

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.778/86

In the matter between:

DR. ALLEN NXUMALO Plaintiff

vs

AFRICAN ECHO PROPRIETARY LIMITED t/a THE TIMES OF 1st Defendant

SWAZILAND (PTY) PUBLISHING COMPANY 2nd Defendant

MASHUMI THWALA 3rd Defendant

THEMBA DLAMINI 4th Defendant

CORAM: DUNN A.C.J.

FOR THE PLAINTIFF: MR. S. EARNSHAW

FOR THE DEFENDANTS: MR. P. FLYNN

JUDGMENT

(17.3. 1989)

DUNN A.C.J.

The plaintiff who is 68 years of age qualified as a medical doctor in 1957. He was involved in the pre-independence politics of this country as leader of the Swaziland Democratic Party. He ceased leadership of that party in 1966 and served as a Cabinet Minister during the period May 1967 to June 1978. He served first as Minister for Health, then as Minister for Health and Education and finally as Minister for Works, Power and Communications. He has since 1978 devoted his time almost entirely to his medical practice. In February 1985 the plaintiff was appointed Chairman of the Swaziland National Sports Council a post he holds to-date.

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He is a man who is well and widely known in Swaziland.

The defendants are respectively" the proprietor, publisher, editor and reporter of a daily newspaper styled The Times of Swaziland (The Times).

On the 28th May 1986, the following article appeared on the back page of The Times:-
WE DIDN'T STEAL DOGS

The Chairman of the Interim National Sports Council and former cabinet Minister Dr. Allen Nxumalo appeared in court yesterday charged with stealing dogs valued at E1,150 from South Africa.

He is charged jointly with two other men.

They are alleged to have stolen the dogs from their two owners in Lothair, a few kilometres away from

the Oshoek Border Post, in South Africa.

The complaintants are James and Ben Simelane.

James Simelane, told the court that he does not know Dr. Allen Nxumalo. He said he only knows the two men who used to visit his place. He said they used to go to the area looking for dogs, turkeys and chicken.

On the alleged day of theft, he said, the men went to his home. Simelane said: "They told me they were going to collect their dog from another Magagula's homestead in Lothair," he said. "They were just passing but had to check me as they were regular visitors to my home".

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He continued "I had three dogs at my home.

"They arrived at about 10 a.m. and left my place to Lothair at about 4 p.m. Then, the following day in the morning one of my dogs was missing. I reported the matter to the Carolina Police. Then I heard that my brother, Ben Simelane's dogs had been stolen.

They had disappeared on the same day as mine. The two men were also familiar with my brother Ben.

They used to come in a car which is said to have been Dr. Allen's car," he said.

Mr. James Simelane said he suspected that the dogs might have been stolen by the men who had visited his place. He then briefed the police in South Africa who later informed the Swaziland police.

The Swaziland police looked for the dogs and one was allegedly recovered from Dr. Nxumalo and another from one of the young men. The third was allegedly recovered in South Africa at the other man's sister's place.

They all pleaded not guilty to the charge. They denied having stolen dogs from Mr. Simelane. They said they only helped the police in looking for the dogs in Swaziland.

According to the Police officer who was investigating the case, the young men only showed the police after they were taken to custody and interrogated by the police.

The case was postponed until 20th June.

The article was set out in the first three columns of the page. The headline was in bold print with letters of approximately 1 ½ cm. The article was attributed to the 4th defendant.

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The plaintiff sets out that the article was defamatory of him and claims damages from the defendants jointly and severally in the sum of E50,000.00. The plaintiff gave evidence to the effect that he had never been charged as set out in the article or at all in connection with the theft of dogs. He denied that he had made any appearance in court as alleged and stated that he had no knowledge of the contents whatsoever of the contents of the article. The plaintiff testified that he was shocked and felt hurt by the publication of the article. He received numerous enquiries from members of the Royal Family, friends, relatives and colleagues concerning the article. A formal demand for damages in the sum claimed was filed with the defendants by the plaintiff's attorney on the 6th June 1986 as a result of which the following apology appeared in The Times on the 17th June 1986.

DR. ALLEN NXUMALO : TIMES APOLOGISES The Times of Swaziland wish to apologise to Dr. Allen Nxumalo and unreservedly withdraws all allegations concerning Dr. A. Nxumalo that appeared on the back page of The Times on 28th May 1986.

The story was printed in good faith by the reporter concerned and the error was due to a complete case of mistaken identity with no malice intended. The Times of Swaziland, Arnot Publishing Co.(Pty) Ltd. The Editor of The Times and the Reporter apologise for any distress or embarrassment caused to Dr. Allen Nxumalo.

This apology appeared in the last column on the right hand side of the back page. The heading which was underlined was in letters of ½ cm. An appearance to defend was filed in respect of the 1st, 2nd and 3rd defendants only. The three defendants admitted publication of the article in question and pleaded as set out in the apology, that this was a case of mistaken identity.

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The defendants deny that the plaintiff sustained the damages alleged or at all. It is pleaded at paragraph 9 that "If it is found by this Honourable Court that plaintiff was defamed, defendants plead that no damages were suffered by plaintiff. Alternatively if it is found that plaintiff was defamed and that plaintiff suffered damages, defendants plead that such damages should be purely nominal by virtue of the apology which was published as aforesaid."

Evidence was given on behalf of the three defendants, by the 3rd defendant, Mashumi Thwala. He told the court that the article in question was brought in by the 4th defendant who was employed by

The Times as a free-lance reporter. The reporter was interviewed by Thwala and Thwala was satisfied that the reporter knew who the plaintiff was and was left in no doubt as to the accuracy of the report. It was on this basis that the article was published without verifying the facts with officials of the court in which the proceedings were alleged to have taken place. Thwala could advance no evidence to the effect that there had, at the relevant time, in fact been criminal proceedings against some person/s other than the plaintiff on the subject matter of the article, in order to lay the foundation for the defendant's plea of mistaken identity.

There can be no doubt, that the article in question was defamatory of the plaintiff. The article has been shown to have been false and without foundation. Whilst it is true that the article merely stated that the plaintiff had been charged with theft, the publication had the effect of lowering the plaintiff in the estimation of members of the public. See HASEN v. POST NEWSPAPERS (PTY) LTD and Others 1965 (3) S.A. 562. BLIRCHELL, THE LAW OF DEFAMATION IN SOUTH AFRICA 104 and the authorities there referred to.

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The plaintiff having established that the article was defamatory, the onus then lay on the defendants to disprove the existence of animus injuriandi. Mr. Flynn for the defendants did not seek to argue the issue of animus injuriandi conceding, that the liability of the press is strict in cases of this nature. See Chapter 15 of Burchell supra on the position of the press, radio and television in cases of defamation.

I now turn to the question of quantum of damages. The plaintiff as earlier pointed out is no doubt well known in Swaziland having served as a cabinet Minister between May 1967 and June 1978. He is a medical practitioner of long standing, in this country. The publication of the article in question reflected seriously on the plaintiff's reputation. The defendants attempted to show in the cross-examination of the plaintiff that he had a general bad reputation arising from certain criminal charges that had

according to the defendants, been instituted against the plaintiff in the courts in the Republic of South Africa. Unfortunately, the defendants did not find it necessary to give advance notice of the fact that the defendants would seek to prove the plaintiff's bad reputation in mitigation of damages. It is desirable in cases of this nature that notice that such evidence will be led should be given by the defendant to the plaintiff to enable a plaintiff to prepare and meet such evidence See *KLISSER v. S.A. ASSOCIATED NEWSPAPERS LTD. v. YUTAR* 1969(2) S.A. 442.

The specific issue that was put to the plaintiff was that he had been charged with and convicted on 7 counts on fraud in South Africa during November 1985. Articles which were published in *The Times* concerning the conviction and sentence of the plaintiff were put to him.

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The plaintiff explained that he had been charged in his capacity as a director of a company known as Mantenga Liquor Distributors (Pty) Ltd. He explained that he was not involved in the conduct of the company's affairs that resulted in the fraud charges. The plaintiff was taken to task by Mr. Flynn, on this issue on the grounds that he (plaintiff) had not taken any steps to correct the reports carried by *The Times* regarding the fraud charges. *The Times* did not disclose the source of its information regarding the arrest and conviction of the plaintiff in South Africa.

The defendants did not produce any evidence of the precise charges that the plaintiff pleaded to and of the person/s against whom the conviction was entered. It was put to the 3rd defendant under cross-examination that the reports in *The Times* were inaccurate and incomplete in a number of material respects. Thwala could not deny that that was so as he had no knowledge of the source of the information. Whilst it is open to a defendant in cases of this nature to plead the plaintiff's general bad reputation in mitigation of damages it is not open to a defendant in circumstances such as the present to itself paint an unfavourable picture of the plaintiff and then attempt to use this as the standard by which the plaintiff's reputation is to be gauged. The defendants cannot be heard to say that it was the plaintiff's duty to correct the impression which was created by the articles in *The Times* concerning the fraud charges. The plaintiff was not in Swaziland at the time of the publications and remained unaware of them until their production in the course of the trial. The defendants have in my view failed to establish that the plaintiff already had a -tarnished reputation at the time of publication of the article complained of.

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The Times enjoys a fairly wide circulation in Swaziland. A column in bold print in the copy of *The Times* in which the article complained of was published reads "The Times is read by over 60,000 people every day". The article was given prominence on the back page. The 3rd defendant agreed that the back page of *The Times* is an important page on which articles on the first page are continued and on which headline news is also contained. As against the extent of the publication it was argued on behalf of the defendants that the apology served to reduce the damage to the plaintiff's reputation.

The apology must no doubt have had this effect but the question remains as to what extent, for as pointed out by Colman J. in Hassen's case supra at 577 an apology "can seldom if ever undo fully the mischief that a published defamation has caused." The defendants could and should in my view, have attempted to give equal prominence to the apology. The position and print size of the apology on the back page is in my view such that it could easily have gone unnoticed by the average reader.

The plaintiff's claim is for E50.000. It has been correctly submitted by Mr. Flynn that this figure is excessive. The only defamation case decided in our courts that I have come across is that of *JOHN MNCENCE NXUMALO v. PAT NXUMALO and ANOTHER* Civ. Case No. 261/83 (unreported) in which I made an award of E2.000.00 against the defendants for defamatory matter published of and

concerning the plaintiff to the effect that the plaintiff in that case was an associate of a Dr. Gilbert who was a confidence trickster. The award in that case was made in April 1984. The evidence of the plaintiff's reputation and standing in that case was poorly presented and that had a direct bearing on the amount of the award.

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I have in the present case a plaintiff who is well known who has held high office over an appreciable period of time. He is a medical practitioner who is held in high esteem and who still holds a public office. The defendants were under a clear duty to check and verify the contents of the article presented by the 4th defendant particularly as these related to alleged court proceedings. The defendants have not been able to establish even at the time of this trial that any trial took place in the Magistrate's court involving theft of dogs as set out in the article. It is against this that I must attempt to assess the damages suffered by the plaintiff. Doing the best I can in the circumstances of this case I assess the plaintiff's damages at E10,000.

Judgment is accordingly entered in favour of the plaintiff against the defendants jointly and severally in the sum of E10,000.00 with interest thereon at 9% p.a. from to-day's date to date of payment and costs.

B. DUNN

ACTING CHIEF JUSTICE