might well have been justified in the public interest even if an application to stop publication had been brought.

Here, however, we are not talking about members of the government, or persons holding public office. We are talking about

persons who may well be close to them and family members. If the allegation is made that a family member of a member of government has benefited from some financial deal, then clearly the public interest cannot be as overriding as if that allegation were made about a public figure or public official concerned. Consequently in that sense the public interest must be somewhat diminished.

The applicants themselves are not public figures. Whether or not their actions were proper is not for this court to determine at this stage. What one needs to consider is whether the public interest is so overriding that their right to privacy and reputation ought to be sacrificed for the public benefit.

That, in my view, is the main problem with this case. The allegation is about persons not central to government. Consequently the public interest test as set out by Corbett CJ in the *Financial Mail* case is not met. Nevertheless, I must weigh up whether, having regard to the position which the applicants occupy in society and the position which the family members of public officials occupy, that ought to be sufficient to tilt the balance in favour of publication.

In a democracy as young as ours it is essential that there is vigorous and robust public debate about all matters relating to clean government. Nevertheless, ordinary citizens, such as for example the first applicant, are entitled to have their Constitutional rights, such as their right to privacy and reputation, protected. It is, in my view the overriding consideration.

The respondents say that the balance of convenience, when looked at wholly, needs to take into consideration the fact that they

would suffer grave financial loss if the public would be deprived of their right to know by virtue of fact that any interim order I make today will virtually be a ban on that publication for this week. I am not at all persuaded that the respondents are entitled to plead in this manner in this case.

If the respondents have, in the words of Lord Denning in a case whose citation escapes me for the time being, "behaved badly", in my view they cannot come to court now and say that we will suffer all these losses. If the respondents were to claim that they are to be prejudiced then they had an opportunity to protect their interests by in the first case responding directly the applicants as to what the source of information was. They chose not to do so. In addition, only yesterday did they write to the applicants indicating to them that they intended publishing further allegations about them. I sought to obtain from Mr Campbell information on when the new information came to the attention of the respondents. On the papers, Mr Campbell fairly conceded there was no information. But he was not prepared to put up such information.

Having regard to the publication made last week, which has been handed in by consent, and the further allegations as contained in the affidavit, I am satisfied that it would appear that the respondents had such information as early as last week when they made the initial publication. Despite this, they waited until the very last minute to advise the applicants that such allegations were going to be published about them this week.

Mr Campbell pointed out that, in regard to the Press Counsel,

or Ombudsman, as he may now be called, it is regarded as sufficient notification for a party who is asked to comment that he be given 24 hours. That may well be so in respect of comments. But it cannot apply to matters where the fundamental rights of persons are concerned and these rights are to be decided by a court of law.

In the circumstances, to the extent that the respondents claim that they will suffer extensive losses I regret to point out that my sympathy for them is somewhat limited.

In the case that I referred to, Lord Denning pointed out that whilst the public had the right to know, and the media had the right to publish, it was also important that the media behaved in a responsible manner. The media cannot elevate itself to a portion above the law. In fact, it is important to point out that section 3 (2) of the Constitution says:

"All citizens are -

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship."

I accept that the wording of Section 3(2) limits the strictures to citizens. Nevertheless, the principle in my view must remain that where a party asks a court to protect a Constitutional right, it must do so having acted in a responsible manner. I am not satisfied that in regard to this matter the respondents have acted as responsibly as the Constitution demands.

I began earlier by pointing out that this is not an easy matter.

It would have been much easier for me had I known the basis on which the respondents had acquired the information. It would have allowed me to weigh, on the one hand, the conduct of the respondents in invading the privacy of the applicants, and on the other hand, to balance that against the public interest that would obviously emanate from a report like the one intended to be published. The respondents have chosen not to place such material before me. Consequently, the conclusion is overwhelming that the conduct of the respondents falls to be condemned.

In the circumstances, the view I take of this matter is as follows. The applicants are entitled to protection of their rights. The applicants, I may add, have tendered what is required as is set out in the *Hix* judgment, namely an undertaking to cover the respondents' losses should it transpire that the interim relief they have sought ought not to have been granted. In the circumstances, there is nothing overwhelming about the balance of convenience which suggests that the respondents' interests ought to prevail over those of the applicants.

I also need to take into account that whatever decision I make will not be final. The public interest can well be protected by publication in due course when this matter comes up again when the matter is decided as an opposed application with all the information before the court and a final decision is made. The only prejudice that the respondents can claim is that the information they wish to publish will be published a month later, if indeed that is the period it would take. But I come back to the point: if the information was so

important the question I must ask is why did the respondents not publish the information last week.

Without wanting to hold Mr Campbell to this, Mr Campbell in my view rightly pointed out that the allegations made in the publication marked annexure A are not of such overriding public importance as the allegations made in the last publication of the respondents.

In all the circumstances the order which I make is as follows:

1. The *Rule Nisi* is hereby issued returnable on 7 June 2005 calling on the respondents to show cause why an order in the following terms should not be granted:

   1.1 Interdicting the respondents from publishing, disclosing or in any way disseminating information or documentation in any matter relating or pertaining to or arising from the first applicant's bank account conducted at Standard Bank of South Africa Limited, account number 022658254, including, but not limited to, any bank statements, cheques or payees of any cheques, or the purposes for which any of the cheques on the said account were issued;

   1.2 Interdicting the respondents from publishing, disclosing or in any way disseminating information or documentation in any manner relating or pertaining to or arising from the matters and issues contemplated in annexure X, which is annexed to the notice of motion;

   1.3 The respondents are to pay the costs of the application;

2. The prayers set out in paragraphs 1.1 and 1.2 shall operate as interim orders with immediate effect;

3. It is recorded that the applicants have tendered an undertaking to cover the respondents losses should it transpire that the interim relief they seek should not have been granted;

4. Whilst the press present, and they include the representatives of Beeld Newspaper, the South African Press Association and The Star, and any other publication or media which derives its information from those present today, may report the decision of this court, they may not refer to any of the allegations made against the applicants.

5. The file in this matter shall be sealed immediately the order is signed by the registrar;

6. That the content matters and issues contemplated in this application shall not be published by the respondents, or any other person, pending determination of the main relief sought;

7. The costs of this application shall be the costs of the main application.

2/6/05