IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 2015/98**

In the matter between:

ASHMOND NGWENYA **PLAINTIFF**

VS

SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION **1st RESPONDENT**

JUBILEE PRINTING AND PUBLISHING **2nd RESPONDENT**

CORAM **MAMBAJ**

FOR PLAINTIFF **MR M. SIMELANE**

FOR RESPONDENTS **MR Z. JELE**

JUDGEMENT
9th April, 2009

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[1] When it was time for the first Defendant to print the new Telephone Directory at the end of 1996 or early 1997, its servant Adam Sipho Matsebula, rushed to the Mbabane Post Office to arrange for a photo-shoot for the Directory's cover. The said Mr Matsebula, it is common cause was acting during the course and within the scope of his employment as a sales manager for the first

defendant. Mr Matsebula was accompanied by a photographer who was ready to take the pictures they wanted at the Post Office. These pictures were to depict or portray the many postal services offered by the first Defendant throughout the country.

[2] After making the necessary arrangement with the manager of Postal Services at the Post Office, Mr Matsebula further arranged with some of the employees of the first defendant who were stationed at that Post Office, for these workers to pose as customers accessing the various services being offered by the first Defendant and had their pictures or photographs taken during those moments. During this photograph session, some of the workers of the 1st Defendant who took part in the simulation, had to remove their employment uniforms-presumably so as to pose as genuine customers of the first defendant.

[3] Before the persons who took part in the photo-shoot could actually pose for such purpose, Mr Matsebula gathered them all in the public service area of the Post Office and informed them about the whole exercise they were about to engage in. It was during this briefing that Mr Matsebula also announced to the members of the public who were there to move to one side of the service area of the Post Office so as not to be involved in the picture session. There has been no evidence led to indicate at what time all this took place except that it was during official business hours when, as one would expect, genuine customers or users of the Postal service would be moving in and out of the service area. The Photographer took several pictures and one of those pictures was that of the plaintiff who had come to the Post Office as a genuine customer and

had, according to him not been alerted about the photograph session being conducted by the first defendant's servants.

[4] The plaintiff who was an accountant in one of the Government's departments, was at the relevant time a regular customer at the relevant post office. In fact he was not aware that he had been photographed until he saw his picture or likeness adorning the front cover of the first defendant's telephone directory in early 1997. In the picture he is shown accessing some of the commercial services offered by the first Defendant, but he is not identified by name. The nature of the service being rendered to him is no apparent or identifiable from the picture.

[5] The Plaintiff is not a public figure or a celebrity and has not claimed in his papers that he was targeted for the publication because of some reason or special circumstance that set him apart from other persons; such as perhaps, being the most photogenic person.

[6] The said telephone Directory was printed and published by the second Defendant.

[7] Upon realizing that his photograph had been used in the manner aforesaid and without his permission, the plaintiff protested to the first defendant that the publication of his likeness or image was in the circumstances, a violation or invasion of his dignity and privacy. He demanded to be compensated. The first defendant refused to compensate him and has not offered an apology to him in this regard.

[8] The plaintiff has claimed for damages in the sum of E150,000-00 plus costs of suit; alleging that the picture in question was published by the Defendants without his knowledge and consent and used in a commercial publication and for commercial purposes by the defendant. He says this constitutes an unlawful and wrongful invasion of his privacy and dignity as a person.

[9] The nature of the invasion of privacy complained of herein is that his person in the form of his photograph or picture was unlawfully appropriated or "stolen" by the first defendant and used to promote or sell first defendant's postal services.

[10] The first defendant denies that the plaintiff has suffered any damages and avers that the publication of his photograph as described above is not wrongful or unlawful and does not constitute an invasion or intrusion of his privacy or dignity. The first defendant submitted in argument before me that the plaintiff had tacitly or expressly given his consent to be photographed for purposes of the eventual publication by the Defendants by not moving to the designated area to which all non-participants in the photograph-session had been asked to move or stand in order to be served by the Post Office or First Defendant during the said session. Lastly, the first defendant avers that its telephone directories are distributed free of charge nationwide and therefore it made no profit or anything of a commercial value by the publication under consideration herein.

[11] It is significant to note that when the picture-taking session was going on inside the Post Office, in the service area, that area of the post

office remained opened and or accessible to members of the public. Mr Matsebula was not the photographer who took the pictures and he did not direct the photographer as to which pictures to take. He was unable to say how or why the plaintiff was photographed in this case and was at the time, not even aware that the plaintiff was not an employee of the first defendant. He was further unable to say whether or not the plaintiff was amongst those postal services consumers or users who had been told to stand aside in order not to be involved in the simulated postal services photograph session. Mr Matsebula did not know any of the persons who were photographed or who participated in the exercise other than perhaps the photographer.

[12] In view of facts stated in the preceding paragraph and the largely uncontradicted or undisputed evidence of the plaintiff, I have no doubt at all that the plaintiff was not aware of the photograph session that took place at the Post Office that resulted in his picture being taken and subsequently publicized by the Defendants. He could not therefore have either expressly or tacitly agreed or even acquiesced to the taking of his photograph and its resultant publication by the defendants.

[13] The fact that the relevant telephone directory is distributed free to all customers of the first defendant, does not by any stretch of the imagination detract from the fact that it is a commercial publication or a publication distributed for commercial purposes. The major, if not the sole purpose of the publication and distribution of the Directory is to inform the public of the various commercial services offered to the public by the first defendant. That it is free - not sold - is neither here nor there; it is of no moment at all. The services advertised therein, including that service pertaining to which the plaintiff was photographed utilizing or

accessing, are offered for a fee by the first defendant. The plaintiff's picture was used to market or sell these services. The publication is therefore for commercial purposes. The photograph or picture of the plaintiff, in the mariner published, added a commercial value to the services offered by the first defendant.

[14] There was no evidence led by Mr Matsebula who was the only witness led by the first defendant on how long the photograph session took place. The court was informed (by Mr Matsebula) that many photographs were taken and these depicted the many different services offered by the first defendant.

[15] Besides what Chapter III of our Constitution provides in respect of protection of fundamental Human Rights such as The Right to privacy and one's dignity (e.g. article 14 (i) (c) and article 18 (1) and (2) and article 22 (1), our common law, under the actio iniuriarum protects the right of the individual's dignity and privacy. In **DIE SPOORHOND AND ANOTHER v SOUTH AFRICAN RAILWAYS 1946 AD 999 at 1010 SCHRENER JA** said that:

> "Our action for defamation is derived ultimately from the Roman actio iniuriarum which rested on outraged feelings, not economic loss." **(VIDE JANSEN VAN VUUREN N.O. v KRUGER 1993 (4) SA 842 (A) at 849E-F).** See also **BERNSTEIN v BESTER N.O. 1996 (2) SA 751 (A) at paragraph 68 where ACKERMANN J** stated that: "In South African common law the right to privacy is recognized as an independent personality right which the courts have included within the concept of dignitas ...
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> In **Financial Mail (Ptv) LTD & Others v Sage Holdings LTD & Another 11993 (2) SA 451 (A) at 462F1** it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful

disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged in the light contemporary boni mores and the general sense of justice of the community as perceived by the court. ...Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, [S v I and another 1976 (1) SA 781 (RA); S v Boshoff and others 1981 (1) SA 393 (T) at 396] the reading of private documents, [Reid-Daly v Hickman and others 1981 (2) SA 315 (ZA) at 323.] listening into private conversations, [S v A and another 1971 (2) SA 293 (T); Financial Mail (supra at 463.)] the shadowing of a person, [Epstein v Epstein 1906 TH 87.] the disclosure of private facts which have been acquired by a wrongful act of intrusion, [such as the publishing of information obtained from illegally tapping telephone conversations; Financial Mail (supra, at 463.)...These examples are clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities."

And at paragraph 71 the learned judge observed that:

"Caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation; it is important to keep in mind that at common law the determination of whether an invasion of privacy has taken place constitutes a single enquiry, including an assessment of its unlawfulness. As in the case of other injuriae, the presence of a ground of justification excludes wrongfulness of an invasion of privacy."

[16] Again in the **FINANCIAL MAIL** case (supra) at 462 Corbett CJ stated as follows:

"I need not essay a definition of the right to privacy. Suffice it to identify two forms which an invasion thereof may take, viz (i) an unlawful intrusion upon the personal privacy of another and (ii) the unlawful publication of private facts about a person ... Of course, not all such intrusions or publications are unlawful. And in demarcating the boundary between lawfulness and unlawfulness in this field, the court must have regard to the particular facts of the case and judge them in the light of contemporary boni mores and the general sense of justice of the community as perceived by the court (cf **SCHULT2 v BUTT 1986 (3) SA 667 (A)** at **679B-C; S v A AND ANOTHER**

1971 (2) SA 293 (T) at 299 C-D; S v I AND ANOTHER, 1976 (1) SA 781 (RA) at 788H-789B ...)'.

Similar words had been uttered about 40 years earlier by Watermeyer AJ (in considering an exception) in **O'KEEFE v ARGUS PRINTING AND PUBLISHING CO. LTD 1954 (3) SA 244 (C)** which dealt with a matter substantially similar to this action. The learned judge stated as follows:

> "I return now to the question of whether, in the light of modern conditions, the plaintiff can reasonably be held to have been subjected to offensive, degrading or humiliating treatment. In my opinion she can. It seems to me that to use a person's photograph and name without his consent, for advertising purposes may reasonably constitute offensive conduct on the part of the user. In the well known English case of Tolley v J.S. Fry and Sons Ltd, 1930 (1) K.B. 467; 1931 A.C. 333, a defamation case, and so not wholly *in pah materia* with the present case, GREER, L.J., in the Court of Appeal express the view that in publishing a caricature of the plaintiff without his consent as an advertisement for the defendants' chocolate, the defendants had acted
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> 'in a manner inconsistent with the decencies of life and in so doing they were guilty of an act for which there ought to be a legal remedy.' Similarly in the United States of America the legal principle is well established that the unauthorized publication of a person's photograph for advertising purposes is actionable. The principle there in force goes much further, and strikes at all invasions of privacy which can reasonably be considered offensive to persons of ordinary sensibilities, and the unauthorized use of a person's photograph for advertisement purposes is merely one of such instances (see Restatement of the Law, Torts para. 867 and the article of Prof. Winfield in the Law Quarterly Review, p.33).
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> It seems to me that under our law similar considerations must apply. The unauthorized publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's *dignitas.* It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like. All that I need decide at this, the exception, stage or the action is whether the publication of the advertisement in question is capable of constituting an *injuria.* In my opinion it is.

(See also The Bill of Rights Handbook, 3rd Edition, 2000 by Johan de Waal et al, chapter 14.)

[17] The position under American law is as follows:

> "Although the unwanted association of one's image with a commercial product may cause psychological distress, he primary interest protected in these kinds of cases, as Prosser well states it, "is not so much as mental as a proprietary one." What is really involved here is a theft of symbolic property, not unlike the reproduction and sale, without permission or payment of royalties, of a book, play, or film covered by a copyright. To use another's name or picture without consent to promote the sale of a product or service is essentially no different. We have said earlier that the context in which purely symbolic activity takes place may provide justification for restrictions on that activity. Surely stealing for personal profit, albeit only of images, is such a justification.
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> Accepting the general proposition that "appropriation" can be restrained without violating the first amendment does not answer a number of closely related questioned that are somewhat more complex. What if the name "appropriate" is John Smith and thus not clearly a referent to any single individual (unless in a small community where there is only one John Smith)? Since that particular name belongs to so many, no one can claim an exclusive proprietary interest in it, and an invasion of privacy suit for its use would make no sense.
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> What if the name is unique, and clearly identified with a prominent individual, but a devoted admirer decides to adopt it as his or her own? Is that legally actionable? In the absence of any evidence that such a change of name is undertaken with a profit motive, courts would not and should not treat such behaviour as an invasion of privacy. If monetary gain were involved it would pose a must closer question and one that might, with sufficient proof, be legitimately answered in the same way as a simpler case of appropriation. The key would be whether or not we were dealing with what was essentially a matter of theft."
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> (Franklyn S. Haiman, Speech and Law in a free society page 63-64) (Footnotes have been omitted by me).

[18] From the above authorities, it is plain that it is not every unauthorized appropriation or publication of one's photograph that constitutes an actionable wrong.

[19] Counsel for the plaintiff, referred me to the following dictum by Kannemeyer J in LA GRANGE v SCHOEMAN AND OTHERS, 1980 (1) SA 885 (E) at 886 where the learned judge stated that:

> "...Applicant had no right to photograph the respondent if he did not wish to be photographed, and has no right to claim to be entitled to do so at any time, even if the respondent did not object to being photographed. ... the taking of the photographs for purposes of publication and the publication thereof is not covered by the privilege attaching to a newspaper report mentioning their names. The publication of the photographs would go further than the report of the proceedings and beyond the privilege protecting the publication of such a report. The publication of the photographs would constitute an injuria in the manner described above."

Mr Simelane submitted that this is authority for his client's claim that mere unauthorized publication of one's photograph constitutes an actionable injuria. I can not agree. The statement by the learned judge was made in the context of a publication of a report on court proceedings where the respondents, who were police officers had been named or identified and accused as having killed someone who was in their custody. The judge said this was an injuria. The judge did not say that all and every unauthorized publication of one's photo graph constitutes an injuria. (See also the remarks by Watermeyer AJ in O'Keefee (supra).

[20] In the case of **National Media Ltd v Bogoshi 1998 (4) SA 1195 (SCA)** which was a case on defamation involving publishers of a newspaper, the court overruled and or departed from its earlier decision in **Pakendorf en Ander v De Flamingh 1982 (3) SA 146**

(A) where it had held that strict liability applied for newspaper publishers and printers. It ruled that mens rea was required and negligence sufficed for this purpose. Hefer JA stated as follows :

> "In *Pakendorf the* court mentioned the inequity of permitting the owner and editor of a newspaper to rely on the absence of animus injuriandi brought about by a mistake on the part of a reporter, but advanced no further reason for holding them strictly liable. In O'Malley the difficulty to bring animus injuriandi home to a particular person was suggested as possible justification. Insofar as it implies a form of collective or substituted liability of persons who may be entirely blameless, on the ground that no particular person can be found, the suggestion is, with respect, wholly untenable. Compared with such injustice, the harm done to the victim of an honest mistake becomes less significant.

There is, however, a potent consideration which was not mentioned. It is the social utility of strict liability in inhibiting the dissemination of harmful falsehoods. One has a natural reluctance to open the door to the dissemination of false information which can not serve any purpose other than to vilify the victim. Such reluctance is not only natural, it is right. ...

If we recognize, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability can not be defended and should have been rejected in *Pakendorf.* Much has been written about the "chilling" effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error. I say this despite the fact that some eminent writers ...have criticized the decision in *Pakendorf.* Strict liability has moreover been rejected by the Supreme Court of the United States of America (Gertz v Robert Welch Inc.....The German Federal Constitutional Court

The European Court of Human Rights... The Courts in the Netherlands,... The English Court of Appeal, The High Court of Australia, ...and The High Court of New Zealand (Lange v Atikinson and Australian Consolidated Press NZ Ltd 1997 (2) NZLR 22...

In my judgement the decision in Pakendorf must be overruled. I am, with respect, convinced that it was clearly wrong. That does not mean that its conclusion on the facts of the case is assailable. The defamatory statement was the result of unreasonable conduct in obtaining the facts by incompetent journalists."

[21] In casu, as I have mentioned earlier in this judgement, the plaintiff was not aware that he was being photographed and therefore did not consent to him being photographed and his likeness being published by the Defendants. He is not identified by name or anything in the relevant picture which appears in the front cover of the first Defendant's telephone directory for 1997. He is only seen standing in front of the counter and being assisted by a teller. The plaintiff appears not to be paying much attention to the person apparently serving him and seems to be concentrating on something to his left hand side towards the camera. The nature of the service being rendered to him is not apparent from the still photograph. There are no words accompanying the picture. Other than that he was "not dressed for the occasion", the plaintiff has not said that there is anything objectionable about the picture in question. His main complaint is that it was unauthorized by him and he knew nothing about it until he saw it in the Directory. It is most likely that the defendant did not know whose picture they had published in their telephone directory until the plaintiff forwarded his complaint to the first defendant.

[22] I can find no reason to hold that the taking of the pictures herein and their subsequent publication was malicious. The first defendant, through its servants, however, could have done more to see to it that only persons who willingly participated in the photograph session had their pictures taken and published. That the photo-shoot took place when members of the public had access into the post office service area, was a misjudgement by Mr Matsebula and his crew. Perhaps that area should have been cleared, completely of all persons who were not involved in the exercise. The situation was exacerbated by the fact that none of the

persons who posed as customers to the post office were known to Mr Matsebula and Mr Matsebula targeted no individual person to be photographed.

[23] In the present case, I have said above that perhaps the first defendant's servants could have done more to avoid taking the picture of the plaintiff. This is not the same as saying they were negligent. Certain measures including an announcement had been made to alert all post office users present, of what was afoot and what they were expected to do. Mens rea either in the form of intention or negligence has, in the circumstances of this case not been shown or proven. The publication though unauthorized was innocent. The appropriation of the plaintiff's image or likeness was simply fortuitous. The picture portrays an unidentified person accessing some of the postal services offered by the first defendant. I do not think that the ordinary reasonable person would find the publication of the plaintiff's picture offensive or objectionable in the circumstances.

[24] The lack of an apology by either of the defendants is worrisome. This shall be reflected in the costs order I shall make herein. One would have expected that upon being alerted about the error by the plaintiff, the defendants would have found it prudent to offer an apology to him. They did not and this no doubt polarized the issues between the parties.

[25] In the result, the plaintiffs action is dismissed and I am of the considered view that this is a proper case wherein the court should depart from the general rule that costs should follow the event or result. Each party is to bear its own costs.

MAMBA J