

IN THE HIGH COURT OF SWAZILAND

PRISCILLA MBULI (nee MDLULI)

Plaintiff

And

JOSHUA JELE

Defendant

Civil Case No. 1805/2006

Coram

S.B. MAPHALALA - J

For the Plaintiff

MR. S. DLAMINI

For the Defendant

IN ABSENTIA

JUDGMENT

20th April 2007

[1] Plaintiff has issued a summons against the Defendant for payment of the sum of E700, 000-00 and interest thereon at the rate of 9% per annum effective from the date of judgment until the date of final payment and costs

of suit. Plaintiff has advanced two claims in her particulars of claim being claim A and claim B. The cause of action is based on defamation in claim A and unlawful assault in claim B.

[2] The Defendant filed his Notice of Intention to Defend through the offices of Justice M. Mavuso and Company who subsequently addressed a letter to the Plaintiffs attorneys requesting further particulars. Defendant failed to appoint a new address of service in accordance with Rule 16 (4) (b) of the High Court Rules when the said attorneys withdrew as the Defendant's attorneys of record on 6th February 2006. The Defendant had until 19th January 2007, at the latest to appoint a new address of service.

[3] Rule 16 (4) (b) of the High Court Rules provides that after such notice, unless the party formerly represented within ten (10) days after the Notice, himself notifies all other parties of a new address for service as required under sub-rule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders.

[4] In regard to the scope of the sub-rule see *Botes vs Botes* 1966 (4) S.A. 295 (T) and the discussion in *Horitzauer vs Horitzauer* 1968 (4) S.A. 376 (T) at 378 and also *Nathan, Barnett and Brink*, "Uniform Rules of Court", Juta, 3rd Edition at page 114 and the cases cited thereat.

[5] The Plaintiff accordingly set the matter down for 2nd March 2007, for relief set out in her Notice of set-down dated 28th February 2007 with the High Court Registrar's stamp dated 1st March 2007.

[6] In the said Notice the Plaintiff seeks among other relief, to prove damages by affidavit and has annexed the affidavits of Plaintiff, the Plaintiffs husband, the

Plaintiffs attorney and the individual in whose residence the Plaintiff has been staying since 30th March 2006 just after the assault on the Plaintiff.

Unlawful assault

[7] Starting with the issue of unlawful assault details of such are set out in paragraph 3.1 through to 3.8 of the Plaintiffs affidavit at page 16 to 17 of the Book of Pleadings. For the sake of completeness I shall reproduce what is stated therein as follows:

3.1 On or about 29 March 2006 and at about 0900 hours, shortly after the death of my neighbour who is also the Defendant's concubine, one Beauty Simelane (nee Gama), a group of the Elulakeni (Shiselweni district) community members led by the Defendant marched to my homestead at Elulakeni in what is popularly known as toyi- toyi.

3.2 Immediately on arrival at my place, the Defendant's son, Sanele Jele, attacked me with a stick striking me two (2) times but I managed to close and lock the door of the room I was in but because the windows in the said room were open, Sanele threw a huge stone through a window directed at me and my two great grandchildren, Bandile Khumalo, 1 year of age at the time whom I was carrying on my back and Mbali Sithole, 2 years old at the time.

3.3 In trying to protect Mbali from being hit by the stone thrown by Sanele Jele, I was hit on my left arm just below my shoulder. Sanele threw a further stone directed at me as did the Defendant's other son, Phinda. A daughter of the Defendant Ncamsile Jele also assaulted me. I hasten to add that the said Sanele and Phinda are still school going and I estimate their ages to be around eighteen (18) and fourteen (14) respectively.

3.4 I have never been more terrified in my entire life. During this attack, my husband was away and I was only left with my two great grandchildren aforesaid.

3.5 I still experience some pain when my left arm is exercised. I now have to be assisted to carry firewood and 20 or 25 litres containers of water. Fetching firewood and water in 20 or 25litres containers is a way of life at Elulakeni and surrounding communities.

3.6 After about what seemed to be a long time to me, the Defendant ordered that the mob leave and said that I would soon follow Beauty Simelane in death. The mob led by the Defendant obliged and left.

3.7 Such was my state of shock that I was unable to even unlock the door to the room I was in and walk out to report the matter to the police station which is hardly a kilometer away from my homestead.

3.8 It was only when my husband John Mbuli came back at around noon that I was able to unlock the door to the room where I was and where the assault on me had taken place.

3.9 For a while after my husband had asked me what had happened, I was unable to answer but cried uncontrollably instead.

3.10 I therefore relayed the entire events and we later walked to report the matter to the police station where I was advised by the police that they did not have sufficient manpower to protect me hence I should leave the area to stay at a safe place.

[8] The Defendant's minor child, Sanele was convicted for the said assault (as shown in paragraph 3 of the Swaziland Royal Police Memorandum at page 33 of the Book of Pleadings) in a case where the Defendant was an accomplice witness.

[9] The Royal Swaziland Police are unable to protect the Plaintiff if she remains at Elulakeni and the Plaintiff has fled to Pine Valley in Mbabane. The Plaintiff spends approximately E100-00 for her daily upkeep. In view of the obvious hostilities, the Plaintiff cannot expect to return to her home anytime before the year 2008. The Plaintiff has incurred transport expenses to shuttle between Elulakeni home and Pine Valley. The total cost is E4, 100-50 as claimed in paragraph 14.3 of Plaintiff affidavit at page 20 of the Book of Pleadings.

[10] As regards the general damages as claimed in paragraph 14.4 of the Plaintiffs affidavit at page 20 of the Book of Pleadings, it is contended for the Plaintiff that the fear and shock of a defenceless woman of 75 years of age who also feared for her minor great grandchildren, none of whom are over two (2) years of age in the face of

a mob which was evidently intent on inflicting serious harm on the Plaintiff is apparent.

[11] In the circumstances of the above related facts I have come to the considered view that Plaintiff is entitled to damages under this head.

Defamation

[12] The Plaintiff claims that the Defendant's statement as set out in paragraphs 4 to 7 of the Particulars of Claim at page 2 to 3 of the Book of Pleadings and those found in paragraphs 3.2, 3.3 and 3.4 at page 24 of the Book of Pleadings are *per se* defamatory. The said paragraphs read as follows:

4. In the period between the months of March and April 2006, in particular on 11 April 2006 and at Qomintaba Royal Kraal, the Defendant stated in widely attended community meetings under the Lindizwe Umphakatsi and concerning the Plaintiff that she had, through witchcraft practices, caused the death of the following persons:

3.11 Mrs Dlamini (nee Gamedze) of Elulakeni;

3.12 A certain Sifo Dlamini's child;

3.13 A certain Mbuli;

3.14 Beauty Simelane.

3.15 The statements by the Defendant are wrong and defamatory of the Plaintiff.

3.16 The statements were made with the intention to defame the Plaintiff and to injure her reputation.

3.17 As a result of the defamation, the Plaintiff has been damaged in her reputation and has suffered damages in the sum of E500 000-00 (Five Hundred Thousand Emalangeni).

[13] At page 24 of the Book of Pleadings the following appears:

3.18 That day 30th March 2007, at Bhekizwe, in a meeting attended by virtually all the members of the community the Defendant alleged that it was not the first time that the Plaintiff had killed (referring to his concubine Beauty Simelane) through witchcraft practices.

3.19 The Defendant alleged that the Plaintiff had killed a certain Mrs. Dlamini (nee Gamedze) of Elulakeni, a certain Sifo Dlamini's child and a certain Mbuli. The Defendant further alleged that I milked cows to feed to ghosts

3.20 On or around 4th April 2006, further on or around 11th April 2006 and at the bigger Qomintaba Royal Kraal where there were even more community members, the Defendant repeated the allegations he had made in the earlier meeting at Bhekizwe on or about 30th April 2006.

[14] It is furthermore contended for the Plaintiff that the Defendant has contravened Section 75 and 76 of the Crime Act No. 6 of 1889.

[15] It is contended further that the Defendant published these defamatory statements on at least three (3) separate occasions on 30 March, 4 April and 11th April 2006. It is submitted that these separate publications give rise to separate causes of action. In this regard the court was referred to the South African cases of *Matthews vs Young* 1922 A.D. 492; *Kook vs Zeeman* 1943 OPD 135 and that of *Peace vs Kevan* 1954 (3) S.A. 910 (D) 914. The court was also referred to the local decision in unreported Civil Swaziland High Court Case No. 1354/2000 in the matter of *Lindifa Mamba and another vs Vusi Ginindza and others* and the cases cited thereat. In this

case the court held *inter alia*, that the general factors to be taken into account when assessing the *quantum* of damages are:

- 3.21 "character, status and regard of Plaintiff',
- 3.22 "nature and extent of publication",
- 3.23 "nature of the imputation (serious or not)"
- 3.24 "probable consequences of imputation",
- 3.25 "partial justification",
- 3.26 "retraction or apology" and
- 3.27 "comparable awards and declining value of money".

[16] *Kelsey Stuart's Newspapermans Guide to the Law (Butterworths) 5th Edition* states that some of the factors which may be taken into account in assessing the amount of damages are:

- 3.28 The conduct of the Defendant from the time of publication until judgment.
- 3.29 The manner of publication and the area and extent of dissemination.
- 3.30 The character of the defamatory words, their falseness and the malice displayed by the Defendant.
- 3.31 The rank and position of the parties in society and any special relationship which existed between them.
- 3.32 The persons to whom the defamatory words were published.
- 3.33 The place, time and mode of publication.
- 3.34 The continuance of the circulation of the defamatory words.
 - (h) The tardiness, inadequacy or absence of apology.
 - (i) Republication intended or authorized.
 - (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 witness?).

[17] This list is not, of course exhaustive, for a useful survey of the principles applied in assessing damages for defamation, see Kuper "A survey of the Principles on which damages are awarded for Defamation " (1966) 83 S.A.L.J. 477.

[18] Determining the *quantum* of damages in an action for defamation is indeed problematic. Amerasinghe in *Defamation and aspects of the actio iniuriarum in Roman Dutch Law* expressed the following opinion in this regard at page 178:

"Assessment of damages for injury to feelings stemming from the loss of an abstraction such as reputation is not easy, since it involves the placing of money value upon abstractions".

[19] In the English case of *Levy vs Hamilton* [1935] T.L.R. 384 at 386 the House of Lords observed that:

"It is impossible to track the scandal, to know what quarters the poison may reach: It is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation".

[20] Over the years the courts, however, have determined certain general factors to be taken into consideration when assessing the *quantum* of damages, namely:

- 3.35 **The character, status and regard of the Plaintiff,**
- 3.36 **The nature and extent of the publication;**
- 3.37 **The nature of the imputation (serious or not);**
- 3.38 **Probable consequences of the defamation;**
- 3.39 **Partial justification;**
- 3.40 **Political criticism (certain latitude allowed here)**
- 3.41 **Whether there has been a retraction or an apology;**
- (h) Whether the defamation was oral or in permanent form;**

- (i) **Comparable awards in other defamation cases and the declining value of money.**

[21] **The court has also taken into account factors in mitigation of damages. See *Burchell, Personality Rights and Freedom of Expression* at page 436 namely:**

- 3.42 **Absence of malice;**
- 3.43 **The fact that the Defendant was not the original of the defamatory matter;**
- 3.44 **Emotional instability or drunkenness of the Defendant;**
- 3.45 **Provocation;**
- 3.46 **Retortion by the Defendant;**
- 3.47 **Undue delay on the part of the Plaintiff to bring the action.**

[22] **Certain factors in aggravation of damages have also been noted:**

- 3.48 **Persistence in a plea of justification of unfounded imputation;**
- 3.49 **Presence of malice;**
- 3.50 **Repetition of offending statement.**

[23] **See also the South African cases of *S.A. Associated Newspaper Ltd vs Yutar* 1969 (2) S.A. 442 (A); *Muller vs Associated Newspaper Ltd and others* 1972 (2) S.A. 589 (C), *Buthlezi vs Proter* 1975 (4) S.A. 608 (W), S.A. *Associated Newspaper Ltd en "n" Ander vs Sammuels* 1980 (1) S.A. 24 (A);**

Argus Printing and Publishing Co. Ltd vs IFP 1992 (3) S.A. 579 (A) at 590 E

- F; Afrika vs Metzler 1997 (4) S.A. 531 (NMH) and Burchell, Defamation

page 292 - 294 and the cases cited thereat.

[24] I shall therefore proceed to assess damages in this case following the measure of damages applied in the case of *Lindifa Mamba (supra)* mentioned in paragraph [15] of this judgment *ad seriatim*, thusly;

(a) Character, status and regard of Plaintiff.

[25] Plaintiff is a humble old woman who had an untarnished reputation prior to the defamatory statements by the Defendant.

(b) Nature and extent of publication.

[26] In the present case the Defendant published these defamatory statements on at least three (3) separate occasions on 30 March 2004, 4th April 2006 and 11 April 2006.

It would appear to me and in this regard I am in agreement with the Plaintiff that these separate publications give rise to separate causes of action (see *Matthews vs Young 1922 A.D. 492; Kook vs Zeeman 1943 OPD 135 and Peace vs Kevan 1954 (3) S.A. 910 (D) 914*).

[27] Further it appears in the documentary evidence of newspaper articles that the defamation in *casu* was given wide publicity in the country's wide selling newspapers, on 9th July 2006, the 15th July 2006 and 19th July 2006 as shown in the newspaper articles at page 41 - 43 of the Book of Pleadings.

(c) Nature of the imputation (serious or not).

[28] Such was the seriousness of the defamatory statements by the Defendant that they remained fresh in the minds of the Elulakeni community to the extent that over three (3) months after the defamatory allegations had been made and on the 6th July, 2006 the Plaintiff was attacked at her home together with her family and they had to seek refuge at the Hluti Police Station for over a week. Save for the occasional visit to Elulakeni which itself had to be concealed, the Plaintiff remains resident at Pine Valley in Mbabane for fear of her life. The Plaintiffs life is obviously in disarray. She is virtually divorced from her family and a community with which she previously lived in harmony wants her dead.

(d) Probable consequences of imputation.

[29] It would appear to me on the facts of the matter that there is no justification whatsoever for the defamation. On the contrary, the Defendant's conduct is

particularly objectionable when it is taken into account that he is an elected Member of Parliament who should always uphold the law rather than break it.

(e) Retraction or apology.

[30] In the present case there is neither a retraction nor an apology from the Defendant.

(f) Comparable awards and declining value or money.

[31] In this regard it was contended for the Plaintiff that whereas previous awards are mainly against newspaper publications and where there is rarely any evidence of the Plaintiff being actually ruined, the Plaintiff in *casu* has had virtually an entire community mm against her. She may well never return to live freely in her home at Elulakeni meaning that she may have to relocate altogether and build a new home away from the gullible and predominately illiterate community which is susceptible to the Defendant's influence. It appears to me that Defendant sought to ruin the Plaintiff and it appears he has succeeded. In this regard I find the words of Williamson AJ in the South African case of *Buthelezi vs Porter and others* 1975 (4) S.A., 608 at 618 to be apposite where he said:

"A defamation which succeeds in its purpose of ruining a man should attract a higher award than one which fails in such purpose".

[32] On the basis of the above-cited facts I proceed to award damages as follows:

(i) (ii) Meals and accommodation

20 months @ E2, 500-00 per month E50, 000-00 E12,

Legal costs 500-00

(i) Meals and accommodation

20 months @ E2, 500-00 per month E50, 000-00

(ii) Legal costs E12,500-00

(iii) Transport E3, 600 + E500-00 E4, 100-00

(iv) General damages for contumelia, loss of

Consortium, pain & suffering E50, 000-00

(v) Defamation general damages, loss of

Reputation, dignity and humiliation etc. E50, 000-00

TOTAL

E166,600-00



S.B. MAPHALALA

JUDGE

[33] In the result, Plaintiff is granted damages of E167, 000-00 as particularized in paragraph [32] *supra* against the Defendant Joshua Jele. The Defendant further to pay costs of suit.