

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 161/09

In the matter between :

THOBILE NDZIMANDZE

APPLICANT

AND

THE EDITOR TIMES OF SWAZILAND

FIRST RESPONDENT

AFRICA ECHO (PTY) LTD

SECOND RESPONDENT

CORAM

MAMBA J

FOR APPLICANT

MR T.R. MASEKO

FOR RESPONDENTS

MR M. SIBANDZE

**JUDGEMENT 20th
January, 2009**

[1] Franklyn S. Haiman in his book "**Speech and Law in a Free Society**" (at page 164) states that;

"If communication is so vital to the functioning of a free society as to warrant the extraordinary protections afforded to it by the [Constitution], it must have the power - we are often reminded for harm as well as good. If speech can enlighten, it can also exploit. If literature can enrich our values, it can also debase them. If pictures can enhance our sensitivities, they can also dull them."

The Applicant, it would seem, does not share these views.

[2] The story that has culminated in these proceedings broke out into the public domain about a week ago and has been the subject of at least two publications by one of the local newspapers. The gist of the story was that a woman, whose identity was not revealed, had smeared another woman who was her love rival, that is to say, with whom she shared the affections of a married man, -with human waste. Today the applicant appeared in court before a Magistrate on a criminal charge of assault pertaining to the aforesaid incident. On being arraigned, she pleaded not guilty to the charge and the matter was postponed to the 3rd February 2009.

[3] The first Respondent is the Editor of the Times of Swaziland, a newspaper duly registered in terms of the laws of Swaziland and the second Respondent is Africa Echo (Pty) Ltd, the publisher of the said newspaper.

[4] It is common cause that when the applicant stepped out of the court room, a photo-journalist employed by the 2nd Respondent photographed her. The said photographer was acting in the course and within the scope of his employment as such. He did so without first seeking and or obtaining the Applicant's consent or permission.

[5] On enquiry by the Applicant, she was told by the servants or agents of the Respondents that she had been photographed for purposes of publishing her picture or pictures in the next edition of the Respondent's newspaper, which circulates in Swaziland and is also available online. She immediately objected and protested about this to the Respondents but she has failed to persuade them not to publish her picture or photograph in their newspaper as indicated or advised by the Respondents. The upshot of their refusal to back down is this urgent application wherein she seeks an order restraining and interdicting the Respondents from publishing her picture

"taken at the Magistrate's court on the 20th January, 2009" In their newspaper.

[6] The Applicant avers that the matter is urgent because the threatened publication of her picture or likeness is due tomorrow and once it is published, there would be no way of reversing it and the damage to her name and privacy, which she seeks to protect would have been done. She argues that because she did not consent to her being photographed for purposes of the intended publication, the taking of her picture and its or intended or threatened publication constitutes an invasion of her privacy and an impairment of her dignity, good name or repute. She avers further that publication of her picture or photograph is not in the public interest. She further avers that the general readership of the respondents' newspaper would be able to identify her by her picture in the newspaper. Once identified, she argues, the public would lynch or physically harm her for the acts which constitute the assault charge referred to above. She, however, lays no factual bases at all for her fears or belief. I do not think that this is an issue that should detain the court any further. There is no merit to it at all and it is rejected.

[7] The Applicant has cited article 14(1)(c) of the Constitution as the foundation for her relief based on the invasion of her privacy. She has also referred to article 18 and article 22 of the Constitution in support of her argument. I quote these provisions in full hereunder: "14(1)(c) The fundamental human rights and freedoms of the individual enshrined in this chapter are hereby declared and guaranteed, namely -

- (a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law;
- (b) freedom of conscience, of expression and peaceful assembly and association and of movement;
- (c) protection of the privacy of the home and other property rights of the individual;

- (d) protection from deprivation of property without compensation;
- (e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and
- (f) respect for rights of the family, women, children, workers and persons with disabilities.

18(1) The dignity of every person is inviolable. (2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment."

And article 22 provides that;

"22(1) A person shall not be subjected -

- (a) to the search of the person or the property of that person;
- (b) to the entry by others on the premises of that person;
- (c) to the search of the private communications of that person, except with the free consent of that person first obtained." With due respect to the Applicant, I am unable to find the relevance of article 22 in this application and in fairness to her Counsel, he did not base his argument before me on these provisions and therefore there shall be no further reference thereto.

[8] The crux of the Application is stated in paragraph 6.3 of the

Applicant's founding affidavit where she states that:

"I respectfully submit that while the respondents may report about the case as court proceedings are a public process, they have no right to publish my name and my photograph without my consent as this will violate my rights to privacy and dignity..." (The underlining is mine).

[9] Article 79 of our Constitution declares that the system of government for Swaziland is to be a democratic one. One of the essential elements, attributes or cornerstone of a free or open democratic society is an independent, transparent and accountable judiciary. Article 62 and 141 of the Constitution provides for such judiciary. As a direct consequence of the transparency and accountability aspect of the judiciary, all court

proceedings should generally be held in public. The public has a right to know what the courts are doing and how they do what they do. The information media, in all its forms have a right and duty to inform the public on what goes on and who goes in and out of our courts. This much, I think, is common cause. There are of course exceptions to this general rule such as for example those pertaining to state security or sexual assault cases involving young children.

[10] The applicant has not said that there is anything inherently or intrinsically offensive or objectionable about the pictures that are due to be published by the Respondents. Her brief appearance in court today was not in camera, but in open court. She was there - in the public gaze - for all present to see. She did not appear incognito. The people who were in court and saw her in the flesh neither sought nor obtained her permission or consent to see her. She was an integral part of the open court proceedings for that day, in particular in the proceedings against her as the accused person.

[11] Can she then, in the circumstances of this case, legitimately claim that her right to privacy and dignity will be violated by the publication of her picture taken at the court premises immediately after the adjournment of her case? I do not think so.

[12] Even applying the most liberal and purposive interpretation or approach to article 14(1) (c) of the Constitution and holding that the expression or phrase "other property rights of the individual" includes the Applicant herself or her picture or likeness or image when involved in a commercial publication such as in the present case, this right cannot supersede or override the public nature of the court proceedings she featured in and the right and duty of the Respondents to inform the public about what goes on in our courts.

She may not determine for the public what is or is not newsworthy for it.

[13] The case of **PRINSLOO v RCP MEDIA LTD t/a RAPPORT, 2003 (4) SA 456 (T)** which was cited by both counsel in support of their respective submissions, save for the general principles laid down therein, is not in point on the issue before me. First, the pictures sought to be returned to Applicant had been stolen or taken away from the Applicant's agent's shop at which they had been handed in to be developed. Secondly, the pictures depicted the applicant and his common law wife and another woman engaging in intimate sexual activity. Thirdly, the images captured in the photographic and electronic material pertained to private moments involving the applicant in his bedroom and "there was no public interest in revealing graphic insights into the bedrooms of advocates." (The applicant and his common law wife were both advocates of the Supreme Court of South Africa.)

[14] In casu, there is no allegation whatsoever that the pictures in question, on any one of them is in any way in bad taste or in any way portrays the applicant in a bad or false light. I can not therefore see how, their mere publication would violate her dignity.

[15] The case of **La Grange v Schoeman and Others 1980 (1) SA 885 (E)** seems to be in point in this application. In that case the applicant, a freelance photographer had been commissioned by the EASTERN PROVINCE HERALD Newspaper to supply it with photographs of inter alia, the first and second respondents for purposes of publication in its publication. Both respondents were police officers and it had been alleged in a civil trial that was pending, that they had assaulted the husband of the plaintiff and thereby caused his death. When the applicant tried to take pictures of the respondents, he was manhandled and threatened with further violence should he publish the respondents' photographs in the newspaper without their consent.

The respondents stated that publication of their pictures taken in public but without their approval was an intrusion on their privacy and dignity. They also argued that as members of the security police, their lives were in danger because of the allegations made against them in the trial. The court ruled that whilst the news reports on the court proceedings were privileged, if a fair and accurate account thereof was published, no such privilege attached to the publication of the respondents' photographs.

Kannemeyer J at 893G-895C stated as follows:

"In my view the facts of this case take it out of the ambit of the ordinary case of the unauthorized publication of photographs. This is not merely a case of a person who, for some reason not of his own asking or making, has, in the opinion of the news media, become "newsworthy". Here the two respondents have achieved notoriety because, according to the applicant, they have been "nominated" by counsel for Mrs Mohapi as the policemen who assaulted her husband while he was in police custody,... thereby causing his death. To say of a person that he has assaulted one in his custody and thereby caused his death is clearly defamatory. The statement imputes not only criminal conduct but also an abuse of power which would not be countenanced in any civilized community. However, when such an allegation is made in a court of law, in the course of legal proceedings, it is privileged. If the press publishes a fair and accurate report of such legal proceedings again a privilege attaches thereto. ... In my view, however, there is a difference between the publication of reports of judicial proceedings in which averments injurious to someone are made and the publication of the photograph of the person concerning whom the injurious remarks are made. Accepting without reservation the right of the public to be informed of what takes place in courts of justice and the desirability that they should be so informed, the question remains whether the public has the right to be informed, by means of a photograph in the newspaper, what the person concerning whom injurious statements are made in court, looks like. For this can be the only reason for the desire to publish the photograph of such a one, and publication without some explanatory nexus or juxtaposition between the photograph and the press report would be pointless. The only reason that any newspaper can require the photograph is, in effect, to be able to say to its readers: "This is what the men who are alleged to have assaulted the late Mr Mohapi and who caused his death look like."

I am unpersuaded that in our law, "community custom" - to adopt the words used in the "American Restatement" - gives publishers a privileged right "to satisfy the curiosity of the public" as to the appearance of the first and second respondents in the instant case. ...

While the first and second respondents cannot object to the publication of a report of the legal proceedings during which they were alleged to have been Mr Mohapi's assailants there is no justification in law which requires them to suffer the added indignity and inconvenience of having

their photographs published in the press to satisfy curiosity and to make it possible for the public at large to identify them, as they go about their lawful avocations, as the people referred to in the press reports of the Mohapi case. If they are able to be so identified their right to "tranquil enjoyment of peace of mind" will be assailed for their privacy will be invaded and they will be open to possible ill-will and disesteem. Further they will not be secure against aggression upon their persons. In this regard the fears mentioned by these two respondents for their personal safety and that of their families can not be brushed aside.

In my view, therefore, 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."

[16] I am in respectful disagreement with the court on this point. Its reasoning is, with the utmost due respect, though succinctly articulated, rather artificial and unconvincing. The result constitutes an unwarranted restriction or invasion on the privilege pertaining to the public nature of public court proceedings.

[17] The **La Grange** decision is, in my view, properly criticized by **Jonathan Burchell** in his work PERSONALITY RIGHTS AND FREEDOM OF EXPRESSION The Modern Actio Injuriarum (1998) at

421 where the learned author states that:

"Surely the photograph of a person involved in a controversial trial constitutes "fair and accurate reporting"! As Prosser, in discussing the privilege attaching to reports of public proceedings, puts it:

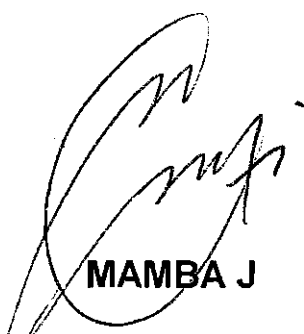
The privilege rests upon the idea that any member of the public, if he were present, might *see and hear for himself*, so that the reporter is merely a substitute for the public eye - this, together with obvious public interest in having public affairs known to all."

[18] An individual, who is not a public figure properly so-called, has a right "to be let alone" in the privacy of his home and in the conduct of his private life. Accepting for the moment that the Applicant is a private person, the story that she seeks to sanction by the restraint on the publication of her

pictures, relates to matters of public interest and information. It relates to the court proceedings I have referred to above. The Applicant has no objection to the publication of the story pertaining to her criminal trial. She concedes that court proceedings are matters of public interest and information.

[19] I am of the considered view that a story, its value, content and the meaning of the written word is enhanced, complemented, augmented, rounded up, completed and or made whole by an appropriate picture. I refer to an "appropriate picture" because if the picture, just of itself, for one reason or the other, subjects or exposes her to public scorn, obloquy or ridicule or is in bad taste, or places her in a false light, this court would be enjoined to come to her aid and restrain its publication. There is nothing of the sort in this application. A litigant's name, picture and such further particulars are as newsworthy and relevant in the overall story as the rest of the facts surrounding the court proceedings.

[20] For the foregoing reasons, the Applicant has failed to show that her right to privacy is about to be infringed or violated by the Respondents. The Application is dismissed with costs.



MAMBA J