

THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2681/00

In the matter between

CASPER SIMELANE

PLAINTIFF

And HERMON SAMBO GULE

DEFENDANT

Coram

S.B. MAPHALALA - J

For Plaintiff

MR. R. DHLADHLA

For Defendant

MR. B. SIGWANE

JUDGEMENT

(08/02/2002)

The plaintiff has filed a special plea to the defendant's counter-claim following an action brought by the plaintiff against the defendant for damages amounting to E450-000-00 where it is alleged that the defendant had on various occasions committed acts of adultery with the plaintiff's wife.

Defendant filed a plea together with a counter-claim alleging that on or about the 23rd May 2000, at or near Piggs Peak and Nhlngano, plaintiff stated to one Eldah Gule

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that the defendant is an adulterer who slept with his wife Thulisile on diverse occasions in Swaziland and South Africa and that the defendant was using money to corrupt or entice his said wife into sleeping with him. The statement by the plaintiff is wrongful and defamatory of the defendant. The statement was made with the intention to defame plaintiff and to injure his reputation. Consequently, defendant has suffered damages in the sum of E750, 000-00.

The special plea advanced by the plaintiff to the defendant's counter-claim is that the defendant's cause of action is based upon a statement allegedly published to the defendant's wife Eldah Gule. The plaintiff contends that it is a principle of our law that where plaintiff seeks to recover damages as a result of publication by another person (s) of a defamatory statement of and concerning him (plaintiff), the publication must have been made to a person other than the plaintiff or his spouse.

In the premise, since the alleged defamatory statement was made to defendant's wife, same cannot found a cause of action for defamation.

Counsel for both parties filed Heads of Arguments and invited the court to decide this crisp point.

Mr. Dhladhla for the plaintiff contended that a statement made to a person's spouse does not found a cause of action for defamation in our law. The statement must have been made to a person other than Plaintiff's spouse. To support this proposition he referred the court to the cases of International Tobacco Co. (S.A.) Ltd vs United Tobacco Co. (S.A.) Ltd (4) 1955 (2) S.A. 40w and that of Mograbi vs Miller 1956 (4) S.A. 239 (T).

Mr. Sigwane on the other hand argues that although a communication of matter, which is defamatory of a third party between spouses is not publication thereof (see Whittington vs Bowles 1934 E.D.L. 142 at 145) any communication of defamatory statement by a third party about one spouse to the other constitutes publication. To buttress this view he cited the following authorities: Kuzzulo vs Kuzzulo 1908 T.S. 1030;

Grindlays Bank Ltd vs Louw 1979 (2) PHJ 33 (R) and Burchell, The Law of Defamation in South Africa, (1985 Edition) at page 74. He argued further that

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publication of a defamatory statement takes place when the statement is made known to some person other than the person defamed (see Lawsa, Vol. 7 (First re-issue), 1995 para, 254, p. 235 - 236).

It would appear to me that Mr. Sigwane is correct that a communication between spouses does not in law constitute publication. Thus, if a husband communicates to his wife material, which is defamatory of a third person, this does not constitute sufficient publication for the purposes of the law of defamation (see Mckerrow, The Law of Delict (7th ED) p. 183 and the case of Whittington vs Bowles 1934 E.D.L. 142). But, if a third person communicates material to one spouse that is defamatory of the other, the element of publication would be satisfied (see Wenman v Ash (1853) 13 C.B. 536; Jones vs Williams (1885) 1 T.L.R. 572; Gatley on Libel and Slander (5th ED) at 99 paragraph 160 and J.M. Burchel (supra) at page 72 - 73).

In casu this was a defamatory statement made to a wife of the plaintiff about the plaintiff, and is sufficient publication following the above-mentioned legal authorities.

In the premise, the plaintiff special plea is dismissed. Costs to follow the event.

S.B. MAPHALALA

JUDGE