

HIGH COURT OF SWAZILAND

CIVIL CASE NO.996/01

In the matter between:

ALBERT SHABANGU

PLAINTIFF

VS

EDITOR, TIMES OF SWAZILAND (PTY) LTD

1st DEFENDANT

AFRICAN ECHO (PTY) LTD

2nd DEFENDANT

CORAM: MATSEBULA J

FOR PLAINTIFF: MR. PM SHILUBANE

FOR DEFENDANTS: ADV. FLYNN (instructed by PR Dunseith)

JUDGEMENT

29th JULY 2005

By summons issued on the 20th February 2001, plaintiff sues the defendants jointly and severally one paying and the other to be absolved for the following:

- (a) Payment of a sum of E1,000.000.00 being damages;
- (b) Costs of suit;
- (c) Further and/or alternative relief.

The plaintiffs case is based on paragraph 4 - 7 of its particulars of claim. Paragraph 4 reads as follows:

"On the 4th March 2001 at Mbabane an article was published in the said newspaper entitled "Fire Them". A copy of the article is annexed."

Paragraph 5:

"The said newspaper is a paper widely distributed in Swaziland and widely read by the general public and also widely distributed through the Internet."

Paragraph 6:

"The said article stated of the plaintiff-

6.1 There is also a supposition that Albert Shabangu the new Minister for Housing and Urban Development is masterminding the downfall of the Prime Minister by silently assisting these **(sic)** who have cross-path with him. All the Prime Minister's detractors seem to be emerging from one camp, the Ngwane National Liberatory Congress (NNLC). Shabangu is a card carrying member.

6.2 The Prime Minister's fundamental error was to let Albert Shabangu get away with an open defiance and insubordination by refusing to follow Government's General Orders that dictate the operations of Swazi Missions staff abroad. I am now convinced more than ever that he should have been summarily dismissed."

The article concerning the plaintiff was published by the first defendant in the pages of the second defendant by its first defendant's editor, one Vusi Ginindza. The publication complained of appears on page 11 of the first defendant. By consent the publication of the first defendant has been handed in as exhibit "A" at page 11 of exhibit "A" are a number of highlighted paragraphs which I will now continue to read and it will form part of the record. The first paragraph being -

1. "There is a lot of distrust, backbiting, double talk and double dealing with complete dishonesty being the common denominator among the cabinet members."
2. "There is also the supposition that Albert Shabangu the new Minister of Housing and Urban Development is masterminding the downfall of the Prime Minister by silently assisting those who have cross-path with him. All the Prime Minister's detractors seem to be emerging from one camp, the NNLC. Shabangu is a card carrying member. Stella, whether or not a member comes from Matsapa constituency."
3. "My fear is that soon we might not have a cabinet. There is a lot of distrust, backbiting, double talk, double dealing with complete dishonesty by the common denominator among the Cabinet members, at stake is national progress."

4. "Again, the foundation of it all is rooted in the old tradition of letting small problems germinate to a full blown crisis before a solution is sought. Cases that were warrant reprimand are pardoned in the vain hope that the problems will go away. Where instant dismissal of an officer is the only viable alternative, a reshuffle is announced, in other words, problematic ministers are pushed into the portfolios where they are less likely to cause trouble. Ministers known to be light-handed are transferred to Ministries where there is nothing worth stealing. Downright, incompetent politicians are shifted to where their work can be quietly done by capable civil servants while they bask in their swivel chairs pushing blame and privatising accolades."

5. The Prime Minister's fundamental error was to let Albert Shabangu get away with an open defiance and insubordination by refusing to follow Government's General Orders that dictate the operation of Swazi mission staff abroad. I am now convinced more than ever that he should have been summarily dismissed and so should Stella, Lutfo and Guduza.

I have just read the highlighted paragraphs of annexure "A" handed in by consent. I may hasten to add that these highlighted paragraphs are not being disputed as not have been correctly printed nor is it being denied that the author is first defendant's editor one Vusi Ginindza. I now proceed to read the paragraphs I have read into my judgment. The defendant admits paragraphs 1 - 6 of the plaintiffs particulars of claim. The defendants deny in paragraph 7 of the particulars of claim, paragraphs 7 read as follows:

"The said words in the contents of the article are wrongfully and defamatory of the plaintiff in that they intend and were understood by the readers of the newspaper that plaintiff is guilty of dishonesty, incompetent and unworthy to be a Cabinet Minister and a member of Parliament of the Kingdom of Swaziland by being a member of a proscribed political organisation whose intention is to make the country ungovernable. As a result the said words were also intended and understood by the readers of the newspaper to mean that plaintiff was also guilty of treasonable conduct."

The author of the passage quoted above and about which plaintiff bases his cause of action has since died and is not available to give evidence. In terms of our law, where the words complained of are admitted and they are per se defamatory, the court is justified to find in favour of the plaintiff. However, the defendants have an array of defence opened to them if they be successful, defendants would not be liable even though the words are per se defamatory. One of the tests adopted by the court is the following and I quote:

"The test is not of that astute lawyer or a super critical reader."

The court must determine the ordinary meaning of the words which an ordinary or a reasonable reader or hearer would attribute to them. This determination entails taking into account, the circumstances and the contents in which they were uttered. This determination is arrived at by the court weighing all the evidence given at the trial.

The plaintiff gave evidence himself. He stated that the articles i.e. those I have read into the judgment referred to him directly and those that did not do so directly did so by implication. He stated that these publications were untrue of him, he found the articles very defamatory of and concerning him. He felt highly defamed and insulted by the articles.

After the publication of the articles complained of, he was approached by fellow politicians, friends and relatives alike asking about what they had seen in the publication of exhibit "A". Some of these people, he states, who approached him was his own son who is studying abroad. His son told him that he had seen this in the Internet. At the time when these articles appeared in exhibit "A" he was being considered as a candidate for a post of a Secretary General of the African Organisation Unity (OAU).

In cross-examination, he admitted that in during earlier years he was a member of the Youth League of the NNLC. He said the NNLC was formed in the early 1960's stating that he was not an employee of the NNLC. He stated that another person who was also a member is the former Deputy Prime Minister, Mr. Arthur Khoza. He mentioned a number of other Swazi citizens who were also members. He said the NNLC had its first elections in 1967 but he did not participate and that it was not necessary for him to resign from the NNLC because he had never applied to be a member in the first place.

He said that in 1973 the King abolished all parties in the Kingdom of Swaziland. After its banning the NNLC became an underground movement. He said he never corrected any articles termed "Bitter Confrontation" because whatever engagement he had with the press and the Prime Minister was a normal engagement which had been done from time to time by members of the Cabinet. He did not remember discussing about the King's intervention and was not aware of the King's involvement in the matter. He was not even aware of the organisation replacing the then Prime Minister Barnabas Dlamini with their old favoured Prime Minister. He did not know the sources or the employee of the first defendant got this information from.

Plaintiff called Senator Isaac Shabangu as PW2. He stated that although the plaintiff was his name's sake they were not relatives. He knew plaintiff as a well principled man. At one stage

PW2 was also a Cabinet Minister and plaintiff was his colleague. He read the article in annexure "A" and in his words, "I was shocked" because of what the article was attributing characteristics which can hardly be true of the plaintiff. PW2 immediately contacted the plaintiff to seek clarification.

In cross-examination, PW2 said the plaintiff commands respect not only to parliamentarians but a wide-crossed spectrum of a community in Swaziland.

Then the plaintiff called PW3 one Phillip Sicelo Hlophe a retired teacher who is now a pastor of a Christian church. He knew plaintiff as a colleague in the teaching profession where plaintiff played a unifying role, in his words and "pursued peace." The article in exhibit "A" does not reflect the type of a person plaintiff is. The plaintiff then rested his case.

Defendants called Nimroci Mabuza as DW1 whose evidence focussed more on the organisation NNLC than on the plaintiff and the defendants. It was his evidence that the NNLC though banned is still very much alive.

The defendants then called Mr. Nimrod Mabuza as DW2 the first defendant's employee as an investigative journalist or reporter as such he reported on political matters amongst other things. During his evidence, the defendant's counsel referred to some articles in another issue of the Times of Swaziland (Times Sunday) of 19th December 1999. This was handed in as exhibit "B" and one dated January 2000 handed in as exhibit "C" and another (whose dates I could not find) handed in as exhibit "D" and; one dated 11th March 2001 handed in as exhibit "E" and lastly, The Times of Swaziland dated 18th December as exhibit "F".

It was not immediately clear what relevance of exhibit "B" to "F" was. However, following Mr. Mabuza's evidence carefully it appears that the relevance of these exhibits was to show that all was not well in the Cabinet of the then Prime Minister Mr. Sibusiso Dlamini. The Prime Minister on one hand and some of his Cabinet Ministers on the other. However, reading exhibit "B" in its entirety one gets the impression that the Secretary to Cabinet, (the then Mrs. Futhi Mdluli) is quoted as having said about these quotation in these papers, "that is all rubbish".

Exhibit "C" refers to a feud between the then Prime Minister and the plaintiff. This, of course is again denied by the plaintiff. In exhibit "C" it is reported that the then Prime Minister denied any feud existing between him and the plaintiff. Exhibit "D" refers to an incident in

which plaintiff was invited to be a guest speaker at a certain meeting by an organisation known as "Sibahle Sinje" and that this organisation wished the applicant to be the Prime Minister of Swaziland instead of the Prime Minister at the time.

Exhibit "E", "F", "G" do not in my view advance the defendant's case any further. The articles complained of are those in exhibit "A". Mr. Mabuza referred to exhibit "A" stated that the author in the articles of exhibit "A" has since passed away. No reasons had been advanced to me why this case delayed until the unfortunate death of the editor of the paper, Mr. Ginindza. Summons having commenced on the 18th April 2001, surely the matter could have been set down earlier than the date it was set down for.

The print media plays a very vital role in our society. In an article comment by Justice Kate Oregan entitled "Pen's not mightier than the courts". The Honourable Judge states that the judiciary has equally to respect the role of the press. The Judge is the Judge of the Constitutional Court in South Africa and she finds certain similarities between the institutions of the press and the judiciary in a constitutionally democracy. She states that both are independent in the sense that they conduct themselves without any inappropriate interference by the democratically elected arms of Government. Secondly, she says judges and the journalists are both crafts people in the old fashioned sense of the word. Like all crafts basic skills may be taught but real expertise grows on the job, like old true crafts too the honing of the relevant skills is best achieved in a collegial environment in which peer critique and mentoring are crucial.

Thirdly, states the judge that both judiciary and the press are institutions requisite to a constitution of democracy. Without both independent press and independent judiciary democracy cannot flourish. This, said the judge, journalists and judges must be self conscious not to over emphasize their own importance at the expense of fundamental institutions of democracy, the legislature and the executive.

The Secretary General of the United Nations said the following concerning the importance of the press "no democratic society can exist without a free independent and pluralistic press."

Having said all the above, it is worth mentioning that matters about which the press reports should not be left to stand over for an unacceptable delay, matters should be brought to court as soon as it is practically possible.

Mr. Mabuza told the court that the former editor of the Times of Swaziland died on 17th May 2003 surely this matter could have been disposed of long before this date. The evidence of DW2 Mr. Mabuza about what then Prime Minister Barnabas Dlamini said to him is only hearsay until the Prime Minister himself comes to confirm what he is alleged to have said.

The court has not been given any explanation why the former Prime Minister was not called to confirm the reports in exhibit "A" particularly in view of the fact that the comments in some of the exhibits were e.g. "B" "was rubbish" by the then Secretary to Cabinet Mrs. Futhi Mdluli.

This is the appropriate stage to deal with the reasons I promised advanced for turning down an application which was of an interlocutory application for handing in by defendants certain documents which had not been discovered. I turn down the application for the following reasons:

(a) The court has a discretion in these matters. In exercising the discretion, I was of the view that allowing the documents at this stage would have prejudiced the plaintiffs case tremendously. All the witnesses for the plaintiff had already given evidence, they had no opportunity to refer to the documents which were intended to be handed in.

(b) There was a possibility that the documents would raise new and fresh evidence not canvassed by the plaintiff. Plaintiff had said when some reference was made to the documents anything which were sought to be handed in that he did not recall anything about these documents.

(c) DW2 was not the proper person to hand these documents in. I will revert to DW2's evidence. In cross-examination, DW2 was not prepared to reveal the sources he contacted to enable him to constitute exhibit "B" nor was he able to recall whether plaintiff was spoken to. DW2 was candid in cross-examination and said that he was not in a position to comment on articles in exhibit "A" written by the late editor Mr. Ginindza. The defendant's counsel then closed their case.

It now remains for this court to consider and assess the evidence of each and every witness, consider their credibility and the probability of their story. The plaintiffs evidence was in my view clear, articulate, and plaintiff was not out in giving evidence in order that the court finds in his favour granting the relief he seeks. Where he was not certain, in view of the passage of time he would say so. I was overall impressed by his evidence and

notwithstanding the incisive cross-examination by defence counsel, plaintiff stood his ground.

PW2 Senator Isaac Shabangu. His evidence was very credible. He impressed me as a witness who was not conned to exaggeration. He was shocked at the article i.e. the contents of article in exhibit "A" and contacted plaintiff seeking clarification. He was not shaken in cross-examination. There can be no reason why this court should not accept his evidence.

PW3 Phillip Sicelo Hlophe a retired teacher, a professional pastor, knows plaintiff who was once a teacher in that capacity, played a vital role, according to him, "uniting the people in the teaching profession and was a peacemaker." According to him, plaintiff respected law. In 1985 plaintiff successfully quelled an explosive situation when false rumours was spread that SNAT of which PW3 and plaintiff were members was plotting to bring about the downfall of the Government of the Kingdom of Swaziland. He saw and read the contents of exhibit "A" and in his view, the articles could hardly be referring to the man the plaintiff is because he could hardly do any of the things alleged to have been done and said by him in exhibit "A".

PW3 stood his ground in cross-examination. I do not have the slightest hesitation to accept his evidence as being credible.

PW1 Shu Lukhele, reference has been made to this witness in the judgement above. It seems to me Mr. Lukhele did not have any clue why he had been called as a witness. He was more concerned about the organisation NNLC being left alone to pursue his goals of establishing democracy. His evidence was not helpful at all.

DW2 Nimrod Mabuza what this witness said about the former Prime Minister can only be admissible if the former Prime Minister was called to come and confirm what he is alleged to have said to DW2 otherwise his evidence is hearsay. Mr. Mabuza was not prepared to divulge the sources of his information. Whatever was informed of him is of no value to this court.

In cross-examination DW2 was unable to say whether or not he showed plaintiff the contents of exhibit "B". He said he remembered discussing it with plaintiff. He said he only interviewed plaintiff after the publication of exhibit "B". Mr. Mabuza said the purpose of interviewing plaintiff after the publication was to add weight to his story. DW2 also refers to a letter that was written by the Principal

Secretary in the Ministry of Foreign Affairs. Neither the letter nor the writer of the letter who was the PS was called to give evidence.

In my view, DW2's evidence was not helpful at all especially the evidence about the publication of exhibit "A" on which the cause of action arose.

Considering all the evidence given so far, the court finds as follows:

- (a) All the articles highlighted in exhibit "A" were published of and concerning the plaintiff;
- (b) The words highlighted *inter alia* refers to plaintiff as the Minister master-minding the downfall of the Prime Minister; also plaintiff being a card carrying member of the NNLC etc. Once it is found that the report would have been regarded as defamatory by the reader of this newspaper then the least that the defendant would have to do is to lead evidence to rebut the presumption of *animus injurearandi*. This, the defendant have failed to do. A mere denial that the words are not defamatory is not valid defence at all. See in this regard **HASSEN VS POST NEWSPAPER (PTY) LTD 1965(3) SA 566 & 567.**

It is my considered view that the plaintiff has proved its case on a balance of probability. Plaintiff claims an amount of E1,000,000.00 being damages. In accessing damages in defamation matters, one no longer awards a penal element, however a retributive remains purely significant in the assessment. An assessment of damages for loss of reputation is inevitably an estimate at *ex aequa et bono*. It is certainly not an easy task to consider the facts to be taken into account in computing and accessing damages to be awarded. The list can be endless comprising such factors as the defamatory words used, the falseness, malice, rank of plaintiff or social status of the plaintiff, absence of apology, or nature of apology if made, publication, general conduct of the defendant two or more different defamatory statements in the same publication lead to accumulative assessment of damages.

I have taken into account all the relevant factors and I am of the view that an award should be substantially and sufficiently to achieve a complete vindication of the character of the plaintiff. I have been extremely cautious in the award of damages. This is purely an award to vindicate plaintiffs reputation and not "a road to riches" as it was said in the case of **AGAS PRINTING AND PUBLISHING COMPANY (LTD) VS INKATHA FREEDOM PARTY 1992(3) SA 573 A @ 590.**

In view of the passage of time since the last publication of the decided cases in the High Court which in any event are only guidelines as each case is determined on its own merits. These cases are not very helpful in so far as the quantum to be awarded is concerned.

I consider the articles complained of in exhibit "A" extremely offending of plaintiff. The nature of the words used in the offending publication. The effect that they are calculated to have upon him, the extent of the publication and the subsequent and conduct of the defendants, in particular, their failure to rectify the harm done, leaves me very little much to reduce the amount claimed by the plaintiff. Of the E1,000,000.00 amount claimed, I am of the considered view that an amount of E750,000.00 is an amount ***ex aequa et bono***.

In the result the court orders as follows:

- (a) The first and second defendant are hereby ordered to pay plaintiff E750,000.00 jointly and severally the one paying the other to be absolved;
- (b) Costs of suit. It should be noted that the plaintiff for some reason did not include interests to its prayers. That would be the judgement.

J. M. MATSEBULA

JUDGE