



IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 263/95

In the matter between

DAVID THOMO

PLAINTIFF

And

ADOLF GRUBER

DEFENDANT

Coram

S.B. MAPHALALA -J

For the Plaintiff

MR. S. MDLADLA

For the Defendant

IN ABSENTIA

JUDGEMENT

In this action, the plaintiff sues the defendant for alleged defamation. The alleged defamation arises from a statement made by the plaintiff to the Lobamba Police Station dated the 12th May 1993, and annexed to the plaintiff's combined summons as annexure "A". The plaintiff claims damages in the sum of E100, 000-00 and interest thereon of 9% per annum from the date of judgment to the date of payment.

The statement which is the subject matter of this action (annexure "A") according to the plaintiff meant and was understood to mean that the plaintiff had stolen or assisted in the theft of certain goods and had committed the crime of contempt of court. The full text of the offending statement reads, thus:

"I was divorced on the 10th March 1993, from my wife Elizabeth Gruber of Forbes Reef, Enkhataba region. The case was heard at the High Court in Mbabane. A contract was made that my ex-wife gets certain household goods immediately (annexure "A") and some goods after an agreed period (annexure "B"). The copies are attached. After the court case my ex-wife collected this goods. During my absent from home together with items she is not entitled. This happened over several days. I instructed my maid to lock the door and tell my wife to call me from work when she takes anything out of the house. The maid did as instructed. However, my ex-wife returned with a police officer Mr. Thomo who is employed at Police headquarters and is a relative of hers; he demanded entrance to my residence in order to take more items not listed in the agreement. This is contempt of court and theft. To avoid extra court cases I consulted my lawyer to return the items without success (except some of the goods). I also spoke to a superior of police officer Thomo to advice Mr. Thomo not to assist in theft and contempt of court in his position as a police officer. I never heard anything in this matter. 3 lists attached with items taken without permission".

The defendant filed an intention to defend the action and subsequently requested and was supplied with further particulars. Thereafter, the defendant filed his plea and thus joining issue with the plaintiff.

The Registrar duly allocated a date for any party to set the matter down for hearing. The defendant set the matter down for hearing on the 23rd to 27th March 2000, at 9.30am. The matter came before me on the 23rd March 2000, where the plaintiff was represented by Mr. Mdladla for trial and there was no appearance for the defendant at 9.30am. Mr. Mdladla brought to the court's attention a notice of withdrawal of the notice of set down by the defendant's attorneys. It appeared that the notice of withdrawal was flawed in that it did not bear a Registrar's stamp as required by the rules of the court, and thus of no effect. The court then took a short adjournment to ascertain the whereabouts of the defendant. When the matter resumed there was no attendance still and the matter then proceeded on the basis that the defendant was in default.

If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim to the extent that the burden of proof lies upon him, and judgment must be given accordingly, in so far he has discharged that burden (see

Herbstein at al The Civil Practice of the Supreme Court of South Africa (4th ED)
at 661 and the cases cited therein).

The court then heard the evidence of the plaintiff. The plaintiff himself gave evidence under oath. He told the court that he is Superintendent in the Interpol Section of the Royal Swaziland Police and that on the 12th May 1995, when he was Desk Officer in the Crime Division he was called by the Paddy O'Connor who was then Assistant Commissioner of Police (Crime). Mr. O'Connor was his Supervisor. He told him the Commissioner of Police Sandile Mdziniso wanted to talk to him about an enquiry, which had been sent to him by the Lobamba Police Station.

Mr. O'Connor was assigned to conduct the inquiry. He said to him "you were terrorising a certain house and took some items belonging to a certain Mr. Gruber". He told him that Mr. Gruber had made a statement to the Lobamba Police Station that plaintiff had stolen goods belonging to the defendant and thus flouting a High Court Order. Plaintiff told the court that he was shown this statement made by the defendant. Plaintiff told the court that he had not gone to Mr. Gruber's home as it was alleged and he did not know where his home was.

On the same day he received a telephone call from one S.V. Mabuza who is a Superintendent in Hhohho who said there was a white man who said plaintiff had gone to his home and took property belonging to him. Plaintiff denied these allegations. He told the court in his long career since 1966 he has never been called by the Commissioner of Police or accused of anything. This has created doubt on his credibility such that his chances of advancement in the force have diminished.

The above is the plaintiff's case and as there was no appearance on behalf of the defendant the court has to establish whether the plaintiff has discharged its onus. From the perusal of the papers it appears that the offending statement is not being denied by the defendant. The defence put forth by the defendant in his plea is that the statement was made without malice and that annexure "A" is a privileged document because it was received by the Royal Swaziland Police for the purpose of obtaining evidence. Mr. Mdladla for the plaintiff argued that it would not be in the public

interest for one to go around reporting people at their work place and later turn around that it was privileged information.

He argued that in the case *in casu* the defendant should lose the defence of privilege. Further, this statement does not fall under the classes of privilege documents recognised by law (see *Jonathan M. Burchell "The Law of Defamation in South Africa (1988) page 287*). To say that a person is a thief is defamatory. If there was not defamation the plaintiff would not have been called by his superiors and an enquiry heard. Police officers are custodian of property rights of citizens and to accuse them of theft is highly defamatory. Moreso if one is accusing them of acting against a High Court Order.

On the question of intention Mr. Mdladla is of the view that the defendant had to be led in order to be cross-examined but he was in default (see *Herbstein et al at 661*). Furthermore, it is contended on behalf of the plaintiff that no copy of the apology defendant is referring to in paragraph 4.3 of the plea was amongst the documents discovered. Lastly, Mr. Mdladla left the issue of the award of damages in the discretion of the court.

These are the issues before me. It appears to me that the nub of this matter is whether or not annexure "A" is a privileged document. It is without question that words used in annexure "A" are defamatory and that they were communicated to third parties as evidenced by plaintiff's evidence-in-chief. It would appear to me that in the case *in casu*. The defendant would be immune from liability on the defence of privileged. There can be no doubt, that it is the duty of every person who has reason to believe that a crime has been committed to inform the police. (*McKerron on the The Law of Delict (7th ED) at page 192* and the case cited thereat). There can also be no doubt that every person has a duty, as well as a right, to bring any misconduct or neglect of duty on the part of a public officer or employee to the notice of the proper authority for investigation. It has been held in English law that a statement by a private individual to the Chief Secretary of the Post-Master General as to the alleged misconduct of an official under the authority of the Post-Master General, or by an Inspector of Police, or Private individual, to a Chief Constable, as to the official conduct of a police Sergeant would constitute qualified privileged (see *Cassidy vs*

Connochie, 1907 S.C. 1112 (Ct of Sess) and Gatley on Libel and Slander (4th ED) at 22). Further, a person who suspects, and has reason to suspect, another of a particular theft, may with a view to enquiry, tax that individual with the theft, and although the suspicion turns out to be erroneous, the law gives no redress to the party accused. A person who suspects another of theft is not only privileged in asking questions of him with a view to ascertaining whether his suspicious are true, but he is entitled to approach any other person who he has reason to believe will be able to throw any light upon the subject of the inquiry, so long as he acts *bona fide*. (see *Gatley at page 213*).

It is my considered view that in the case *in casu* the plaintiff would be immune in the circumstances and I could not find that he was actuated by any malice.

I rule that each party pays his own costs.

S.B. MAPHALALA

JUDGE