**CITATION:** Miguna v. Sitel Operating Corporation, 2024 ONSC 632
**COURT FILE NO.:** CV-22-00682736-0000
**DATE:** 20240130

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Miguna Miguna

**AND:**

Sitel Operating Corporation, Refinitiv Limited

**BEFORE:** J.T. Akbarali.

**COUNSEL:** *Miguna Miguna*, in person

*Mary Paterson, Marleigh Dick and Sierra Farr,* for the defendant Refinitiv Limited

*Chenyang Li*, for the defendant Sitel Operating Company

**HEARD:** January 18, 2023



## CORRECTED ENDORSEMENT

### Overview

[1] On this motion, the defendants move for summary judgment, seeking to dismiss the plaintiff's action for defamation and breach of privacy.

### Brief Background

[2] The defendant Refinitiv Limited ("Refinitiv") operates a database known as the "World-Check Database" (the "database"), available to subscribers only. Refinitiv's subscribers are mainly financial institutions who are obliged by law to conduct due diligence on certain categories of people before facilitating transactions. This due diligence is part of an effort in the global financial system to combat money-laundering.

[3] One category of people with respect to whom financial institutions must undertake due diligence are politically exposed persons ("PEPs"). Every senior and many mid-level participants in every government in the world is included in the database as a PEP. For example, Princess Charlotte is a PEP. Judges of the Supreme Court of Canada and Court of Appeal for Ontario are also PEPs. PEP is a neutral category.

[4] The entries in the database respecting each person contained in it are brief; they do not purport to be fulsome biographies. The purpose of the database is to identify people who fall into a category requiring a financial institution to complete additional due diligence.

[5] The information in the database is aggregated from public sources that Refinitiv has determined to reputable, such as credible media reports, regulatory, law enforcement, and other government websites. The information obtained from those sources is distilled into an abbreviated form for subscribers.

[6] Subscribers to the database contractually agree, among other things, that (i) the database provides information without giving any opinion or recommendation about any person or entity named in the database; (ii) they should not rely solely on the database when making any decision to deal with any person or entity and should undertake their own independent checks to verify accuracy; (iii) information in the database is necessarily in summary form and should be read in the context of the full details available in the third-party news sources which are linked to the database's reports; (iv) the inclusion of a person or entity in the database should not automatically be taken to draw any particular inference about them; (v) if third party news sources cited in a report contain negative allegations about any person, it should be assumed the allegations are denied by that person; (vi) there is no guarantee that the information in the database has not changed or will be correct; (vii) the database offers no warranty about the accuracy, completeness or currency of the information in the third-party news sources referred to in its reports.

[7] Although there is no warranty that the database is current, as soon as a representative of the database becomes aware that a third-party news report is inaccurate, database policy requires correction of the information.

[8] There is no single definition of a "PEP". The database services financial institutions across the globe, and different countries have adopted different definitions. Refinitiv has developed guidelines that are informed by the domestic guidelines of different countries, and by the Financial Action Task Force ("FATF"), an international body with 37 members, including Canada, that sets standards and promotes the implementation of legal and other measures to combat money laundering, terrorist financing, and related threats.

[9] According to FATF, foreign PEPs are "individuals who are or have been entrusted with prominent public functions by a foreign country…", while domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions".

[10] Refinitiv's guidelines describe PEPs as "individuals holding or having held prominent public functions", and notes that PEPs represent a potential risk for the financial institutions. PEPs may misuse their power and influence to illegally enrich themselves or their family and associates at the expense of their states. Many PEPs are in positions that can be abused for the purpose of committing money laundering offences and related predicate offences, including corruption and bribery, as well as activities related to terrorism financing. However, the guidelines also note that "the vast majority of PEPs are honest and dedicated politicians and public servants. If an individual is classified as a PEP, this doesn't automatically mean that [a financial institution] shouldn't do business with them, … but it means the [financial institution] ought to review the customer's report

and transactions more regularly, and carry out due diligence and other screening activities on that customer."[1]

[11] Between 2009 and 2011, the plaintiff, who is a lawyer qualified in Ontario and in Kenya, was a senior advisor to the prime minister of Kenya. As such, he was included in the database as a PEP. The entry respecting the plaintiff was removed in accordance with Refinitiv's guidelines on December 6, 2021, ten years after he stopped being an advisor to the prime minister of Kenya.

[12] Over the years the plaintiff was identified as a PEP in the database, the information about him changed, as publicly available information about him also changed. The record before me includes all the versions of the entry about the plaintiff, which was updated 11 times.

[13] The plaintiff alleges that he was wrongfully included in the database, and that as a result, many major financial institutions operating in Ontario denied him financial services. He also alleges that his inclusion in the database has led to his detention and interrogation at international borders. He alleges the information contained in his entry was defamatory.

[14] According to the plaintiff, for many years, he believed that it was the government of Kenya that was creating issues for him. However, an incident occurred in late October 2021 that appears to be the catalyst for this action.

[15] At that time, the plaintiff was expecting $1,500 in funds from a person identified as the plaintiff's client for legal services in Ontario. The money transfer was sent through Moneygram, but Moneygram refused to release the transfer to the plaintiff pending verification of additional information. This resulted in telephone calls between the client and Moneygram's customer service line, and between the plaintiff and Moneygram's customer service line. Moneygram had contracted with the defendant Sitel Operating Corporation to operate its customer service line.

[16] The plaintiff alleged that defamatory statements were made by the customer service agent during the three calls. As a result, on November 1, 2021, he commenced an action against Moneygram for damages, including damages for defamation in the amount of $900,000.

[17] Moneygram defended, and pleaded that it required the additional information for anti-money laundering and anti-corruption check purposes because the plaintiff had been flagged as a PEP.

[18] Subsequently, Moneygram and the plaintiff entered into settlement negotiations, and a deal was reached. As part of the deal, Moneygram sought and obtained contribution from both Sitel

[1] Although this language comes from Refinitiv's September 2021 language, the evidence indicates that the guidelines applicable throughout the relevant time contain similar language.

and Refinitiv. On April 5, 2022, the plaintiff signed a release in favour of Moneygram, Sitel and Refinitiv; the parties dispute the scope of the release.

[19] Following the execution of the release, the plaintiff delivered notices under the *Libel and Slander Act*, R.S.O. 1990, c. L. 12, to Refinitiv on May 27, 2022, and to Sitel on June 9, 2022. The *Libel and Slander Act* requires that notice be delivered no later than six weeks after the alleged libel is discovered. Despite the plaintiff having been aware of the involvement of Sitel and Refinitiv in the Moneygram action by, latest, February 2, 2022 (according to his cross-examination evidence, although his affidavit indicates an earlier date), he states that he did not realize that he could advance legal claims against the defendants until May 16, 2022.

[20] The plaintiff commenced this action on June 16, 2022, against the defendants and two officials in the Kenyan government, against whom he claimed damages for torture and abusive conduct. The plaintiff subsequently abandoned his claim against the Kenyan officials following the commencement of a motion to stay the action on the basis of a lack of jurisdiction of Ontario courts and on the basis of the *State Immunity Act*. He amended his claim against the two remaining defendants, although he continues to repeat allegations of torture and abuse.

**Issues**

[21] This motion raises a number of issues. The defendants argue that summary judgment should be granted in their favour because:

a. The statements in the database were not false;

b. The database is protected by qualified privilege;

c. The plaintiff's claims are barred by the release signed in the Moneygram action;

d. The plaintiff's claims are barred by the limitation period in the *Libel and Slander Act*.

[22] On this motion, the plaintiff has adduced over 2000 pages of evidence contained in 24 volumes. It was wholly unnecessary to do so. The question is not whether the information in the database about him could have been further contextualized, and if so, what it could say; it is whether the information that was in the database was defamatory, and whether any defence applies.

[23] This court is facing a significant backlog and must use its time efficiently. A review of 2000 pages of evidence in the circumstances of this case was an inefficient use of the court's resources. I do not propose in these reasons to detail all the evidence led by the plaintiff. Nor do I find it necessary to address all of the issues raised by the defendants. Rather, I focus on two controlling issues the analysis of which, in my view, justifies granting the motions brought by the defendants and dismissing the plaintiff's claim.

**Test for Summary Judgment**

[24] There is no dispute between the parties that the guidance of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 applies. In my view, the facts of this case are not nearly as complicated as the size of the record suggests. It is possible to make the necessary findings of fact based on the objective sources in the record, apply the law to those facts, to reach a just conclusion. Moreover, doing so is proportionate, more expeditious and less expensive than a trial would be.

**Defamation - the Legal Framework**

[25] To succeed in a claim for defamation, a plaintiff must prove that (i) the words in question are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (ii) the words referred to the plaintiff; and (iii) the words were published. If the plaintiff can prove these three elements, falsity and damage are presumed. The onus then shifts to the defendant to prove a valid defence: *Grant v. Torstar Corp*., 2009 SCC 61, at paras. 28-29.

[26] For purposes of my analysis, I assume without deciding that the plaintiff has proven the three elements required.

**The Plaintiff's Claim against Refinitiv**

[27] The first basis Refinitiv advances for a summary judgment in its favour is that the statements in the database about the plaintiff were not false. In other words, Refinitiv relies on the defence of justification.

[28] Justification applies when, on a balance of probabilities, the words in question, construed according to their ordinary and natural meanings, were true in substance and fact: *Paderewski v. Skorski*, 2017 ONSC 6594, at para. 23, aff'd 2022 ONSC 1550 (Div. Ct.).

[29] Section 22 of the *Libel and Slander Act* provides that a defendant need not prove the truth of every statement if the words that have not been proved true do not materially injure the plaintiff's reputation having regard to the truth of the remaining statements.

[30] In proving justification, the defendant may adduce evidence that was not in existence at the time of the alleged libel: *Makow v. The Winnipeg Sun et al.*,2003 MBQB 56, at para. 56, aff'd 2004 MBCA 41.

[31] In assessing the defence of justification, the court must have regard to the setting, context, and circumstances in which the words were used: *Makow*, at para. 61.

[32] I have no hesitation on the record before me in concluding that the statements in the database were true in substance and fact. I do not intend to go through each of the 19 statements in the different versions of the database entry related to the plaintiff, but I offer some examples.

[33] First, the plaintiff has complained that the database indicates that he "left Kenya for Europe" in July 2012, when he states he in fact flew to Amsterdam and then boarded a connecting flight to Canada. The important fact, that he left Kenya, is admitted to be true.

[34] Second, the plaintiff has complained that the database described him as a "senior special advisor" to the Kenyan prime minister when he was in fact a "senior advisor" to the Kenyan prime minister. Leaving aside the questionable premise that the use of the word "special" injured the plaintiff's reputation, the plaintiff's own website from 2011, when the statement was published in the database, describes him as a senior special advisor.

[35] The plaintiff argued that he did not have a website in 2011. He alleges some kind of collusion between Refinitiv and the Kenyan government to create a false version of his website to support false statements in the database.

[36] First, I note that the reference to the website was included in the 2011 entry in the database about the plaintiff. To accept that this website was mocked up after the fact, I would have to conclude that, in 2011, Refinitiv made up a website with an address that the plaintiff himself just happened to choose for his website several years later, a fanciful proposition.

[37] Second, the record contains a link to the 2011 database, accessible through the Wayback Machine, an online tool that allows one to access earlier versions of websites. Not only does the record include a printout of the 2011 website, but by following the link, I was able to ascertain that the Wayback Machine does indeed have a cached version of the 2011 plaintiff's website available, and on it, he described himself as a senior special advisor to the Kenyan prime minister.

[38] As a third example, consider the statement about the plaintiff in the database on August 29, 2011: "August 2011 – suspended by Prime Minister (PM) pending investigations into alleged gross misconduct and abuse of office. Criminal investigation requested by politicians."

[39] Apart from the fact that subscribers to the database understood that allegations must be considered to be denied by the person against whom they are made, and that there was no warranty of accuracy with respect to the database, Refinitiv has demonstrated that on August 4, 2011, a newspaper article was published indicating that the prime minister had suspended the plaintiff "over gross misconduct, abuse of office and harassment of junior officers". The article also records that several political leaders "asked the PM to open criminal investigations" into the plaintiff. The plaintiff, in his own memoir, states that, on August 4, 2011, the prime minister suspended him indefinitely without pay, and that the allegations "ran the full gamut", including complaints from government officials.

[40] As a final example, on February 6, 2018, the database published the following: "Feb 2018 – reportedly arrested for being a member of an outlawed organization and administering an illegal oath of office".

[41] This entry relates to an incident that occurred after tumultuous elections in Kenya in 2018. The plaintiff was a supporter of the candidate who lost the election. That candidate and his supporters held a big event where the losing candidate was symbolically sworn in as the people's president. The plaintiff administered the oath.

[42] Newspapers reported that the plaintiff was arrested for administering an illegal oath and being a member of the National Resistance Movement (the "NRM"), "an outlawed organization".

On cross-examination, the plaintiff agreed that on February 6, 2018, the NRM had been declared a criminal organization, but he maintained its declaration as such was unlawful. He also agreed that on November 3, 2017, he announced in a tweet that he had joined the NRM as the "general in charge of operations", a fact also set out in one of his publications, *Treason*. Finally, the plaintiff agreed that he had administered the oath in question to the losing candidate and was arrested, ostensibly on that basis.

[43] Two days later, on February 8, 2018, the database entry was updated to add to the entry, "High Court reportedly barred Directorate of Criminal Investigations and Inspector General from preferring any criminal charges. Reportedly arraigned at a Kajiado court on charges of engaging in organized criminal activity relating to treason. Deported to Canada. Expressed intent to challenge illegal and unconstitutional arrest and deportation".

[44] This update not only vindicated the plaintiff, given the information that the High Court barred the authorities from preferring any criminal charges, but included the plaintiff's intent to challenge his arrest and deportation. The plaintiff objects to the word "deportation"; he prefers the word "exile." But "deportation" is the word used in the press at the time, and is the word the plaintiff himself used in one of his memoirs, and in any event, the analysis of defamation does not require that words be parsed in this manner.

[45] Schedule C to Refinitiv's factum sets out more examples of the same. It lists each statement made about the plaintiff in the database, and links it to the sources of the information. In some cases, it links it to publications that arose after the date, as it is entitled to do. However, there are also contemporaneous sources for the information published in the database.

[46] The plaintiff objects that he ought not to have been included in the database in any event. He relies on Canadian legislation and argues he does not meet the definition of a PEP. But the database is a product designed for actors in the global financial system. As a global screening tool, it did not have to use the Canadian definition of a PEP (even allowing for the fact that, at the time the plaintiff was first included in the database, it was owned by a Canadian company).

[47] Accordingly, the plaintiff's inclusion in the database was appropriate; as a senior special advisor to the Kenyan prime minister, he was a PEP. Secondly, Refinitiv has proven that the statements it published about him were true. Justification has been made out.

[48] I note that the plaintiff's claim raises other causes of action. Of those, the only one recognized at law is breach of privacy. However, because all the information in the database was gleaned from public sources, including the plaintiff's own press releases, website and memoirs, there can be no breach of privacy. There is no expectation of privacy in information that is already public.

[49] I need go no further than this to conclude that the plaintiff's action against Refinitiv shall be dismissed.

**Sitel**

[50] The claim against Sitel must also be dismissed.

[51] First, the only words spoken by Sitel that are identified with particularity in the claim were spoken during the three conversations Sitel employees had with the plaintiff and his client at the time Moneymart held the transfer of funds to the plaintiff in October 2021. Whatever else might be said about the scope of the release, it is common ground that claims arising out of those interactions were released.

[52] Even if they were not, there is no evidence of anything defamatory being said by any Sitel employee at any time. There is no reason to think that customer service representatives would be involved in making decisions for Moneymart about whether to hold or release funds. While Sitel is alleged to have provided customer services for other financial institutions that declined to facilitate transactions for the plaintiff, there is no evidence of any other involvement between Sitel employees and anyone about the plaintiff. Moreover, customer service representatives generally service customers. To the extent anyone at Sitel responded to a call from the plaintiff, they could not have defamed him to himself.

[53] Finally, even if Sitel did publish words from the Refinitiv database (assuming customer service representatives would even have had access to it), I have already found that the words in the database were true.

[54] It follows that the plaintiff's action must be dismissed in its entirety.

**Costs**

[55] During the hearing, I indicated to the parties that I intended to address costs once I had finished writing my reasons on the merits of the litigation. Accordingly, each has uploaded their bills of costs, written submissions on costs, and any offers to settle. I viewed these documents only after my reasons on the merits were written.

[56] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[57] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[58] The defendants are the successful parties on this motion and as such, are presumptively entitled to their costs.

[59] The defendant Refinitiv seeks costs on a substantial indemnity basis due to what it describes as the volume of evidence, the amount at stake, and the plaintiff's conduct. Among other things, it relies on the plaintiff's decision to file an enormous record, much of which was unnecessary, and to take positions that tended to lengthen the proceeding unnecessarily and drive up costs, such as making unfounded objections to the evidence. It notes that the plaintiff filed a non-compliant factum which I required him to revise, and in the revised factum, filed the day before the hearing, the plaintiff abandoned some arguments and raised new arguments.

[60] Refinitiv's bill of costs supports substantial indemnity costs of $359,826.62 all-inclusive.

[61] Sitel also seeks substantial indemnity costs, relying on the plaintiff's conduct in re-litigating the same allegations that were settled by way of the release, and on the plaintiff's conduct that tended to lengthen the proceeding unnecessarily and drive up costs, described above. Sitel seeks all-inclusive substantial indemnity costs of $85,598.68.

[62] For his part, the plaintiff denies any improper behaviour, and argues that had Refinitiv facilitated his request to inspect documents, the issues on the motion would have been narrowed. I do not accept that submission. The plaintiff did all he could to expand the issues on this motion, not narrow them. Twenty-four volumes of evidence produced by one party for a motion the parties booked for a single day (and which time I reduced to three hours after reviewing the material) is not reasonable.

[63] I saw firsthand the plaintiff's conduct that distracted from the real events in issue when, at the outset of the motion, the plaintiff made a series of specious objections to certain documents in the record. The plaintiff is an Ontario-qualified lawyer with almost three decades of experience. Despite knowing better, he commenced this action against Sitel with no allegation that had not already been released, and litigated it unreasonably against both defendants, in a manner designed to increase costs to them (and that increased the burden on the already over-burdened court) for no good reason.

[64] For these reasons, I conclude that costs on a substantial indemnity scale are appropriate.

[65] With respect to the appropriate amount of costs, I note the following factors:

a. The amount sought in the litigation was significant; the plaintiff claimed more than $13.05 million in damages plus punitive and special damages;

b. The motion was made complex by the volume of material filed by the plaintiff. It spanned over a decade of events and required the review of significant media and the plaintiff's own published works, plus the enormous record compiled by the plaintiff;

c. The issues implicated Refinitiv's reputation, in view of the allegation that Refinitiv conspired with the government of Kenya to harm the plaintiff, and that it had fabricated evidence;

d. The issues implicated Sitel's reputation, given the plaintiff's allegations, among others, that Sitel targeted the plaintiff "because of his race, country of origin, colour and ethnicity" and "because of his political opinions and association";

e. There was thus every reason to conclude that the defendants would devote significant resources to the motion. A lawyer of the plaintiff's experience would have reasonably expected the defendants to incur significant costs.

f. Work carried out by Refinitiv's lawyers was appropriately delegated to junior counsel;

g. Refinitiv carried the defence burden on the motion, given the focus of the plaintiff's allegations. Its costs are understandably higher than Sitel's costs;

h. The hourly rates charged by defence counsel, while consistent with the market in which counsel operate, are high for the market generally. Refinitiv's bill of costs also includes some duplicative costs.

[66] Taking into account these factors, I award all-inclusive costs, fixed on a substantial indemnity scale and payable within thirty days by the plaintiff as follows:

a. To Refinitiv, in the amount of $200,000;

b. To Sitel, in the amount of $65,000.

**Conclusion**

[67] The defendants' motions for summary judgment are granted. The plaintiff's action is dismissed in its entirety.

[68] The plaintiff shall pay costs of $200,000 all inclusive to the defendant Refinitiv, and $65,000, all inclusive, to the defendant Sitel within thirty days.

J.T. Akbarali J.

**Date:** January 30, 2024