REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38564/14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/08/2019
DATE

SIGNATURE

In the matter between:

DR HUGH BRATHWAITE Applicant

and

SOUTH AFRICAN HIV CLINICIANS SOCIETY Respondent

J U D G M E N T

MAKUME, J:

INTRODUCTION

[1] In this matter the Applicant seeks an order in the following terms:

1.1 That the Respondent removes the defamatory material marked annexures "I8" and "I9" from the Respondent's website.

1.2 That the Respondent publishes a retraction of the defamatory material as well as an apology in one National Newspaper and in the Respondent's website.

[2] The Respondent contends that the Applicant is not entitled to final interdictory relief because the Applicant has not established a clear right in that the publication was not unlawful by virtue of it being true, and being for the public benefit and also that it comprises fair comment or is privileged. Further that the articles are reasonable and not intentional.

THE PARTIES

[3] The Applicant is a registered medical practitioner. He is a member of the following structures within the medical profession:

3.1 The South African Medical Association.

3.2 South African HIV Clinicians Society (the present Respondent).

3.3 A past Regional Director of the Academy of Family Practitioners.

[4] The Applicant commenced practice as a medical practitioner in 1965 after obtaining a degree in Medicine and Surgery from Stellenbosch University. In 1967 he was appointed Medical Officer at Frere Hospital. From 1968 to 2003 he went into private practice and became head of Dr H A Brathwaite and Partners.

[5] During his years in practice he held various positions within the medical fraternity to name but a few namely Clinical Secretary of SAMA (South African Medical Association), Founder and Chairman of the Katberg/Glaxo Refresher Course, Founder Member of the Cardiac Rehab Programme for which he received awards from the Cardiac Foundation from 1981 to 1988, President of SAMA Border Coastal Branch, Member of the Ethics Committee, Regional Director of Vocational Training, Head of the Student Health Care Centre at the Walter Sisulu University.

[6] The Respondent is a registered non-profit company. It was established in 1998 to provide guidance and support to doctors who had patients with HIV who wanted and needed antiretroviral treatment. It is a membership based organisation whose mission is to promote quality, comprehensive evidence based HIV healthcare in Southern Africa. It has a membership of ± 3 500 comprised of doctors from the public, private and academic sectors, nurses primarily from the public sector and other healthcare professionals such as Pharmacists, Psychologists and Dentists. It is common cause that whilst most of its members are in South Africa it has regional affiliate branches in Botswana, Namibia and Zimbabwe.

[7] Article 1.1 of the Respondent's Memorandum of Incorporation recognises the following amongst its objectives:

7.1 To foster evidence based HIV related education for healthcare practitioners.

7.2 To produce HIV related evidence based prevention, diagnosis, treatment care.

7.3 To publish a journal and other relevant publications on the above themes.

THE IMPUGNED ARTICLES

[8] On the 30th May 2012 Dr Francesca Conradie in his capacity as the President of the Respondent as well as Dr Michelle Moorhouse a Board member of the Respondent addressed a letter to the Medicines Control Council, the Advertising Standards Authority of South Africa as well as to the Health Professions Council of South Africa in which letter they sought to persuade those bodies to take action against the Applicant for his role in what the Respondent considered to be the unlawful marketing and sale of a gel described as Dr Hugh Dermo Blue Pre-sex Protection gel ("*the gel*").

[9] During August 2012 in its edition of its newsletter known as Transcript the Respondent again published and commented on the pre-sex gel referred

to above and insinuated that the Applicant's conduct in the marketing and sale of the gel was unprofessional and had been prohibited by the Medical Council as a result it had now been removed from the market.

[10] It is the contents of the two documents that the Applicant says contains defamatory matter concerning him in his professional capacity as a medical practitioner of long standing.

[11] The Applicant says the Respondent's claims are negligent and unlawful in that it is suggested that his actions poses public health risk and are misleading, further that the Applicant's actions in promoting the gel are in contravention of the law.

BACKGROUND FACTS LEADING TO THE TWO IMPUGNED ARTICLES

[12] It is common cause that during or about the year 2002-2004 the Applicant invented the gel. During 2008 a company known as Rainbow Lotion (Pty) Ltd which holds the licence to market and distribute the Applicant's products including the pre-sex gel made application to the Medicines Control Council to register the gel and was allocated what it calls a complimentary registry number being 029720.

[13] It is the advert that appeared in the media as well as in the Radio Algoa which the Respondent found not only offensive but misleading. In the advert

which appears as Exhibit "I6" the following words are ascribed to define the use and effects of the pre-sex gel. It reads as follows:

> "*My lover insists on not wearing a condom its kinda his thing says it cramps his style me I insist on protection its kinda my thing either way we both win.*
>
> *Pre-sex when safe sex is better sex a sexual gel strengthened with copper and zinc for use by both men and women.*"

[14] At the bottom of this advert appear the following words:

> "*Suitable for use with condoms, does not damage condoms.*"

[15] The advert on Radio Algoa reads almost the same except that it has the following words which are attributed to the female partner in a sexual relationship:

> "*I insist on protection to avoid unwanted pregnancy and infections. I use pre-sex gel together with standard family planning.*"

[16] The advert then continues to describe the gel as follows:

> "*Pre-sex is a sexual lubricant strengthened with copper and zinc which kills viruses, bacteria and fungi on contact with an added contraceptive benefit, pre-sex when safe sex is better sex.*"

[17] In their letter of the 30th May 2012 the Respondent in complaining about the adverts including the advert that had been published in the Daily Dispatch during 2011 said that the adverts suggest that sexual partners could use the gel instead of the recommended use of condoms to prevent HIV transmission and other sexual diseases. This the Respondent says was irresponsible as the gel was not only an unregistered medicine but that there was no clinical proof that the gel indeed prevented the transmission of HIV. In

the words of Dr Francesca Conradie as appears in that letter he says the following:

> *"As a society we feel that the advertising and distribution of an unlicensed product is irresponsible, unlawful and exploits the public by misleading them with fictitious claims. The fact that Dr Brathwaite claims that it stops the transmission of HIV is a possible replacement for the condom is also of grave concern."*

[18] The Applicant denies that a reading of the two adverts suggests the replacement of condoms with the gel and insists that the adverts do indicate that the use of the gel is recommended provided the condom is also used. It is significant to note that the media advert I6 does mention usage of condom but the radio advert is silent on the use of the condom.

[19] The Applicant contends that the contents of the letter dated the 30th May 2012 suggest that he was dishonest, that he made negligent and unlawful statements to the public, that he was reckless and was a criminal and that sanctions should be imposed on him by the Medical Council and other authorities.

[20] In seeking redress the Applicant initially addressed letters to the Respondent requesting a meeting with the leadership of the Respondent to discuss the issue. This request was refused by the Respondent when it advised the Applicant in a letter dated the 7th November 2012 that the matter was deemed closed and denied any wrongful or unlawful conduct on its part and in particular the Respondent denied having defamed the Applicant in any way. Thereafter the Applicant's attorneys addressed a letter to the

Respondent on the 27th November 2012 requesting that the impugned articles be removed from the website. This request was also ignored.

THE ISSUES

[21] At the centre of the dispute in this matter is whether the pre-sex gel is a medicine and thus falls within the definition of medicine as set out in Section 1(1) of the Medicines Act No 101 of 1965 (The Medicines Act)

[22] The Respondent contends that the gel is a medicine and accordingly that before the Applicant could market and advertise it for sale to the public it had to be registered by the Medicines Control Council whilst the Applicant maintains that the product was duly registered not as a medicine but as a complimentary medicine and also referred to as a sexual device.

[23] Secondly, it is whether the publication on the Respondent's website made of and concerning the Applicant to the effect that claims made in respect of the product were misleading, negligent, unlawful, irresponsible, untruthful and that Applicant should be criminally charged whether such statements infringe on the Applicant's reputation personality, interest and *per se* defamatory.

LEGISLATIVE FRAMEWORK GOVERNING REGULATION OF MEDICINES

[24] In order to answer the first issue it is appropriate to look into the law regulating control of medicine.

[25] Section 14(2) of the Medicines and Related Substances Act No 101 of 1965 ("*the Medicines Act*") empowers the Medical Control Council ("*MCC*") by resolution approved by the Minister of Health to determine that a medicine or class or category of medicines or part of any class or category of medicines mentioned in the resolution shall be subject to registration. This section therefore implies that not all medicines have to be registered.

[26] Before me are two contrasting views. The Applicant contends that registration of the gel was not strictly required as it fell within the category of medicines referred to as complimentary medicines whilst the Respondent has submitted evidence by a number of experts who reason and hold the view that the gel is not a complimentary medicine and ought to have been registered with the Medical Control Council before being sold and/or marketed to the public. When this did not happen it constituted a contravention of Section 14(1) of the Medicines Control Act and is an offence.

[27] The Applicant submits that during the year 2008 he submitted application to the Department of Health pursuant to a call up notice No R204 Government Notice No 23128 as published on the 22nd February 2002 for complimentary medicines and maintains that notwithstanding the nature of the gel registration was not strictly required for purposes of manufacturing, marketing and distribution of the gel. The Applicant maintains further that he

has complied with the requirements to obtain registration of the gel as a complimentary medicine and believed it had been so registered.

[28] A close scrutiny of the application referred to above which is found on page 74 Annexure "D" to the founding affidavit indicates the following under paragraph 7:

> "7. *Please Note*
>
> *(i) This document indicates that the Medicines Regulatory Affairs on behalf of the Registrar of Medicines has taken receipt of the abovementioned documents.*
>
> *(ii) This document does not authorise the use of MCC's/MRA's name for trading purposes or for any other official use other than of the Registry itself.*"

[29] I therefore fail to understand the basis on which the Applicant contends that he had complied with the requirements for registration of the gel as a complimentary medicine and that the MCC never notified him that the product was subject to registration as a medicine rather than as a complimentary medicine and that it was reasonable for him to proceed and sell the pre-sex gel.

[30] Even if the Applicant meant or believed that Annexure "D" was for registration as a complimentary medicine still that argument is fallacious because the document itself states clearly that it is not to be used as authorisation for trading purposes.

[31] In my view all the evidence points to the fact that the Applicant should have registered the gel as a medicine prior to launching same to the market.

[32] The definition of a medicine in the Act gives a clear intention of what the Regulator seeks to protect. It is the unsuspecting and ignorant community which the Act seeks to protect. It reads as follows:

> "*Medicine means any substance or mixture or substance used or purporting to be suitable for use or manufactured or sold for use in –*
>
> *(a) the diagnosis, treatment, mitigations, modification or prevention of disease abnormal physical or mental state or the symptoms thereof in men or*
>
> *(b) restoring, correcting or modifying any somatic or psychic or organic function in men,*
>
> *and includes any veterinary medicines.*"

[33] Three experts namely Professor Abdool Karim, Professor Rees as well as Dr Conradie are all in agreement in their affidavits that the gel is a medicine and should have been registered with the MCC before it being sold or marketed to the public. All three of them conclude that given the antibacterial, antifungal and antiviral claims made implies that pre-sex gel provides pre-sex protection from HIV protection and other STI's and/or pregnancy.

[34] Kriegler AJA as he then was explained the purposes of the Medicines Act in the matter of *Administrator Cape v Raats Rontgën and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) at 254B-E as follows:

> "*Manifestly the (Medicines) Act was put on the statute book to protect the citizenry at large. Substances for the treatment of human ailments are as old as mankind itself, so are poisons and quacks. The*

technological explosion of the twentieth century brought in its wake a flood of pharmaceuticals unknown before and in comprehensible to most. The man in the street and indeed many medical practitioners could not cope with the cornucopian outpourings of the worldwide network of inventions and manufacturers of medicines. Moreover the marvels of advertising, marketing and distribution brought such fruits within the grasp of the general public. Hence the Act designed as the long title emphasises, to register and control medicines. The enactment created a tightly meshed screening mechanism whereby the public was to be safeguarded. In general any medicine supplied to any person is first subject to stringent certification by experts, then it has to be clearly correctly and comprehensively packaged and labelled and may only be sold by certain classes of persons and with proper explanatory information, to round it out detailed mechanisms for enforcement are created and ancillary measures are authorised."

[35] It is common cause that an effective microbicide to prevent HIV infection has yet to be developed anywhere in the world. However, the advertising claims made in respect of the gel were likely to result in it being used in place of condoms by the unsuspecting and ignorant public in the belief that it will prevent HIV infection.

[36] The advert drew the attention of Dr Ali Stuart Manager of Medisinergy Clinical Research who on hearing the advert on Radio Algoa reacted as follows in a letter addressed to the radio station:

"*Today, we have met to discuss the ad currently running on your radio purporting the use of a gel substitute for condoms that can prevent HIV/sexually transmitted diseases.*

As a responsible member of the community I feel it my duty to raise concern about this person.

1. *I believe that there is no medical evidence to support the claim in the ad.*

2. *The product website provides no information.*

3. *The use of products not proven to prevent HIV, advocating the benefits in lieu of condoms raises huge concerns about its impact on your audience."*

[37] It is clear that if Dr Ali who is in his own right a clinical medical researcher was worried about the message what about the ignorant and unsuspecting public. The fact is that the advert gave wrong impression to potential users. It is no wonder that the Respondent as an organisation founded to provide guidance and support to doctors who had patients with HIV felt and took it upon themselves to raise concern with the authorities in order to protect the public.

[38] This now brings me to the second issue that is whether the statements published in the Respondent's website and the letter infringe on the Applicant's reputational personality interests and was defamatory and if so whether the Respondent is entitled to raise a defence of:

38.1 truth and public benefit;

38.2 honest expression of fair comment;

38.3 privileged occasion;

38.4 reasonableness given the circumstances under which the publication took place;

38.5 whether the Respondent acted in good faith and had no intention of defaming the Applicant.

[39] In order to answer this vexed issue it is appropriate to revisit the wording of the documents as they appear and attached to the founding affidavit as Annexures "I5", "I6", "I7", "I8" and "I9". Annexures "I5", "I6" and "I7" are publications attributed to the Applicant he is the author thereof and that they were penned with his knowledge and approval. Annexures "I8" and "I9" are the impugned documents by the Respondent in response to the aforementioned adverts.

[40] When the Applicant invented the Dr Hugh Demo Blue Cream his application to register that range as a medicine did not include the pre-sex gel. Therefore when the Applicant says in paragraph 9 of his founding that the pre-sex gel was a sub-product of the Dr Hugh Range and was to be marketed as a sexual device he indirectly sought to give it some form of legitimacy as a medicine hence the adverts and publications as appears on "I5", "I6", "I7".

[41] The crux of the Applicant's complaint is to be found in the words used by the Respondent in their letter dated the 30th May 2012 (Annexure "I8"). It is correct as the Applicant says that in all the documents advertising the gel except the radio advert it is stipulated that the gel should be used in conjunction with a condom and to the extent that the Respondent in their letter of the 30th May 2012 wrote that the radio advert in Algoa FM advocates use of

the pre-sex gel as an alternate to condoms they are correct. The advert is clear as it appears on "I7". There is mention of the use of condoms as well as use of the pre-sex gel together with standard family planning.

[42] The Respondent including Dr Stuart Ali all were worried and questioned the adverts on the basis that there has been no proof of the success on the use of the gel. The Applicant despite being questioned by the media could not produce any evidence that the pre-sex gel was safe or had proved a success.

[43] The Applicant says that he has been referred to as a criminal by the Respondent in their letter of the 30th May 2012 and that the words illegal and unlawful have been used four times in the letter and accordingly attributing such nomenclature to him caused him reputational harm.

[44] The opening remarks of this letter in my view sets the reason as well as its purposes. The letter says the following:

> "*The Southern African HIV Clinician Society (the Society) wishes to express its grave concern regarding a product which is currently being advertised extensively on at least one regional radio station as well as in several smaller local online printed publications. The reason for our concern is that the product has no proven use and potentially poses a public health risk as it is misleading and Dr Hugh Brathwaite's are in contravention of the law.*"

[45] It is correct that failure to register a medicine which you then proceed to sell and advertise is prohibited but doing so does not mean that you are a criminal. The words negligent, unlawful and contravention of the law must be

seen against the background of what took place prior to the Respondent writing that letter and a proper interpretation thereof given.

[46] Interpretation of words, statutes and other documents has received attention of the Supreme Court of Appeal in the words of Wallis JA in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 582 (SCA) at paragraph [18] on page 603 he says the following:

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provisions or provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purposes to which it is directed and the material known to those responsible for its production. The process is objective, not subjective a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*"

[47] It is an undisputable fact that the Society (Respondent) together with other health organisations worldwide are currently occupied with the mammoth task of finding a cure and solution for the spread of the HIV disease and anything that appears to derail their cause of action calls for them to take action and correct the situation.

[48] The Applicant complains that the Respondent never requested any information about the gel prior to writing the letter dated the 30th May 2012. This cannot be correct for in the letter Annexure "I8" Dr Conradie says the following at paragraph 4:

> *"According to the advertisement the gel contains copper and zinc which Dr Brathwaite claims kills viruses, bacteria and fungi on contact. He recommends use of the product 'when safe sex is better sex'. To access further information one is advised to make further contact via SMS. However when the Society did this in order to better understand the nature of this misleading advert there was no acknowledgement of or any form of response to the SMS certainly no additional information."*

[49] Dr Conradie as a clinical and medical research expert in his own right says that the primary purpose of the May 30 letter was to persuade the Medical Control Council and the Health Professions Council to take action against the Applicant for selling an unregistered and untested medicine. Accordingly it is wrong for Applicant to read into that letter that Respondent intended to injure his reputation. There is nothing wrong in an organisation bringing to the attention of its regulatory body any conduct that borders on professional misconduct to enable the regulatory and professional body to investigate and mete out appropriate sanction. It was never the meaning of the words used to imply that Dr Brathwaite was a criminal far from it.

[50] Article 1.1(f) of the Memorandum of Incorporation of the Respondent identifies amongst its objective to combat the unlawful promotion of untested products that are sold to prevent and/or treat HIV infection. Therefore the two impugned articles must be read and interpreted against this background information.

[51] The steps that the Respondent took by addressing the May letter to the regulatory bodies can be compared to a similar type of action that was taken by the Treatment Action Campaign against a certain Mr Raath in the case of *Treatment Action Campaign and Another v Raath and Others* (2008) 4 All SA

360 (Z) in which Zondi J found that Mr Raath and his colleagues were acting unlawfully by conducting unauthorised clinical trials and by publishing advertisements that made certain medicinal claims that had yet to be evaluated by the MCC. Mr Raath and his team were interdicted from continuing with their conduct.

[52] Accordingly in my view the intention of the Respondent in writing the May and August letters was not to defame the Applicant but pursue their objects of making certain that the public is not exposed to untested medicines or medical devices. It is no wonder then that when the Applicant became aware of the concerns raised by the Respondent as well as other medical professionals in the person of Dr Ali Stuart the Applicant immediately withdrew the promotion of the pre-sex gel. The media had previously exchanged questions with the Applicant about the legality and effectiveness of the gel. This proves that the treatment and the fight against HIV is a national one and all stakeholders including the Respondent have a right to voice concern whenever there are suspicions of irregularity.

[53] I have accordingly come to the conclusion that the statements on which the Applicant relies in my view constitute fair comment and are related to a matter of public interest and were honestly expressed by the Respondent. The May 30 letter was sent to critical stakeholders in the fight against HIV. Each of those stakeholders namely the Minister of Health, MCC, CEO of the National Aids Council, Treatment Action Campaign, Section 27 and Algoa FM had a direct interest in the matter.

THE PLASCON-EVANS RULE

[54] It is trite that in the case where there are factual disputes an applicant who proceeds by way of motion proceedings becomes subjected to the well-developed rule now widely known as the Plascon-Evans rule. The meaning and effect of that rule was aptly captured by the Supreme Court of Appeal in the matter of *Wrightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 at paragraph [12]:

> "*Recognising that the truth almost always lies beyond mere linguistic determinations the courts have said that an applicant who seeks final relief on motion proceedings must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are in the opinion of the court not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on paper.*"

[55] The version of the Respondent as supported by expert evidence established that firstly the gel should have been registered and in the absence of such registration it should never have been promoted for sale to the public. This version must be accepted as it leads to the basis why the letter of the 30the May was written. It was written in the honest belief that there was a contravention of the Medicines Control Act as well as that the public needed to be informed of the contravention.

[56] I accept the Respondent's version more so that despite concerns regarding inaccuracies contained in two articles published in the Daily

Dispatch the Applicant decided not to take any legal action against the publications.

[57] To secure a final interdict the Applicant must establish the following:

57.1 A clear right;

57.2 Unlawful interference with that right actually committed or reasonably apprehended.

57.3 Absence of any other satisfactory remedy.

[58] It is common cause that the Applicant has a clear right of reputation which is protected by the common law of defamation. However, the Applicant can only succeed in this matter only if it is clear that the Respondent has no defence.

[59] In the answering affidavit the issue of public interest as well as the absence of a clear right was dealt with as follows:

"*112. Brathwaite has no clear right because the publication of the impugned documents was not unlawful. I have been advised that this is because:*

112.1 The alleged defamatory statements on which he relies are true with the publication being in the public benefit.

112.2 Some of the alleged defamatory statements constitute fair comment, being comments based on true facts that are related to matters of public interest and were honestly expressed.

112.3 Publication of each of the impugned documents was made on a privilege occasion as explained in paragraph 43 above.

112.4 It was reasonable given the circumstances for the Society as a media respondent to publish the impugned documents in the particular way in which, and at the particular time they were published.

112.5 At all times the Society acted in good faith and without the intention of defaming Dr Brathwaite."

[60] The response by Dr Brathwaite was a bare denial that the statements were not in the public interest or for the benefit of the public and that the statements do not constitute fair comment nor are they based on true facts. The Applicants in the reply does not place in dispute that it was reasonable given the circumstances of the Society as a media correspondent to publish the impugned documents in the particular way and at the particular time they were published. That fact is in my view established by the Respondent.

[61] Paragraph 113 of the answering affidavit is an extension of paragraph 112 and was responded to by the Applicant in the same glibness as the previous paragraphs namely a bare denial.

[62] The Applicant only raises the issue of media respondent in the heads of argument and simply says that the principle is not recognised in our law. It may very well be so however when one interprets the wording of Hefer JA in the matter of *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) when he said:

> "*The publication in the press of false defamatory allegation of fact will not be regarded as unlawful if upon a consideration of all the circumstances of the case, it is found to have been reasonable to*

publish the particular facts in the particular way and at the particular time."

Then in my view and taking into consideration the watchdog role that the Society (Respondent) plays it is only fair to extend the reasonable publication defence to the Respondent.

[63] In my view the Applicant has failed to prove that his right of self-reputation was unlawfully interfered with nor has he succeeded to convince the court that if unlawfulness be proved that he does not have any other satisfactory remedy. Accordingly this application stands to be dismissed.

ORDER

[64]

64.1 The application is dismissed.

64.2 The Applicant is ordered to pay the costs of this application which shall include the costs of two counsel.

DATED at JOHANNESBURG this the 15 day of MARCH 2017.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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