

**THE HIGH COURT OF SWAZILAND**

**BHEKI MAGAGULA & 40 OTHERS**

Plaintiffs

And

**ELMON FAKUDZE**

1<sup>st</sup> Defendant

**SWAZI SPA HOLDINGS LIMITED**

2<sup>nd</sup> Defendant

**SWAZILAND TELEVISION AUTHORITY**

3<sup>rd</sup> Defendant

Civil Case No. 1161/99

Coram: S.B. MAPHALALA – J

For the Plaintiffs: MR. S. SIBANDZE

For the Defendants: ADVOCATE J.M. VAN DER WALT (Instructed by Millin & Currie)

**JUDGMENT**  
(2<sup>nd</sup> March 2006)

## Introduction

[1] The Plaintiffs have filed an action for defamation pertaining to a televised interview during which the 1<sup>st</sup> Defendant made a certain statement concerning caddies working at the 2<sup>nd</sup> Defendant's Royal Swazi Sun Hotel in Ezulwini. There were 42 Plaintiffs. Only 18 testified as Plaintiffs.

[2] It is alleged in the Plaintiffs Particulars of Claim that the 1<sup>st</sup> Defendant uttered "more or less", *inter alia*, the following words:

**"Crime here at Ezulwini is perpetrated by caddies of the Royal Swazi Sun ... they are thieves. When they have not been hired to carry the golfer's clubs they steal and they rob the guests and they commit housebreaking at Ezulwini area because they are used to always having money".**

[3] The interview was in Siswati and the words spoken were as follows:

**"Bugebengu lapha Ezulwini bubangwa bo Khei balapha ehhotela eRoyal Swazi Sun ... ngibonjevele labangemasela ... Labokhei batsi nabangakatfoli tikwama besebenta lobusela nekubamba inkuzi tivakashi begcekeze kulenzawo yaseZulwini ngenca yekutsi bajwayele kuhlala banemali".**

[4] The Plaintiffs allege at paragraph 11 thereof that by the utterance and publication of the defamatory words the Plaintiffs have been injured in their good name and reputation and have consequently suffered in the sum of E1 00, 000-00 each. Interest thereon at the rate of 9% per annum *a tempore morae*, and costs of suit.

[5] It was the Plaintiffs allegation that the 1<sup>st</sup> Defendant referred to them as a group. Eighteen (18) Plaintiffs testified and there was no independent witness to testify as the exact defamatory words allegedly used. Nor was there any video footage of the incident shown to the court.

[6] The 1<sup>st</sup> Defendant denied that he had said the words alleged and testified that he had only referred to crime in and around the hotel premises, including the golf course. He said that he had said that some of the caddies committed crimes and had not referred to all of them. The 1<sup>st</sup> Defendant testified that what he had said, in response to a question why he was presenting uniforms to the community police on behalf of the 1<sup>st</sup> Defendant, *inter alia*, that crime was rife at the hotel and golf course itself but after the initiation of the community police, the crime rate dropped. He was then asked who were responsible for these crimes and he responded that some caddies if unemployed attempt to commit crimes including robbing guests of money in bags and snatching tourists' bags from cupboards.

[7] The Plaintiff as stated before never introduced the actual television footage into evidence, nor was

the journalist called as a witness. As such the only evidence as to what exactly had been said, i.e. the defamatory words allegedly used, is that testified to by the witnesses during the trial, all of whom were relying on their memories several years after the event.

[8] The Plaintiff witnesses' evidence as to what had been said was not always the same, but the thrust thereof was that the reference to crime was reference to crime in the Ezulwini community, and that the reference to caddies was reference to all caddies, therefore to each individual Plaintiff. In contrast thereto, the 2<sup>nd</sup> Defendant testified that the geographical reference was to the hotel premises including the golf course, and that his reference was to some and not all caddies at the hotel.

#### **The law.**

[9] As regards vicarious liability of the 2<sup>nd</sup> Defendant for the actions of the 1<sup>st</sup> Defendant, it is not in dispute that the 1<sup>st</sup> Defendant acted in the course and scope of his employment and this aspect need not be addressed further.

[10] One of the required elements of defamation includes reference to the Plaintiff personally, which is the main enquiry in the present case, (see *Atner's Precedents of Pleadings* (4<sup>th</sup> ED) at page 108).

[ I I ] Where the defamatory words refer to a group then **""the Plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member is, in fact a publication, thereof and concerning him personally"** (see *Jonathan Birchell, Personality Rights and Freedom of Expression* at page 198 and the case of *S.A. Associated Newspapers vs Estate Pelsler 1975 (4) S.A. 797 and 812*).

[12] *Wessels J A* in *S.A. Associated Newspaper vs Estate Pelsler (supra)* at page 810C stated the following:

"There is no special rule of law which apply to cases of class or group libel where an individual member of a class or group institutes defamation action grounded or defamatory matter which in terms refers to the class or group in question. In every defamation action the Plaintiff must allege and prove that the defamatory words were published of an concerning him. So too, in a case of so-called class or group libel, the Plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof and concerning him personally ... The reasonable reader may no doubt appreciate that the Executive Council is a legal entity apart from its members. On the other hand, he may also appreciate that as such an entity it has no will or conscience from its members. If, therefore, criticism is not confined to the demerits of any particular policy or decision, the decision, the reasonable reader could, in my opinion, reasonably infer that the criticism reflects not only upon the Executive Council as a legal entity apart from its members, but also on the individual members thereof. If immoral or unlawful conduct is imputed to a class or group

(such as the Executive Council) such conduct could ordinarily be more properly attributed to the individual member thereof.

[13] The basic test is whether the ordinary reasonable man would have understood the words complained of to apply to the Plaintiff, and this is an objective test. In the case of *Young vs Kemsley 1940 A.D. 258* at page 281 the following was said, and I quote;

"It is also trite that a Plaintiff or Applicant in a defamatory action must allege and prove that the defamatory matter was published of and concerning him. It must refer to or concern him personally (see *Burchell, The Law of Defamation in South Africa* at 128; *Goodall v Hoogendoorn Ltd 1926 AD 11* at 15; *South African Associated Newspapers Ltd and another v Estate Pelser 1975 (4) SA 797 (A)* at S10C; *Knupffer v The London Express D. Newspaper Ltd [1944] 1 All ER 495 (HL)* at 496A). It has been stated on many occasions that the test is an objective one and it is whether the ordinary reasonable reader would have understood the words".

[14] In a case of so-called class or group libel, as is the case in *casu*; a plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is member, is in fact a publication thereof concerning him **personally** if there is no direct reference to a Plaintiff by name, **special circumstances** which would have identified him to the addresses must be pleaded, (see *Amler's (supra)*) with reference to *Argus Printing and Publishing Co. Ltd vs Weichardt 1940 CPD 453*). A plaintiff must therefore prove that the words complained of must be read to refer to each and every member of the group, and thus necessarily to him/her.

[15] In the case of *Saids vs Hendrickse 1992 (3) S.A. 912 (A)* the following was said; and I quote in *extenso*:

"In order to succeed the appellants must prove (the *onus* being on them) that the statement was defamatory, and that it was published of and concerning them (*South African Associated Newspapers Ltd and another vs Estate Pelser 1975 (4) S.A. 797 (A)* at 8J0C). The statement makes no specific reference to the appellants. What does it refer to persons belonging to a class or group - office bearers of NAAWU.

To succeed in their action the appellants must establish that the words complained of would lead an ordinary reasonable person acquainted with them to believe, on reading the statement, that such words referred to them personally. The test is, therefore, an objective one and the actual intention of the Respondent is irrelevant. In *Knupffer vs London Express Newspaper Ltd [1944] 1 All ER 495 (HL)* at 497 F - G, Viscount Simon LC propounded a two-fold test for a matter such as the present in the following words:

The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him?"

It is common cause that the first question must be answered in favour of the appellants. What is in issue is whether the second question also falls to be so answered.

Whether defamatory words used of or concerning a group will be taken to refer to every member of such group will depend in each case upon the precise words used seen in their proper factual matrix. The mere reference to a group per se will not be sufficient. A Plaintiff must still prove that, as a member of such group, he was included in the

defamatory statement - often a difficult matter, particularly when one is dealing with a group comprising a large or indeterminate number of persons. In *Knupffer's* case *supra* at 49HA Lord Atkin remarked:

The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the Plaintiff was in fact included in the defamatory statement: for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds: or the words are occasionally intended to be a facetious exaggeration. He went on to add (at 498C):

"It will be as well for the future for lawyers to concentrate on the question whether the words were published of the Plaintiff rather than on the question whether they were spoken of a class".

In the *South African Association Newspapers* case *supra* at 810D the above statements were said to reflect the law correctly.

Mr. Liebenberg for the appellants referred us to a number of reported D cases where an individual member of a group was held to have been personally defamed in a reference to the group. Amongst these were *Hertzog v Ward* 1912 AD 62 (the medical council); *Young v Kemsley and others* 1940 AD 258 (the licensing board); and *Bane v Colvin* 1959 (1) S.A. 86S (c) where a reference to a company was held to include all its directors). Further examples are also to be found in *Galley on Libel and Slander* 8<sup>11</sup> Ed paragraph 288. These cases are all distinguishable. They relate to instances where, because of the express words used, or by necessary implication, the defamatory imputation was held to apply to every member of the group concerned. For a contrary decision see *Visse v Wallachs' Printing and Publishing Co. Ltd*; *Visse v Pretoria News and Printing Works Ltd* 1946 TPD 441 where the allegedly-defamed class was held to be "unlimited and so large as not to justify the application of any stigma to each member, including Plaintiff (at 449).

This is not a case where reference was made to all the members of a group. The statement refers simply to "office bearers of NAAWU". It does not in express terms refer to all the office-bearers. Nor can such a reference necessarily be implied. The position may have been different had it spoken of "the office-bearers" for that might have implied all. Seen in their proper context the words "office-bearers of NAAWU" only refer to some office-bearer - an interpretation which Mr. Liebenberg was obliged to concede. Some in that sense denotes an unspecified yet relatively limited number...

A reasonable person reading the statement would have no grounds for connecting it with the appellants personally. Nor are there any background facts or surrounding circumstances from which a person acquainted with the appellants could reasonably have inferred that they were the office-bearers to whom the statement referred ... there is no evidence of how many branches of NAAWU there are on a regional or local bearers there are at each such branch, or on the national executive. For all we know the overall number of office-bearers in the Republic may be a very sizeable one. The statement only refers to some of them. A reasonable person reading the statement would have no grounds for connecting it with the appellants personally. Nor are there any background facts or surrounding circumstances from which a person acquainted with the appellants could reasonably have inferred that they were the office-bearers to whom the statement referred.

There is not even admissible evidence that the appellants come from or reside in the Port Elizabeth or Uitenhage areas. If the statement had referred to an office-bearer it could clearly not have been taken to refer to the appellants, or any one of them. The position can be no different where the reference is to some of an indeterminate and potentially large number of office-bearers.

Mr. Liebenberg contended that, if the appellants were seen walking down the street together by someone acquainted with them, such person would associate them with the office-bearers referred to in the statement. The answer would seem to be that any such acquaintance, in the absence of information with regard to how many NAAWTJ office-bearers there are and other relevant background facts and circumstances, could not reasonably come to such a conclusion. In the result the trial Judge correctly held that the appellants had failed to discharge the *onus* of proving that the statement referred to them personally".

[16] The above therefore is the legal position which governs the present case. The question to be answered in *casu* is whether each Plaintiff who gave evidence in the present case has proved, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof concerning him **personally** and if there is no direct reference to him by name, **special circumstances** which would identified him to the addresses must be pleaded. Further, that he must therefore prove that the words complained of must be read to refer to each and every member of the group, and thus necessarily to him.

#### **The law and the facts.**

[17] All eighteen (18) Plaintiffs gave evidence and they all said that the 1<sup>st</sup> Defendant referred to caddies of the Royal Swazi Sun.

[18] The 2<sup>nd</sup> Defendant on the other hand testified that he made reference to **some**, and not all, i.e. not each and every caddie, and therefore not to any of the Plaintiffs personally.

[19] The Plaintiffs' Particulars of Claim at paragraph 7 thereof stated the following:.

"Crime here at Ezulwini is perpetrated by caddies of the Royal Swazi Sun ... they are thieves ... when they have not been hired to carry the golfer's clubs they steal and they rob the guests and they commit housebreaking at Ezulwini area because they are used to always having money".

[20] At paragraph 8 thereof, it is stated that "the reference to caddies of the Royal Swazi Sun was intended to include reference to each of the Plaintiffs and was so understood by the addresses.

[21] It is therefore clear that the alleged words uttered are not "**the**" or "**all**" or "**each and every**" or similar words which would include each individual caddy. No application for amendment of the Particulars of Claim, and therefore the Plaintiffs' case must stand or fall by the Particulars in their present form.

[22] The evidence of the Plaintiff who gave evidence before court have been summarized by *Miss Van Der Walt* at paragraph 25 of her Heads of Argument, and for ease of reference the table outlined therein is incorporated into this judgment.

[23] It emerged from the above evidence that not only did the Plaintiff witnesses contradict each other, but PW1, 3, 5, 8, 11,12 and 17 contradicted the Particulars of Claim, which refer to "**caddies**" and "**they**" whereas these witnesses said the word "**the**" had been used. Also, during cross-examination PW4, 7 and 8 admitted to "**some**", and PW14 that it was not "**each and every**". In addition, PW5 and PW7 admitted that the Plaintiffs had discussed the case between themselves, a fact which would obviously render their evidence all the more unreliable.

[24] It would appear to me after reading the whole evidence in this case as aptly summarised in the table supplied by Counsel for the Defendant that each Plaintiff has not proved that the said publication thereof concerned to him **personally** and as there is no direct reference to each by name, no special circumstances which would identify him to the addresses have been shown. On the totality of the whole evidence I cannot say that the words complained of refer to each and every member of the group, and thus necessarily to him.

[25] It would appear to me that the 1<sup>st</sup> Defendant's evidence that he did not refer to Plaintiffs personally is more probable, as he testified, that he would have been fired from his job had he said all hotel's caddies commit crimes, because that would have implied that tourists should not visit the hotel.

[26] In the premises, the Plaintiffs have failed to prove that the alleged publication referred to them personally and therefore the action ought to be dismissed, and it is so ordered. The Plaintiffs to further pay costs, to include the costs of Counsel as certified in terms of Rule 68 (2) of the High Court Rules.

## S.B. MAPHALALA

### JUDGE

p W	In Chief	XX	Re-ex
1	"the"	Not "each and every"; Cannot admit or deny "some"	"all"
2	People who commit crime are "caddies"; "Caddies at the Royal Swazi Sun"	"Caddies"; He did not hear "some"; "Bo-caddies" (which he admits is capable of more than one meaning)	He took it to mean "all"
3	"the" caddies of the Royal Swazi Sun; "bo"	"caddies"; Did not listen to whole broadcast	"caddies"
4	"caddies"	"bo" which can mean more _____ than one; "some"	"caddies"

5	"the"	"bo"; Can only remember some of what was said; some"; "all" (contradiction)	
6	"caddies of Royal Swazi Sun"	"bo"	
7	"caddies of Royal Swazi Sun"	"some"; "bo"	
8	"the"	Cannot remember exact words, only drift thereof as he understood it; "some"	
9	"caddies of Royal Swazi Sun"	Does not remember whether "some" was used	
10	"the" bo"	"some"	-
11	"the"	Does not remember "some"; Not "each and every"	
12	"the"	Not "each and every"; Simply "caddies"	
13	Did not see broadcast; was told about by wife; did not take it seriously	Did not take it seriously because thought matter would be amicably resolved	
14	"Royal Swazi Sun caddies"; Not "some"	Not "each and every"	
15	"Caddies"	Does not remember "some"	-
16	"Caddies of Royal Swazi Sun"	Does not remember some	
17	"the"	Does not remember "some"	-
18	"caddies of Royal Swazi Sun"	"bo" which he understood to be "each and every"	