

THE HIGH COURT OF SWAZILAND

ONE TO ONE EMERGENCY SECURITY

And

THE EDITOR, SWAZI NEWS NEWSPAPER

1st Defendant

SIHLE MAVUSO

2nd Defendant **AFRICAN**

ECHO (PTY) LTD

3rd Defendant

ARNOT PUBLISHERS COMPANY

4^h Defendant

Civil Case No. 3663/2004

Coram: S.B. MAPHALALA – J

For the Plaintiff: MR. S. MAGONGO

For the Defendant: IN ABSENTIA

JUDGMENT
(3rd March 2006)

[1] This is an application for default judgment brought in terms of Rule 31 (3) (a) of the High Court Rules arising from a defamatory claim by a company duly registered in terms of the company laws of the Kingdom of Swaziland. The Plaintiff being the said company seeks for damages in the sum of E1, 500, 000-00 and costs of suit.

[2] The 1st Defendant is the Editor of the Swazi News Newspaper. The 2nd Defendant is Sihle Mavuso in his capacity as the reporter of the story carrying the alleged defamatory allegation about the Plaintiff and working for 1st Defendant. The 3rd and 4th Defendants are Swazi News African Echo (Pty) Limited and Amot Publishers Company in their capacity as printers and publishers, respectively of the said newspaper, having its place of business at Stand No. 407, Sheffield Road, Industrial Sites, iVIbabane in the Hhohho district.

[3] On the 15th May 2004, at Mbabane, the 2nd Defendant during the course of his employment published in the Swazi News an article entitled "Mzwakhe Myeni Security Company loses contract". The said article reads *ipsissima verba* as follows;

"A security company owned by local gospel music icon, Mzwakhe Myeni has been kicked out of CMC company premises where they were contracted to after a mysterious disappearance of tools worth over E10 000-00. Myeni is a Director of One two One Security Company, which is based in Matsapha. According to information gathered by the Swazi News, unknown people gained access into the company premises at Ezulwini where it is constructing a sewage plant. The thugs never broke anything, which raised a lot of eyebrows, and stole tools like pick heads, shovels, drillers and a number of valuable items in the storeroom and made it out and made it out of the company premises without anyone noticing them even though the place was Hooded with security officers of Myeni's company. The matter was reported to Lobamba police who are now pursuing it. Myeni has also launched his own private investigations.

According to CMC Project Manager at Ezulwini, Barbara Luca they have replaced Myeni's company with V.I.I'. Security Company.

"We are still in the dark about what really happened and we hope that the police will come out with something from their investigation. We lost a lot of valuable material here" she said. She mentioned that there were no breakages on the fence or anywhere else that would suggest that the thugs broke into the place, which makes it difficult for them to come out with the truth about what really happened. ••Myeni also told us that he had launched his own investigations and we are still waiting for a response from him," she said.

Luca mentioned that prior to that incident they had a good working relation with Myeni though there were some loopholes here and there. "We had a kind of a working environment that was conducive for both of use, though there were problems here and there but we would leave with it.

However, after what happened on the Easter weekend we could not take it", he said. Myeni refused to get into details of the matter, stating that the police are handling it.

[4] . The Plaintiff alleges in his Particulars of Claim at paragraph 6 thereof that the said article stated that Plaintiff has been kicked out of CMC company premises following a mysterious disappearance of tools worth over E10, 000-00. The said words, in the context of the article, were wrongful and defamatory of Plaintiff in that they were intended and were understood by the readers of the newspaper that Plaintiff is dishonest in that:

8.1 The Plaintiffs employees were responsible for the mysterious disappearance of tools;
8.-2The-Plaintiff!-performed-its duties unprofessionally.and.negligently, as required of
security companies in that thugs did not break any thing during the mysterious
disappearance of tools; and 8.3 Plaintiff never at any stage render security services at
CMC Company as stated on
the article.

[5] Plaintiffs director, Emmanuel Myeni appeared before court on the 28th April 2005, for leading of oral evidence and to prove the damages. The witness led evidence on general damages, marketing strategies hampered and loss of tender from Government. Plaintiffs director did state on oath how they were hampered and estimated the loss to be E50 000-00 which is claimed for as loss of tender from Government. Plaintiff also claimed for general damages amounting to E640 000-00. The claims for good name tarnished, agreement for future services cancelled and client's refusal to increase payment were abandoned.

[6] The Plaintiffs affidavit in proof of damages in the items which are reflected in paragraph 4.1 to 4.4 were abandoned and only items 4.5, 4.6 and 4.7 remained. These being marketing strategies for the company hampered for E40, 000-00, loss of tender for E50, 000-00 from Government and general damages for E640, 000-00.

[7] When the matter came for arguments *Mr. Magongo* filed very comprehensive Heads of arguments with authorities in proof of damages, for which I am grateful to Counsel for his industry.

[8] The Defendants have not filed any opposition in this matter. Therefore it is not disputed that Plaintiff is entitled to judgment. The only question for determination is the proof of damages to be awarded.

[9] The law grants a right of action to both a trading and non-trading corporation for a defamatory statement that is calculated either to reflect upon the business status and

reputation of the corporation, or to cause it financial prejudice, (see the cases of *Dhlomo NO. vs Natal Newspaper (Pty) Limited 1989 (1) S.A. 945 (A)* and that of *Universiteit Van Pretoria vs Tommie Meyer Films (EDMS) BPK 1977 (4) S.A. 376 (T)* and *1979 fl) S.A. 441 (A)*).

[10] In the case of *Midler vs S.A. Associated Newspaper Ltd 1972 (2) S.A.* at 598 the following *ratio* was propounded:

"In assessing the amount of damages to be awarded the court must have regard to all the circumstances of the case. It must *inter alia*, have regard to the character and status of the Plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the Defendant and in particular his attempts and the effectiveness thereof to rectify the harm".

[1.1] The court observed in *Chetcuri vs Van Der Walt 1993 (4) S.A. 394* at 399 *F* that assessing damages is always a difficult matter involving "**the placing of a money value upon abstraction**" and damages cannot be gauged with precision or nicety.

[12] According to *Kelsey Stuart's Newspaperman's Guide to the Law, 5th Edition* at page 67 some of the factors which may be taken into account in assessing the amount of damages to be awarded are:

- a) The conduct of the Defendant from the time of publication until judgment.
- b) The manner of publication and the area and extent of dissemination.
- c) The character of the defamatory words, their falseness and the malice displaced by the Defendant.
- d) The rank and position of the parties in society and any special relationship which existed between them.
- e) The persons to whom the defamatory words were published.
- f) The place, time and mode of publication.
- g) The continuance of the circulation of the defamatory words.
- h) The tardiness, inadequacy or absence of apology.
- i) Republication intended or authorised.
- j) The time of publication of the apology and the prominence of its publication,
- k) Whether the defamer first employed the defamatory words or whether he simply-repeated the defamatory words of another.
 - 1) The character of the person defamed.
- m) The responsibility which the Plaintiff may have to bear for bringing about the publication of the defamatory matter, n) Absence or presence of actual ill-will towards the person defamed on the part of the defamer.
- o) Any undue delay by the Plaintiff in bringing his action.
- p) Whether the matter published was true, even if it was not published for the benefit of

- the public.
- q) Any prolonged or obstinate failure by the defamer to do anything to assuage the hurt of the person defamed.
 - r) Whether the attack injured the defamed person in the way of his business or profession, s) A decrease in the value of money.
 - t) The fact that robust language is common in political discussions.
 - u) The conduct of the Defendant in conducting his defence (e.g. did he seek to attack the Plaintiffs character; did he dispute his evidence unduly or did he seek to discredit his witnesses?)

[13] This list is not, of course, exhaustive. See also *Kuper "A Survey of the principles on which damages are awarded for defamation"*, (1966) 83 S.A.L.J 477 *Smith vs Die Republikein (EDMS) En Ander 1989 (3) S.A. 872*, *Micah Celucolo Mavaso vs Sabelo Mamba and two others - Civil Case No. 1993/99, S.A. Associates-Newspaper Ltd vs Samuels 1980 (1). S.A. 24 (A)* and the case of *Khan vs Khan 1971 (2) S.A. 499 RAD at 500 C.*

[14] In the present case, it is my considered view that the Plaintiff lost the tender to Government and therefore would be entitled to the sum of E50, 000-00. Further, marketing strategies for the company hampered for E40 000-00. However, as to the sum claimed for general damages that of E640, 000-00 I have come to the considered view that this sum is excessive in the circumstances of the case but that the sum of E60, 000-00 would fit the merits of the case. I say so for the following reasons. Firstly, the Defendants have not apologized for publication of the said defamatory words. Secondly, the attack injured the Plaintiff in the way of its business. Lastly, the character of the defamatory words, their falseness has put Plaintiff in a bad position. In arriving at this figure I have considered a number of local cases on the measure of damages including that of *Micah Celucolo Mavuso (supra)*, *Lindifa Mamba vs The Times of Swaziland (supra)*. I find that this amount is in line with the range fixed in those cases.

[15] In the result, for the afore-going reasons Plaintiff is granted an order as follows:

- i) E40, 000-00 in respect of the loss of tender to Government;
- ii) E20, 000-00 for marketing strategies for the company hampered.
- iii) E60, 000-00 in respect of general damages.
- iv) Costs of suit.

S.B. MAPHALALA
JUDGE