IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3751/06**

In the matter between:

NOMFUNDO HLOPHE **1st PLAINTIFF**

DUDU HLOPHE **2nd PLAINTIFF**

VS

THE SWAZI OBSERVER (PTY) LTD **1st DEFENDANT**

MUSA NDLANGAMANDLA **2nd DEFENDANT**

PHINDA ZWANE **3rd DEFENDANT**

CORAM **MAMBA J**

FOR PLAINTIFFS **MR. N. FAKUDZE**

FOR DEFENDANTS **MR. Z. SHABANGU**

JUDGEMENT

26th MAY, 2009

[1] At all times material hereto, the first Plaintiff and her mother, the second plaintiff were students at a College in Pietermaritzburg in South Africa. Just after noon on the 26th February, 2006 they, together with their maid were attacked at their rented city apartment, in Pietermaritzburg, by a group of thugs and were sexually molested.

The first plaintiff was stabbed with a knife or such like sharp object about 26 (twenty-six) times on her body.

[2] After their horrifying ordeal, the plaintiffs were rushed to a hospital where they were treated and admitted. The first plaintiff was discharged on the 3rd March, 2006 but before this, an article appeared in the *Swazi Observer Newspaper,* detailing what had befallen or happened to the plaintiffs as described above. The article appeared on the 1st March 2006 edition of the said Newspaper and referred to the plaintiffs by name and revealed all their particulars or identities and also where they lived in Pietermaritzburg.

[3] The Newspaper aforesaid is published and is widely distributed in Swaziland and is also available online. It is owned by the first defendant. The 2nd defendant is its Chief Editor. The article was written by the third defendant who was at the time acting in his capacity and within the scope of his employment as a Newspaper reporter and employee of the first defendant. The article appeared under the headline **"Swazi Student stabbed 20 times in South Africa ...her mother, maid not spared."**

[4] Save that the first plaintiff was not stabbed 20 times (as alleged in the article) but 26 times, the contents of the article are a true reflection of what took place. The story, it is common cause, was published without the knowledge and or consent of the plaintiffs. The article was also published whilst the plaintiffs were in hospital and before they had told their families of their ordeal. These families first learnt or got to know of what had happened to the plaintiffs through this Newspaper article.

[5] The plaintiffs have sued for damages alleging that:

> "12. The said article or publication was wrongful, intentional and unlawful in that it constituted an impairment of the person, dignity and reputation of the plaintiffs and as such was defamatory, lowering the plaintiffs' standing in the estimation of readers of the publication."

In response the defendants have denied that the publication was wrongful or unlawful or that it constituted an impairment of the person, dignity and reputation or the plaintiffs. They further aver that:

> "4.4.1 the article in question was substantially true and in the public interest or for the public benefit;

4.4.2 the article was published in exercise of the Defendants' duty to inform the public which has a corresponding right to receive the information." The Defendants have further pleaded that the publication in question is protected in terms of article 24(1) and (2) (c) of the Constitution of Swaziland.

[6] According to *Jonathan Burchell* in his work **PERSONALITY RIGHTS AND FREEDOM OF EXPRESSION : The modern Actio Injuriarum** at 179;

> "[t]he Law of Defamation seeks to find a workable balance between two equally important rights : one individual's right to an unimpaired reputation, and another's freedom of expression (or society's right to be informed). The law of defamation has, over the years, reflected the constant tension between these two competing rights.

The plaintiff in a defamation action has to prove, on a preponderance of probabilities, that there was publication of defamatory matter (by words or conduct) referring to him or her. Proof of publication of defamatory matter referring to the plaintiff gives rise to two inferences: (a) an inference of unlawfulness or wrongfulness and (b) an inference of animus injuriandi (subjective intention on the part of the individual defendant to impair the plaintiff's reputation, with knowledge of unlawfulness).

The Supreme Court of Appeal in **NATIONAL MEDIA LTD vs BOGOSHI [1998 (4) SA 1195 (SCA)]** has held that members of the Media are not entitled to rely on absence of subjective *animus injuriandi* as a defence because their liability is based on an objectively assessed criterion of the reasonableness or unreasonableness of the publication - a criterion that would include an investigation into whether reasonable steps were taken to verify the accuracy of the information before publication, i.e. whether negligence was present or not. The Supreme Court of Appeal in *Bogoshi* regarded negligence on the defendant's part as a determinant of the legality (or unlawfulness) of the publication rather than as a determinant of fault.

A defendant ... bears a burden, at common law, of proving (on a preponderance of probabilities) a defence excluding unlawfulness. The major defences excluding unlawfulness are: truth, for the public benefit, fair comment, privileged occasion, consent, private defence or necessity. Because of the flexible nature of unlawfulness, there is no closed list of defences excluding this element."

(Footnotes have been omitted by me).

[7] From the above statement or exposition of the law, with which I respectfully agree, it is plain that it is only upon proof of publication of defamatory material referring to the plaintiff that the court would infer that the publication was unlawful or wrongful and was also accompanied by or with an intention to injure the plaintiff in his or her reputation. It follows, I think, that the plaintiff must allege and prove that the publication complained of is defamatory of or concerning him.

[8] In the present case, the substance of the article complained of is that the plaintiffs were brutally attacked, raped and stabbed by thugs in Pietermaritzburg at the relevant time. The accuracy or truthfulness of the story is beyond question. The plaintiffs do not, in their particulars of claim, set out or allege how or in what way or manner is the article in question defamatory of or concerning them. This, they had to allege and prove. The plaintiffs were unable to point out any words in the article that have a defamatory meaning either in their ordinary meaning (per se) or secondary meaning (an innuendo). In essence, the plaintiffs' case is that the mere publication of the story about or concerning their plight or unfortunate experience, without their authorization or consent is defamatory. I can not agree. In fact the summons is exceptionable or excipiable as disclosing no cause of action as it fails to allege in what respect the publication is defamatory of them. The words used in the publication as a whole convey to all and would be understood by the ordinary reasonable and informed reader that the plaintiffs were the unfortunate victims of crime. Nothing more. There is nothing implied or even vaguely suggested in the words used in the article in question; e.g. that somehow the plaintiffs brought their ordeal upon themselves.

[9] In the light of the above factual situation and the deficiencies in the plaintiffs' pleadings, this court is of the considered view that no right-thinking person, or the so-called ordinary newspaper reader, or "substantial or respectable sections" of our community would find the article complained of defamatory of and concerning the plaintiffs - in the sense that it lowers them in their estimation. An article such as the one under consideration herein would, in my judgement, not arouse hatred, ridicule, obloquy or contempt or cause the plaintiffs to be shunned, pitied or avoided, but on the contrary, it would arouse or evoke support, even if only moral support, and a public desire to fight against crime. I do not for a moment believe that in this day and age, a "substantial and respectable section" of our

society believes that a victim of rape is tainted by the crime and that such victim should be ashamed as a consequence or be stigmatized and marginalized by society as a result.

[10] It is my finding that the particulars of claim herein are incapable of being defamatory. Absolution from the instance was granted and I ruled that costs shall be payable as if an exception had been successfully raised.

[11] As pointed out in my ex *tempore* judgement delivered immediately after submissions by counsel, whilst the article complained of has not been shown to be defamatory of and concerning the plaintiffs, the timing and manner of its publication, and in particular the failure by the defendants to afford the plaintiffs the chance to be the first persons to divulge or reveal their plight to their next-of-kin or loved ones, was in utter bad taste. Even if the story was considered as an exclusive, the so-called "scoop" in newspaper jargon, by the defendant, a human touch to it was still needed. The defendants were found wanting in this regard. The article is a very insensitive piece, totally lacking in *buntfu.*

[12] I should say that even if I am wrong on my analysis of the facts and conclusions on both law and fact above, plaintiffs claim must still fail based on the right and duty of the information media to inform the public on matters of public interest. Article 24 (1) and (2) of our Constitution provides that;

> "24(1) A person has a right of freedom of expression and opinion. (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say ...
> (c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)

I, with due respect, endorse and align myself with the view expressed by Hefer JA in the *Bogoshi* case (supra) where the learned Judge of Appeal stated as follows:

> "...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 is 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....'

[13] 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."

MAMBA J