

Law of Defamation: Why the EFF lost to Manuel

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In the recent case of *Trevor Andrew Manuel (Manuel) v Economic Freedom Fighters and Others (the EFF)*, the Johannesburg High Court was tasked with determining whether an entity or person that was not part of the print and broadcast media could raise the defence of reasonable publication to a claim of defamation.



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The case dealt with the publication of a statement made by the EFF on Twitter in which it was alleged that Manuel was corrupt and nepotistic. These allegations related to the appointment of Edward Kieswetter as the new Commissioner of the South African Revenue Service by a panel, which Manuel had chaired. It emerged, following his appointment, that Kieswetter was a colleague and business friend of Manuel, although Manuel had recused himself from Kieswetter's interview with the panel.

As with all cases concerning defamation, the court was required to consider the right to freedom of expression and the right to dignity, both of which are enshrined in the Constitution, and to determine an appropriate balance between the two.

The EFF contended that the statement was not defamatory and that, if the court were to find that it was, they were nevertheless protected from liability because the statement:

- a. was substantially true;
- b. was the result of fair comment;
- c. was in the public interest; and/or
- d. constituted a reasonable publication.

On considering these defences, the court determined that the statement was not substantially true, and that this was known by the EFF. Additionally, the court determined that the EFF had not made out a case that the statement constituted fair comment or that it was in the public interest. In reaching this decision, the court referred to the Supreme Court of Appeal's decision in *National Media Ltd and Others v Bagoshi* where it was held that there can be no justification for the publication of untruths and that members of the press may not lower the standards of care which must be observed before any publication in a newspaper.

In determining that the statement constituted a publication, even though it had been published on Twitter and not in a newspaper or a broadcast medium, the court held that the "ordinary reader" must be taken to be a reasonable representative of the users of Twitter who follow the EFFs' Twitter accounts. At the time of the publication, the EFF had close to three million Twitter followers and, consequently, the tweet received wide coverage in the media and on high-traffic online channels.

The court held that a reasonable person of ordinary intelligence would understand the tweet to mean that Manuel was corrupt and nepotistic. Accordingly, there could be no doubt that the statement would generally tend to lower Manuel's reputation in the eyes of society and was thus a defamatory statement. In this regard, the court determined that the defence of reasonable publication could not assist the EFF in the matter, as they had failed to show that it was reasonable in the circumstances to publish the statement in the particular way at the particular time.

Although the statement was held to be defamatory in the circumstances, the court established that, as a result of social media platforms, such as Twitter and Facebook, ordinary members of society (who would not generally be entitled to raise the defence of reasonable publication) now have publishing capabilities that sometimes reach beyond that of which the print and broadcast media is capable. The difference between an ordinary person communicating matters of public interest on social media, and a journalist publishing the same statement in a newspaper, is that communications on social media are now capable of reaching millions more instantaneously. As a result, media outlets should not be provided greater liberty than an individual when faced with a claim for defamation and, consequently, the defence of reasonable publication should be open to individuals as well as media outlets.

The EFF has attempted to appeal this decision unsuccessfully, with the result being that this decision remains in full force and effect. This is a significant decision in South African law, as it acknowledges that statements made on social media, given their potentially wide coverage, amount to publications in their own right and that, consequently, such statements can be defamatory. As a result, the decision is an important step in developing the defences available in a defamation claim, aimed at ensuring the right to freedom of expression.

Although the defence of reasonable publication has been expanded in this way, individuals should always exercise caution when making statements of any kind on social media, especially given that the courts will ultimately be required to consider whether an individual's right to freedom of expression trumps the right to dignity - a decision a court will not take lightly.

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