

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1815/04

VABEEM ASUDAE

PLAINTIFF

AND

MARTIN DLAMINI

1ST DEFENDANT 2nd

AFRICAN ECHO (PTY) LTD

DEFENDANT 3rd

ARNOT PUBLISHING COMPANY (PTY) LTD

DEFENDANT

CORAM

K.P. NKAMBULE -J MR.

FOR PLAINTIFF FOR

L. MAMBA P.R.

RESPONDENTS

DUNSEITH

JUDGEMENT 11/11/04

This is an exception to the particulars of claim in an action in which the plaintiff claims damages for defamation. The particulars of claim allege that two matters defamatory of plaintiff were published in the Times of Swaziland, whose editor is first excipient and which is printed and published by the second and third excipients respectively.

In paragraph 7 of the particulars of claim it is alleged that:

"on the 23rd April 2004 two articles were published in the front page of the Times of Swaziland with the captions 'ITS CALLED LOOTING' and 'ARMY SPENDS E4 MILLION ON UNIFORMS'. Copies of the articles are hereto annexed marked A".

The first article headlined "ITS CALLED LOOTING" was an editorial comment which criticised the Ministry of Defence, which had overspent its budget by E4 million. This was according to its own performance report. The article headlined "ARMY SPENDS E4 MILLION ON UNIFORMS" merely sets out the contents of the performance report for the Ministry of Defence.

In paragraph 8 of the particulars of claim it is alleged that:

"The said articles stated or alternatively were maliciously intended to convey to the readers of the newspaper and were in fact so understood, that;

8.1 *The plaintiff was the supplier of the ceremonial uniforms for the double celebrations and smart partnership dialogue;*

8.2 *The uniforms were purchased by the Government of Swaziland from the plaintiff;*

8.3 *The said uniforms were worth far less than the price they were purchased for*

8.4 *That the plaintiff was looting public funds.*

In paragraph 9 of the particulars of claim it is alleged that:

"The said articles, in the context are malicious, wrongful and defamatory of the plaintiff and were intended and were understood by readers of the newspaper that the plaintiff is;

8.5 *dishonest*

8.6 *a thief*

8.7 *corrupt."*

In submission Mr. Mamba for the plaintiff stated that the second article refers to the plaintiff by name as "The owner of the shop dealing with army uniforms". He stated that by the use of the definitive article "The" before the word "Owner" and the word "Shop" places the reference to the plaintiff beyond doubt.

In response the excipient has excepted to the particulars of claim on the grounds that they lack the essential averments to establish the cause of action upon which the plaintiff relies, namely defamation.

The excipient submits that the articles complained of are not reasonably capable in their ordinary meaning of conveying to a reasonable reader a meaning which is defamatory of the plaintiff. Further that the articles do not contain the meanings relied upon by the plaintiff and cannot be interpreted as having a meaning which is defamatory of the plaintiff.

The principles which must apply in the instant case were enunciated by the appellate division in **National Union of Distributive Workers Vs Clerghorn and Harris** 1946 (4) SA. In that case Schreiner JA said:

"Where a defendant - excepts to a declaration in order to raise the issue of the defamatory quality of the words complained of his only valid ground of exception where no secondary meaning is alleged in the declaration, is that the words are not in their ordinary sense capable of bearing a defamatory meaning; where a secondary meaning is alleged in the declaration the exception must rest on the twofold ground that the words are incapable in their ordinary sense of bearing a defamatory meaning and that in the circumstances alleged in the declaration they are not capable of bearing the meaning attributed to them in the innuendo. A secondary meaning may be roughly described as an unusual meaning which could only be attributed to the words by a hearer having knowledge of special circumstances. The judge in deciding the exception is not concerned with the question whether in his opinion the words are defamatory or whether they appear to him to bear the secondary meaning alleged. Since he is not in such case dealing with any alleged embarrassment arising from the form of the declaration his sole function is a sifting one, namely to stop hopeless cases from going to trial, while allowing others to proceed to their due conclusion. If a reasonable person could hold that the words are in the ordinary sense defamatory of the plaintiff or that, in the circumstances alleged they bear the defamatory secondary meaning alleged, he must dismiss the exception."

In **New Age Press Ltd and Another Vs O'Keefe** 1947 (1) SA 311 **Ramsbottom J** quoted with approval the passage in the judgement of Tindale JA. in **Basnew Vs Trigger** 1945 A.D. 22 at page 35. This was regarding the approach to the question whether a reasonable person could hold that the words are defamatory in their ordinary sense or whether they are reasonably capable of bearing a secondary meaning assigned to them. The learned Judge said:

*"In **Johnson Vs Rand Daily Mail** 1928 AD 190 Wessels JA at page 204, in dealing with the determination, on the trial of an action, of the meaning of words, said: 'We must not first consider how an astute lawyer or a supercritical reader, would read the passage, but how an ordinary newspaper reader would judge it. Would he in reading the words quoted attach a sinister meaning to them? By an 'ordinary newspaper reader' I presume the learned judge meant a reasonable reader of average intelligence and education."*

Turning to the particulars of claim it is clear that the allegations are that the words are defamatory of plaintiff in their ordinary sense. Paragraph 8 of the particulars of claim alleges that the said articles stated or alternatively were maliciously intended to convey to the readers of the newspaper and were in fact so understood that; (I) the plaintiff was the supplier of the ceremonial uniforms for the double celebrations and smart partnership dialogue.

The articles in question only state that *"The owner of the shop dealing with army uniforms, Kareem Ashraff was also contacted, but could not divulge any information."*

The questions for determination are as follows:

- (i) Do the articles convey the meaning or the innuendoes attributed thereto by the plaintiff?
- (ii) Can any ordinary reasonable reader reading the articles understand them in the sense alleged by the plaintiff?

From the article we are not told what kind of questions were posed to the owner of the shop dealing with army uniforms. The articles do not state that the plaintiff sold the uniforms in question to the army. All that we are told is that the owner of the shop dealing with army uniforms was contacted and he did not give any information.

From the foregoing it cannot be deduced that the plaintiff was the supplier of the ceremonial uniforms for the double celebrations and the smart partnership dialogue.

- 2) That the uniforms were purchased by Government from the plaintiff;

Nowhere in the articles is there a mention that the uniforms were purchased from the plaintiff; all that we know is that the plaintiff was questioned regarding the uniforms for double celebrations and smart partnership dialogue.

From the foregoing it is the opinion of this court that a reasonable person could not hold that the words published by the excipient are in their ordinaiy sense, defamatory of the plaintiff. The exception must therefore be upheld. Costs to follow the coarse.

K.P. 