CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/15

In the matter between:

AYANDA MTYHOPO Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION NATIONAL PROVIDENT FUND Respondent

Neutral citation:	*Mtyhopo v South African Municipal Workers Union National Provident Fund* [2015] ZACC 32
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgment:	Cameron J (Unanimous)
Decided on:	1 October 2015
Summary:	Section 16 of the Constitution — freedom of expression — defamation — interdict — unconstitutional prior restraint of speech — words not defamatory — interdict set aside

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ORDER

On appeal from the Eastern Cape Division of the High Court, Grahamstown:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Eastern Cape Division of the High Court, Grahamstown, is set aside. In its place is substituted: "The application is dismissed with costs".
4. The respondent must pay the applicant's costs.

JUDGMENT

CAMERON J (Mogoeng CJ, Moseneke DCJ, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J):

Introduction

[1] The applicant, Mr Ayanda Mtyhopo, is a member of the South African Municipal Workers Union National Provident Fund (Fund). He lives in Kwa-Nobuhle, Uitenhage and works for the Nelson Mandela Bay Metropolitan Municipality, Eastern Cape Province. He is the spokesperson for 99 disaffected members of the Fund. They have long been unhappy with the Fund's administration and management. They wanted to leave it, but, after trying various ways out, they found themselves thwarted. The impasse gave rise to angry feelings on both sides, and to words. Mr Mtyhopo uttered them. They are at the centre of his application for leave to appeal.

[2] The Eastern Cape Division of the High Court, Grahamstown, per Tshiki J (Grahamstown High Court), granted the Fund a broad order against Mr Mtyhopo. He was interdicted from—

(a) "[p]ublishing any false and/or defamatory matter about the [Fund]"; and
(b) "[c]ausing, whether directly or indirectly, or from allowing any publication or representation about the [Fund]" to the effect that—

(i) there is any order binding on the Fund issued by the Pension Funds Adjudicator (Adjudicator) relating to a complaint lodged by Mr Mtyhopo and other Fund members relating to the Fund's refusal to allow them to transfer to another pension fund of their choice; or

(ii) the Fund has failed to comply with any order issued by the Pension Funds Adjudicator or by any court or other tribunal.[1]

Mr Mtyhopo was also ordered to pay the Fund's costs on the punitive scale as between attorney and client.[2] He now seeks leave to appeal against the entirety of the order.

Background

[3] The background is this. What blocked Mr Mtyhopo and those for whom he spoke from leaving the Fund was a collective agreement concluded in the South African Local Government Bargaining Council (bargaining council). From 2000, the Council imposed a moratorium on inter-fund transfers, pending negotiations on the structure of municipal pension funds.

[4] Frustrated after years of trying to leave the Fund, Mr Mtyhopo lodged a complaint with the Adjudicator. There he succeeded.[3] The Adjudicator concluded that the Fund's rules permitted its members to move their memberships to a different fund. But the Fund appealed, as was its statutory entitlement, against this decision to the South Gauteng High Court, Johannesburg (Johannesburg High Court).[4] At the time of the proceedings in that Court, Mr Mtyhopo and the other members did not have legal representation and were unable to intervene. The appeal was unopposed.

[1] *South African Municipal Workers Union, National Provident Fund v Mtyhopo* [2014] ZAECGHC 48; 2014 JDR 1145 (ECG) (Grahamstown High Court judgment) at paras 38-9.

[2] Id at para 38.

[3] *Mtyhopo and Others v South African Municipal Workers' Union National Provident Fund* [2013] 2 BPLR 203 (PFA); [2013] JOL 30280 (PFA) (Adjudicator's decision).

[4] See section 30P of the Pension Fund Act 24 of 1956.

On 15 November 2012, the Johannesburg High Court upheld the Fund's appeal. It set aside the Adjudicator's decision. It seems to have done so in unopposed motion proceedings, without a judgment clarifying the grounds for its order – or even whether it upheld the Fund's objection to the Adjudicator's jurisdiction – and without reaching the merits of Mr Mtyhopo's complaint.

[5] Within the same week of the ruling of the Johannesburg High Court, Mr Mtyhopo initiated communication with Ms Rochelle de Kock, a journalist at *The Herald*, a newspaper in Port Elizabeth. She subsequently published an article in print on 18 February 2013. The following is an extract from the article:

> "The SA Local Government Bargaining Council placed a moratorium on the transfer of municipal workers between various pension and retirement funds in 2000 and has yet to lift the ban.
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> The group of 99 said the ban infringed on their constitutional rights to freedom of association.
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> Spokesman for the group Ayanda Mtyhopo said they had spoken to SAMWU [a municipal workers' union], the SA Local Government Association (SALGA) and the Bay Municipality about their grievances, begging them to intervene, but with no luck.
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> The group also took the matter to the Pension Funds Adjudicator – a body which investigates and resolves pension fund disputes – which ruled in their favour in June last year. This had not, however, influenced the bargaining council's decision.
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> '[Despite] numerous discussions with representatives of [the Fund] and letters of termination, we have not been successful and find ourselves disadvantaged in many ways. . .' Mtyhopo said.
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> Other grievances are that the [Fund] was embroiled in a scandal in which R800 000 was allegedly stolen."

[6] The Fund complains that the newspaper article represented it as uncooperative and, worse, tainted by scandal. And, mysteriously, it mentioned only the Adjudicator's decision, without explaining that the Fund had succeeded in overturning it. This incensed the Fund. Two issues in particular evoked its ire. First, it said

Mr Mtyhopo had intentionally misled the journalist by not informing her that the Fund had successfully appealed against the Adjudicator's decision. Second, it complained about the statement that the Fund was "embroiled in a scandal in which R800 000 was allegedly stolen".

[7] The Fund demanded a retraction. This *The Herald* published two days later, on 20 February 2013. The retraction, of course, has no direct bearing on the Fund's litigation against Mr Mtyhopo. It may have been published for purely commercial reasons, or for the sake of keeping the peace or hearing the other side. A second observation is warranted. The fact that *The Herald* published a retraction surely impacted very considerably on the need for further steps against Mr Mtyhopo. The retraction of the newspaper article, within 48 hours, surely remedied any harm or misapprehension that had arisen.

[8] But the retraction did not appease the Fund. It also confronted Mr Mtyhopo. In a lawyer's letter, it said he had acted in bad faith by deliberately providing the journalist with false information. It said he had made "wrongful and intentional false representations of fact knowing that such statements would induce the reporter to act on those false statements and report it to the public at large". For his part, Mr Mtyhopo has at all stages accepted that he prompted the newspaper article and that broadly it correctly quoted him.

[9] The Fund now sought a wide-ranging undertaking from Mr Mtyhopo. It demanded that he, "with immediate effect, cease to communicate with the press, or otherwise make public statements about any matter relevant to the Fund, in particular relating to the aforesaid complaints and determinations, or make any defamatory or untrue statements about the Fund".

[10] In more detail, the Fund required an undertaking "at least" that Mr Mtyhopo would "cease to communicate any and all information and opinions by any means of communication and regardless of the origin of such information and opinions" about

the Fund to any members of the press, any persons in public, or to any person in private, "seeking to induce such person to communicate the information or opinions to the press or to the public, whether directly or indirectly, intentionally or unintentionally".

[11] In response, Mr Mtyhopo dug in. He refused to give the undertaking. So the Fund applied for an interdict restraining Mr Mtyhopo from, among other things, publishing or allowing any other person, including the members he represented, to publish any defamatory or false statements about the Fund. The proceedings were not against the newspaper or the reporter, but against Mr Mtyhopo only. The Fund asserted that, though it was not a trading corporation, Mr Mtyhopo's statements put it at risk of pecuniary harm. In its founding affidavit the Fund said that the article might undermine members' confidence in its management and lead to more members wishing to leave, with the risk of continued litigation.

[12] In his affidavit opposing the relief sought, Mr Mtyhopo denied that his statements carried in the article were defamatory. He claimed that they were not untrue because he did not know that the Johannesburg High Court had overruled the Adjudicator's decision in the Fund's favour. He said the correspondence from the Fund's attorney was "filled with jargon". This left him unsure about what it meant. He also denied defaming the Fund. He asserted that the scandal claim was "all but admitted by the Fund" in its response to the Adjudicator. And, he said, the undertaking the Fund sought from him, on pain of the ensuing litigation, was "unjustifiably onerous".

[13] The Grahamstown High Court's judgment, as its punitive costs award showed, was a stinging rebuke to Mr Mtyhopo. It held that what he caused to be published in *The Herald* was "not the truth". The Court found his claimed ignorance about the Johannesburg High Court ruling in favour of the Fund was not credible. The notion of a language barrier preventing him from appreciating the significance of the Court's

order was far-fetched. He was only pretending not to understand.[5] It also found that the requirements for an interdict, including that no other remedy be available, were met. The Court held that damages would be an insufficient remedy[6] because if Mr Mtyhopo could not afford to pay those damages, "there would be no wisdom in proceeding with such a claim and an interdict would turn out to be the only satisfactory remedy".[7]

[14] On 14 October 2014, the Grahamstown High Court refused Mr Mtyhopo leave to appeal. So did the Supreme Court of Appeal, on 2 March 2015.

In this Court

[15] In directions dated 13 May 2015, the Chief Justice invited the parties to file written argument on whether the interdict was justified; whether alternative relief was viable; the implications of the interdict for freedom of speech; and whether the interdict could have been tailored more narrowly.[8] After receiving the parties' submissions, this Court decided to dispose of the matter without an oral hearing.

[16] In this Court, Mr Mtyhopo mounts a broad attack on the Grahamstown High Court order. He makes three contentions:

(a) The Fund failed to meet the requirements for an interdict in a defamation claim;

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[5] Grahamstown High Court judgment above n 1 at para 23.

[6] See *Tullen Industries Ltd. v A de Sousa Costa (Pty.) Ltd. and Others* 1976 (4) SA 218 (T) at 220A, which notes that there are cases where "an award for damages [would be] a poor substitute", cited with approval by the Grahamstown High Court judgment id at para 37.

[7] Grahamstown High Court judgment id.

[8] The Chief Justice invited short written argument on—

> "a) Whether the circumstances of this matter justify the relief imposed by the High Court;
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> b) The viability of alternative relief in this matter;
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> c) The implications of the right to freedom of speech in this matter and how the interdict granted by the High Court infringes on this right; and
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> d) Whether the terms of the interdict granted by the High Court could have been tailored to limit the infringement of the right to freedom of speech."

(b) The interdict is over-broad for several reasons, including that it is an unconstitutional prior restraint of speech; and

(c) If he had defamed the Fund, the Grahamstown High Court ought instead to have an ordered apology.

[17] Mr Mtyhopo contends that neither the issue about the Adjudicator's award nor his claim about scandal amounted to unlawful defamation. He pointed out that he had said that it was the bargaining council – not the Fund – that had been unswayed by the Adjudicator's decision. On the scandal, he submits his statement was true, the facts were admitted by the Fund, and that publicising the scandal was in the public interest.

[18] He further denies that the defamation, if indeed it was that, was intentional. He was confused as to the "true position" of the dispute and spoke only to what he understood. The fact that his statements may have been erroneous, according to Mr Mtyhopo, does not mean that they were defamatory, for he lacked the necessary intent to defame.

[19] But these arguments are secondary to Mr Mtyhopo's central concerns: that the interdict was overbroad; there were better alternative remedies; and the interdict imposed an unconstitutional prior restraint. He argues that an interdict is a remedy for future wrongs, not past transgressions. Because the Fund had no reasonable apprehension that Mr Mtyhopo would in future defame it, the Grahamstown High Court erred in issuing so broad an interdict.

[20] There were, he furthermore contends, at least two remedies available to the Fund: damages, or an apology. The Fund could have sought damages from both him and *The Herald* – this would have redressed any harm.[9] Alternatively, the Grahamstown High Court could have ordered him to apologise.[10]

[9] See [7] above regarding the retraction *The Herald* published.

[10] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC); *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); 2011 (6) BCLR 577 (CC) (*Le Roux*); and *The Citizen 1978 (Pty) Ltd and Others v McBride*

[21] Finally, Mr Mtyhopo urges that the interdict against him constitutes a serious infringement on freedom of expression. Prior restraint of speech is among the most serious infringements of freedom of expression.[11] The interdict extends to any future statement about the Fund, even those that might be lawful. It also restrains not solely defamatory statements but also statements that are untrue, when no case of injurious falsehood was made. This limits disclosure about scandals that might affect the Fund's operations and prohibits the indirect allowing or causing of defamatory materials to be published by others. This, Mr Mtyhopo claims, makes him a guardian of the Fund's reputation. All this fails to meet the stringent requirement of narrowly tailoring an interdict suppressing speech.

[22] The Fund contends that the Grahamstown High Court simply applied trite principles in granting the interdict. Mr Mtyhopo's statements plainly defamed the Fund, infringing a clear right, and the only reasonable alternative was an interdict since Mr Mtyhopo's relative penury meant that a monetary judgment against him would not be satisfied. Given Mr Mtyhopo's hostility towards the Fund and his prior pattern of bad faith, the Fund says it had a reasonable apprehension that he, or some affiliate, would continue to defame it.

[23] The Fund further urges that it is not reasonable to expect it to seek redress from *The Herald* since the newspaper was not responsible for the erroneous statements. Nor would damages – which would be difficult to quantify – help against future defamatory statements, which was the point of the litigation.

[24] On prior restraint, the Fund argues that the Grahamstown High Court thoughtfully assessed whether the Constitution placed any limits on the common law

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(Johnstone and Others, Amici Curiae) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*).

[11] *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (*Print Media*) and *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA) (*Midi Television*).

of defamation, which operates as a general law limiting the right to freedom of expression. Furthermore, they argue that this case presented no novel issues that would require the development of the common law, and note that the Grahamstown High Court held that there was a reasonable apprehension that justified an interdict.

Jurisdiction

[25] This Court has jurisdiction because the interdict affects the right to freedom of expression.[12]

Assessment

[26] The first question is whether *The Herald* article defamed the Fund. If the answer favours Mr Mtyhopo, all the other issues fall by the wayside. The Grahamstown High Court held that the Fund was defamed. Its central finding was that what Mr Mtyhopo told the journalist about the Adjudicator's decision was not the truth. It then proceeded with some energy to consider Mr Mtyhopo's defence of ignorance and lack of understanding about the effect of the reversal by the Johannesburg High Court of the Adjudicator's decision. Mr Mtyhopo admitted the Fund's attorney informed him of the reversal.[13]

[12] Section 16 of the Bill of Rights provides:

> "(1) Everyone has the right to freedom of expression, which includes—
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> (a) freedom of the press and other media;
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> (b) freedom to receive or impart information or ideas;
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> (c) freedom of artistic creativity; and
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> (d) academic freedom and freedom of scientific research.
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> (2) The right in subsection (1) does not extend to—
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> (a) propaganda for war;
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> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[13] Grahamstown High Court judgment above n 1 at paras 22-5 and 29.

[27] The Grahamstown High Court rejected all Mr Mtyhopo's disclaimers. It found that he was "well aware" of the outcome of the Johannesburg High Court battle when the journalist interviewed him. This applied to both the Adjudicator's decision and the scandal. It is doubtful whether there is a sound basis for the Grahamstown High Court's finding that Mr Mtyhopo disingenuously raised a language barrier in seeking to defend his supposed ignorance of the Johannesburg High Court order in favour of the Fund. Mr Mtyhopo did not complain that there was a language barrier beyond making the justified point that lawyers' language is impenetrable. On 15 November 2013, he asked the Fund's attorney for an explanation as to whether the Adjudicator had been overruled. He received the following reply: "Kindly note that the Fund's appeal in both matters were today upheld which resulted in the complainants' complaints having been dismissed". Thereafter, in November 2012 and January 2013, he asked for the full judgment. In March 2013, he complained that there was no full judgment. One may speculate that with these inquiries Mr Mtyhopo wanted to ascertain whether the Johannesburg High Court had overruled the Adjudicator on a technicality or on the merits of her finding in his favour.

[28] At all events, the Grahamstown High Court found that when the newspaper article appeared, "he knew very well that he was publishing something which was not true".[14] This put paid, too, to his defence that he was innocent of defamatory intent. Since courts do not encourage the deliberate publication of material the publisher knows to be false, the Grahamstown High Court found that an interdict should be issued.

[29] The Grahamstown High Court reasoned that because Mr Mtyhopo published information he knew or ought to have known was not true, he had defamed the Fund, which had therefore established its entitlement to an interdict:

[14] Id at para 29.

> "The only relevant question is whether, in the opinion of the reasonable man with normal intelligence and development, the reputation of the person concerned has been injured. This is an objective approach and if so the words or behaviour are defamatory to, and in principle wrongful against that person. In our case, [Mr Mtyhopo] has published information which he knew or at least ought to have known that it [was] not true and therefore, any conduct in attempting to or continuing to deliberately publish false information should be discouraged at all costs as this conduct could not be in the interests of justice and good order."[15]

[30] This approach to whether a statement is defamatory is mistaken. The long-established test, as this Court recently put it in *Le Roux*, is that "a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published".[16] So the question is this: did the article diminish the Fund in the estimation of reasonable readers? We may accept that Mr Mtyhopo's disclaimers were implausible. But the Grahamstown High Court omitted to consider the question whether the Fund was defamed separately from the question whether Mr Mtyhopo misled the journalist by not telling her that the Fund had successfully challenged the Adjudicator's decision in the Johannesburg High Court.

[31] The newspaper article, so far as it goes, is factually correct on the Adjudicator's decision. What the newspaper article leaves out is the fact that the Johannesburg High Court overturned the Adjudicator's decision at the instance of the Fund. Did that defame the Fund? The question is whether the omission diminished the Fund in the estimation of reasonable readers. A well informed reader would certainly be entitled to know, and would want to know, about the Johannesburg High Court decision. But, not knowing about it, would she think less of the Fund? That seems very unlikely.

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[15] Id at para 32.

[16] *Le Roux* above n 10 at para 91; *McBride* above n 10 at para 19; and *Demmers v Wyllie and Others* 1980 (1) SA 835 (A); [1980] 1 All SA 391 at 842A-C.

[32] The closest the newspaper article comes to defaming any institution or body is what follows immediately after it tells readers about the decision in Mr Mtyhopo's favour. The article proceeds: "This had not, however, influenced the bargaining council's decision". The allusion is not to the Fund. It is to the bargaining council. When read in the context of the grievance the article sets out earlier – which was a grievance against the bargaining council, and not the Fund – the reasonable reader would at most think that this was a criticism of the bargaining council's failure to lift its moratorium on membership transfers. Although the article implies that the Fund is responsible for the disgruntlement of the 99 disaffected members, it does not say, nor does it imply, that the Fund failed to implement a decision by the Adjudicator that was binding on it.

[33] In considering these aspects of the newspaper article, one must be careful not to confuse disapproval of any lack of candour by Mr Mtyhopo in not disclosing to the journalist the outcome of the Fund's appeal with the question whether the article defamed the Fund. Complete accuracy would have demanded that she be told of this, but it does not follow that Mr Mtyhopo's failure to do so made the article defamatory of the Fund. One may accept that Mr Mtyhopo's omission was disrespectful of the journalist. And one may accept it was disrespectful of the readers he aimed to reach through her. This may warrant disapprobation and perhaps even censure. But it does not follow that his omission constituted actionable defamation. For that, it would need to have the effect of reducing the Fund's reputation in the estimation of ordinary readers. And, on any reading of the article, that is not what the hypothetical reasonable reader would conclude from the article.

[34] Then there is the article's mention of the grievance that the Fund "was embroiled in a scandal in which R800 000 was allegedly stolen". The Grahamstown High Court made no separate assessment whether this statement was

defamatory. It merely found, somewhat obliquely,[17] that the scandal allegation was included in the Adjudicator's overturned decision. It found that Mr Mtyhopo libellously misled the journalist.

[35] This approach was mistaken. The Adjudicator made no finding about the R800 000. She merely recorded both Mr Mtyhopo's complaint about it, plus the Fund's response. Her entire determination,[18] as well as her order,[19] concerned solely the Fund's rules on transfers and the law relating to transfers.

[36] Her ruling was that the Fund—

> "is directed to take all necessary steps to effect the transfer of the complainant's benefit in terms of its rules within eight weeks of the date of this determination".[20]

It is mistaken to suggest that the Adjudicator made any determination about the allegedly stolen R800 000, still less that the Johannesburg High Court could have overturned any decision on it in the Fund's favour. The "scandal" statement in the newspaper article must be determined on its own defamatory nature and capability, without burdening Mr Mtyhopo with the suggestion that he omitted to tell the journalist about the Johannesburg High Court ruling that vindicated the Fund.

[37] So was it defamatory for *The Herald* to report that one of the grievances of the disaffected group was that the Fund "was embroiled in a scandal in which R800 000 was allegedly stolen"? The answer is no. And the answer lies in the fact that the Fund responded to the Adjudicator about Mr Mtyhopo's complaint about the R800 000. His complaint was that the Fund suffered "maladministration" and "as a

[17] Grahamstown High Court judgment above n 1 at para 25, where the Court held that Mr Mtyhopo "knew very well that the issue about R800 000 also formed part of the matters which were successfully challenged by the Fund" in the Johannesburg High Court.

[18] Adjudicator's decision above n 3 at para 5.

[19] Id.

[20] Id at para 6.

result it is estimated that there is an amount of about R800 000 which cannot be accounted for" by the Fund.

[38] The Adjudicator recorded Mr Mtyhopo's claim without comment, and without later assessment. But she was careful also to record the Fund's response. She did so equally without comment, and equally without assessing it. Her decision records this:

> "According to [the Fund] there is no trustee who misused R800 000. However, the money was paid to the trustee by the Momentum Group Limited and this company refunded [the Fund] in 2009, together with interest. The person involved was subsequently removed from the board. There has been no evidence produced by the complainant [Mr Mtyhopo] that other funds grow at a faster rate than [the Fund]. The complainant's allegation that there are long delays in paying claims is a general statement that has no basis. Members are paid as and when they submit proper documentation."[21]

[39] This response affords the reason why Mr Mtyhopo did not defame the Fund. It confirms that R800 000 was paid to a trustee; that the sum should not have been paid; and that the trustee was in consequence removed from the Fund's board. This is a scandal. If it is not a scandal in what the Fund admitted to the Adjudicator, it is a scandal in what it omits to say. Who was the trustee? How did he or she manage to procure the payment into a personal account? What processes and procedures of the Fund were so deficient that a major life insurer, Momentum Group Limited, wrongly paid such a big sum to an individual board member? Was the money ever recovered from the trustee? Was a criminal charge ever laid? Was the trustee ever prosecuted? If so, what was the outcome? If not, why not? What later steps have been taken? Have any board processes been revised to preclude a future repetition? If not, why not? Have other funds and fiduciary institutions been alerted to the identity of the trustee and to the circumstances of the payment so that there is no repeat?

[21] Id at para 4.3.

[40] In both what is said and in what is left out, there can be no clearer admission of scandal. The repayment of the money by Momentum Group Limited did not close the door on the taint. It only accentuated the importance of the questions the Fund's response to the Adjudicator did not address.

[41] Mr Mtyhopo and his group were entitled to feel aggrieved about the payment. And they were right to regard it as a scandal. And they were entitled to challenge the Fund to account more fully for what had happened with the R800 000. Their persisting grievance is what continued to "embroil" the Fund in the scandal.

[42] So the statement in *The Herald*'s article that the Fund "was embroiled in a scandal in which R800 000 was allegedly stolen" was not actionably defamatory. It was true. And to the extent that it was not a fact, it was a comment or opinion that Mr Mtyhopo was entitled to hold and to express.[22]

[43] It follows that, from first base, the Fund was not entitled to an interdict. This conclusion makes it unnecessary to consider Mr Mtyhopo's further arguments that the interdict was unwarrantably overbroad, and that it constituted a prior restraint out of consonance with the judgment of this Court in *Print Media* and the judgment of the Supreme Court of Appeal in *Midi Television*.[23]

Order

[44] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Eastern Cape Division of the High Court, Grahamstown, is set aside. In its place there is substituted: "The application is dismissed with costs".

[22] *McBride* above n 10 and *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC).

[23] *Print Media* and *Midi Television* above n 11.

4. The respondent must pay the applicant's costs.

For the Applicant:	S Budlender and M Bishop instructed by the Legal Resources Centre
For the Respondent:	Bowman Gilfillan