

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3398/04

In the matter between :

TOM MKHATSHWA

PLAINTIFF

AND

SIHLE MAVUSO

1st DEFENDANT

THE EDITOR SWAZI NEWS

2nd DEFENDANT

AFRICAN ECHO (PTY) LTD

3rd DEFENDANT

CORAM MAMBAJ

FOR PLAINTIFF MR. *K.* FAKUDZE

FOR DEFENDANTS **ADV. P. FLYNN**

JUDGEMENT - MAY, 2009

[1] The plaintiff is Thomas Jabulani Mkhathshwa, an adult Swazi Transport operator of EZulwin! area in the Hhohho District. His transport business operates within Swaziland, but at times he is hired by local businesses to transport goods to and from South Africa. Several motor vehicles are used in his business and very often he drives his own trucks on trips undertaken outside Swaziland.

[2] At all times material hereto, the plaintiff's father, who is now deceased, was leasing out some of his offices situated at his home at Ezulwini. One Hunter Vusi Shongwe, a Private Investigator, who gave evidence as the first witness for the Defendants, was one of his tenants. The place also housed or acted as, a repair workshop for the plaintiff's motor vehicles.

[3] On the 6th October, 2004, in the afternoon just around 1.30 p.m., a truck belonging to Builders Discount Centre entered into the said premises and was immediately ushered and or directed by one of the plaintiff's sons Mpendulo Mkhathwa, to park at a certain spot within the premises. Its occupants were Mr Tsabedze and Mr Nkambule both employees of Builders Discount Centre.

[4] Mr Shongwe became suspicious and he sent out one of his assistant investigators to go and find out what was taking place. His assistant returned to inform him that fuel was being drawn from the truck. Armed with his pistol, handcuffs and a camera, he went out of his office to see or investigate this for himself. On arrival at the scene where the truck was parked, he found that the three men mentioned above were siphoning out fuel from the truck into three containers. One of such containers, which appears to be a 20 litre size, was already full of the fuel. He immediately took photographs of what was taking place and when these men tried to run away, he drew his pistol and told them they were under arrest and ordered them not to run away. They obeyed his orders and he handcuffed the two employees of Builders Discount Centre to each other. Mpendulo, who, according to Shongwe was a young man and who was obviously being used by the plaintiff and the two employees of Builders Discount Centre, was not handcuffed or arrested by Shongwe.

[5] The two employees aforesaid were caused to sit on a bench nearby and the Police, Press; in particular the Times of Swaziland and the management of Builders Discount Centre were informed of what had occurred by Mr Shongwe. But before long, the plaintiff came into the

premises and found the two employees seated and handcuffed as described above. Mr Shongwe stated that they immediately asked the plaintiff why he had brought them "to a policeman's house" to which the plaintiff, who ironically appeared very worried, said: "do not worry, I will get you out of this", and hurriedly went into the main house (within the premises).

[6] A few moments later, Mpendulo came to Mr Shongwe and told him that "Mkhulu" - plaintiff's father - wanted to speak to him. Shongwe went to Mkhulu's house where he found him together with his wife and the plaintiff. Mkhulu immediately enquired of Mr Shongwe why he was interfering in the plaintiff's business and Mr Shongwe retorted that what the two employees had done was a crime and it deserved to be exposed and punished. Mkhulu then demanded that Mr Shongwe should release the said employees, failing which his tenancy at the premises would be terminated summarily. The plaintiff is also said to have chipped in to say that, Mr Shongwe "was doing this to them notwithstanding that they had kept him on the premises." Mr Shongwe refused to change his stand, left Mkhulu's house and went to his office. Later the plaintiff got into his motor vehicle and left the premises.

[7] The Manager of Builders Discount Centre came to the scene at about 3 pm followed by the Police an hour later. The first defendant, who worked as a Reporter for the *Times of Swaziland* and its so-called sister publication Newspapers, got to the scene about 2 hours later; at 6pm. The events described above were related to the 1st defendant by Mr Shongwe, who also supplied the newspaper with some of the photographs he had taken at the scene. The story was subsequently published in the *Swazi News* weekly Newspaper on Saturday the 10th October, 2004 under the headline : **HUNTER HUNTS TWO MEN DOWN FOR FUEL**". Alongside that story is another one alleging that Mr Shongwe had been ordered out of the plaintiff's father's premises within twenty-four (24) hours of the incident described above. The headline in this regard read : Hunter

[8] The *Swazi News* publication is published by the second defendant and the 3rd Defendant, who has not been named, save by his title, is its editor. Thulani Thwala testified as such editor and did so immediately before the first defendant who was the third witness called by the Defendants. Both articles above appear under the name of the first defendant.

[9] Both Mr Thwala and Mr Mavuso - the editor and reporter, respectively, told the court that they had taken all reasonable steps to ascertain the accuracy and or truthfulness of the two stories above, before publication. The story about the theft of the fuel and the arrest of the two employees had also been confirmed by the Police who informed the reporter that the arrestees would appear in court on Wednesday the following week.

[10] The Newspaper article stated that the two employees had been caught red-handed draining fuel from their employer's truck and "were about to sell [it] to Mr Tom Mkhathshwa" - the plaintiff.

[11] The plaintiff complains that this article is wrongful and defamatory of and or concerning him inasmuch as the words used

"were intended and were understood by readers of the Newspaper to mean that:

8.1 plaintiff buys fuel illegally from thieves to run his transport business.

8.2 plaintiff is engaged in corrupt practices and is a corrupt businessman."

Plaintiff also makes the point that the article has damaged his "good name and business reputation" and that the said words were made by the defendants well knowing them to be false. Damages in the sum of E500,000-00 are claimed as a result.

[12] In defence, the Defendants deny any wrong-doing. They deny that the relevant article is defamatory of and concerning the plaintiff or that in the

relevant context, the article is wrongful or defamatory. In the alternative, the defendants plead that

"the facts in relation to the plaintiff are true or in essence true, and the publication of the articles was to the benefit of the public and or in the public interest."

It is pleaded further by the Defendants that all reasonable steps were taken to verify the truth and correctness of the story and it was reasonable and in the public interest to publish same and there was no intention to injure the plaintiff thereby.

[13] The plaintiff gave evidence on oath on his own behalf and told the court that he was not present when the fuel was actually siphoned out of the truck. This occurred about 6 km away from his homestead. He said, at the relevant time he was away in Hlathikhulu and first got to know about the incident at about 7pm from his father (Mkhulu) who had telephoned him on his mobile telephone to tell him that Hunter Shongwe and some Police officers had been to his place for some unknown purpose. He said this was on Friday the 08th October, 2004. He insisted that on this day he had not been at the scene of crime, i.e. his father's premises but had been at Hlathikhulu. He said the article had then appeared in the Newspaper on the next day.

[14] The plaintiff is clearly in error in saying that the incident which is the subject of the newspaper article occurred on Friday, 08th October, 2004. The evidence by the defence witnesses, including the dates shown on the photographs taken at the scene by Mr Shongwe, is overwhelming that this occurred on Wednesday 06th October, 2004. Other than that the fuel was to be sold to the plaintiff and that Shongwe told the would-be sellers and would-be buyer that it was wrong to steal the fuel, I am unable to read anything in the article that supports the plaintiff's claim that the publication alleges that he was actually present when the two employees referred to above, were siphoning the diesel out of their truck. There is nothing in the article that suggests or alleges that the plaintiff is a corrupt transport operator who is in the habit of buying "fuel illegally from thieves to run his transport business." There report refers to a single incident about an

attempt to sell fuel to him. That can hardly be referred to as a habit, propensity or practice.

[15] The Plaintiff totally denied being at the scene of crime on the day in question. In fact he erroneously said the incident occurred on the day immediately before the publication of the article. He threw an all-embracing denial of the events in question insofar as it pertains to himself. He was unable, in the face of the evidence by the defence, to account for his whereabouts on the relevant times; the alleged conversation between himself and the employees of Builders Discount Centre upon his arrival at his father's place; the alleged conversation between his father and Mr Shongwe in the former's house and in the presence of the plaintiff. Mr Shongwe's evidence on all these aspects of the case is far superior and cogent than the plaintiff's barren denial. I have no hesitation whatsoever in accepting the evidence of Mr Shongwe that the plaintiff did come to his father's place at the relevant time and that the two conversations I have referred to herein did take place under those circumstances and in the manner or terms as described by him. The arrestees blamed him of being responsible for their arrest. He promised them to get them out of it. In his presence, his father accused Shongwe of interfering with the plaintiff's business by the arrest and report to the police. He, the plaintiff, agreed by silence or impliedly by saying that Mr Shongwe was being ungrateful of their generosity in keeping him at their homestead as a tenant. The conclusion is inescapable. The arrestees came to his father's place at his behest or instructions.

[16] Based on the above assessment of the evidence, the article in question is therefore substantially or essentially true. But, was its publication in the public interest or to the benefit of the public?

[17] The role of the press or electronic media is very crucial in an open, free, plural democratic society. Swaziland through its Constitution professes to be such a society, (see article 79 of the of the Constitution). I

am not unmindful of the fact that the publication complained of was made before the coming into force of our Constitution. The right and duty of the media to inform the public on matters of public interest or concern is a common law right or freedom. The freedom or right of expression by the media or anyone else, is also premised, supported and guided by the right of- the public to be informed on matters of public interest or benefit. The Constitutional provisions only serve to confirm these rights or freedoms.

[18] In the case of **Nomfundo Hlophe and Another vs The Swazi Observer (pty) Ltd and 2 Others** (case no. 3751/06, judgement delivered on 26 May 2009) I quoted the following remarks by Hefer

JA in **National Media Ltd v Bogoshi, 1998(4) SA 1195 (SCA)**

"...but, we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. ...The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks ...Conversely the press often becomes the voice of the people - their means to convey their concerns to their fellow citizens, to officialdom and to government. To describe adequately what all this entails, I can do no better than to quote a passage from the as yet unreported judgement of the English Court of Appeal in *Reynolds vs Times Newspapers Ltd and Others* delivered on 8th July 1998. It reads as follows:

'We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections...and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private^ such that there *in* no public interest in their disclosure. Recognition that the common convenience and welfare of society are best served in this way is a modern democratic imperative which the law must accept. In differing ways and to [p1209] what differing extents the law has recognized this imperative, in the United States, Australia, New Zealand and elsewhere, as also in jurisprudence of the European Court of Human Rights. ...As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognized as its duty. The cases cited show acceptance of

such a duty, even where publication is by a newspaper to the public at large. ... We have no doubt that the public also has an interest to receive information on matters of public interest to the community....'

I concluded that:

"Where, as in this case, there is tension between the right of the press and electronic media to inform the public on matters of public interest and the right of an individual to the protection of his or her reputation, the court would normally rule in favour of subordinating the individual right to the right of the public to be informed. In the words of *Franklyn S Haiman* in his book *SPEECH AND LAW IN A FREE SOCIETY* at page 66, speaking about the invasion of one's privacy,

"...where the communicator is fulfilling the function of informing the public on matters in which it has an interest, the privacy claims of the person who has been publicized must simply be subordinated to freedom of expression."

These words are apposite in this case.

[19] The issue of crime, which is the subject matter of the article under consideration herein is, to my mind, a matter of public interest, benefit and concern, all over the world. That many businesses fail due to theft or fail as a direct result of the greed and illegal activities perpetrated thereon by their employees, is a known fact. It is a matter that concerns the public and therefore must be reported on by the media. The public has an interest to know about crime in its endeavor to fight against it. The public or society can meaningfully wage this fight if it has adequate and accurate information about it.

[20] For the foregoing reasons, the plaintiff was not defamed; the action was dismissed with costs, such costs to include the costs of Counsel to be duly certified in terms of rule 68(2) of the rules of this

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MAMBA J