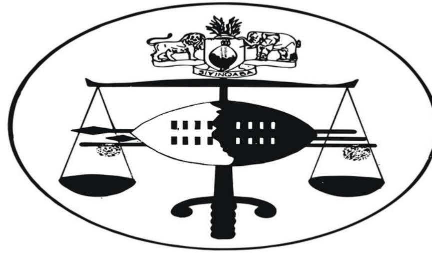

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1912/11

In the matter between:-

SIBONGILE PHUMZILE SIFUNDZA **Plaintiff**

and

BHEKI THWALA **Defendant**

Neutral citation: *Sibongile Phumzile Sifundza v Bheki Thwala* (1912/11) [2012] SZHC…(14th March 2012)

Coram: HLOPHE J

Heard: 12th December 2011

Delivered: 14th March 2012

For the Plaintiff: Mr. T. C. Mavuso

For the Defendant: No appearance

Summary:

Civil Procedure – Defendant served with a combined summons issued by Plaintiff who claims to have been defamed- Defendant not entering an

appearance to defend – At the expiry of the dies accorded him by the rules of court, Plaintiff seeks leave of court to lead oral evidence in proof of damages as well as a judgment against the Defendant.

Defamation – Plaintiff, a widow, claims to have been defamed by the Defendant on three incidents of publication where she was accused of having killed her husband- Publication –Words published defamatory on their own- When publication suffices – Once proved, a presumption of unlawfulness and Animus injuriandi exists.

Publication proved in relation to two of the incidents – quantum of damages – considerations for fixing an appropriate award of damages- Court must as best it can make a realistic assessment of what it considers just and fair in all the circumstances.

JUDGMENT

[1] Following the failure by the Defendant to enter an appearance to defend action proceedings instituted by the Plaintiff against him by means of a combined summons, which the return of service filed by the Deputy Sheriff alleged was served personally upon him, the Plaintiff set the matter down for leave to lead oral evidence and for default judgment in the amount claimed to be thereafter entered against the said defendant.

[2] In her particulars of claim the Plaintiff alleged that the Defendant published defamatory words of and concerning her on three different occasions. The alleged defamatory statements were allegedly made on a date that could not be recalled in November- December 2010, and twice on the 28th May 2011. The details of the incidents complained of are set out herein below.

[3] As a result of failure to defend the matter, the Plaintiff was led in evidence to prove her case. The Plaintiff informed the court that she was widowed, following the death of her husband, one Majembeni Msebenzi Sifundza, in August 2010. She gave evidence under oath and stated that after having painted her house at Vuvulane where she was staying with her children, and in the neighbourhood of the Defendant, the latter's dog, dirtied her painted walls whilst trying to catch the moth and bees attracted to the light from her house. Consequent to this she had gone to the Defendant to complain about the actions of the dog which she reasoned had to be put on the leash. She had tried several times to meet the Defendant over this until she eventually managed.

[4] It would appear the Defendant was not happy with this because after having said he had expected her to report a case against him, a suggestion she said she refuted strongly owing to their not having discussed the matter prior as neighbours, the Defendant is said to have come to the Plaintiff's yard at night and shouted certain defamatory words of and about the Plaintiff. In fact as he was shouting such words, he was blowing the trumpet known as a vuvuzela. The exact words he is said to have uttered were in Siswati and were as follows:-

> "*Kuyangenyanyisa kutsi lomfelokati wala kulelikhaya angene emabaleni akitsi agcoke tinzilo, ikakhulukati nje ngobe wabulala indvodza yakhe, nababe wami, kusho kutsi nyalo sewufua kubulala mine*".

A direct translation of the same words to English is as follows:-

> *"I get offended when the widow from this homestead enters the grounds of my home clad in her mourning clothes, especially because*

she killed her husband and my father; it means that she now wants to kill me".

[5] Although she claims that the Defendant was blowing a trumpet (vuvuzela) and shouting when uttering the foregoing words, the evidence reveals that the only person who heard the exact words, particularly the alleged defamatory ones, was the Plaintiff only.

[6] The plaintiff's son who gave evidence as the second Plaintiff witness (PW 2) informed the court that although he overheard the disturbing conduct by the Defendant on the night concerned, (that is the shouting and blowing of the trumpet), he could not hear the exact words by the Defendant as he was sleepy. The court has not been informed of anyone, other than the Plaintiff herself, who heard the exact words, what they were, including whether he or she believed them. I can only comment in passing that an essential requirement of defamation is publication, and that where there is no such publication to a third person or others other than the Plaintiff herself, there can be no defamation. I shall return later in this judgment to this aspect of the matter after I would have summarized all the alleged incidents of defamation.

[7] The other incidents of defamation attested to by Plaintiff as having been made of and concerning her by the Defendant are now being turned to. I clarify that she attested to not having personally heard these but that they had been told her son (PW2) and daughter (PW3) by the Defendant. Owing to the fact that the two confirmed the words, uttered, I shall state them below. It suffices for now to say that the words

complained of were told to the Plaintiffs aforesaid children on two different occasions although on the same day, the 28th May 2011.

[8] To Plaintiff's son by the name of Martin Sifundza, PW 2, the Defendant is said to have uttered the defamatory words set out herein below of and concerning the Plaintiff. It shall be noted this was at a time when Plaintiff's son, whilst in the company of about five other boys of the area, had gone, as per usual practice, to the Defendant's house to watch soccer. It was whilst soccer was being watched that the defamatory words complained of were allegedly uttered;- which were as follows:-

> "*Hamba lakhaya wena, futsi nje wena namake wakho nacosha Celani umnakenu lekhaya kini, ngobe nifuna kudla imali ye- estate ya Majembeni lowabulawa ngunyoko*".

A translation of the words is that:-

> "*You leave my parental homestead. After all you and your mother chased away your brother Celani from your family home because you both wanted to enjoy the (proceeds) money from Majembeni's estate, whom your mother killed*".

[9] On the same day the foregoing defamatory words were made to Martin Sifundza PW 2, the Defendant is alleged to have uttered the words set out hereunder, and concerning the Plaintiff to Plaintiff's daughter by the name of Siphephile Sifundza, PW3 herein, who was alone at the time.

> "*Ngisandza kucosha bhuti wakho Martin, ngobe bana make wakho, bacosha Celani, ngekutsi make wakho angafuni kwatiwe kutsi yena wabulala Majembeni*".

A translation of the words into English is as follows:-

> *"I have just chased away your brother Martin because in concert with your mother they chased away Celani because your mother does not want people to know that she killed Majembeni"*.

[10] As indicated above, both Martin Sifundza and Siphephile Sifundza, gave evidence respectively as PW 2 and PW 3 and confirmed the evidence given by their mother about them or put differently about their hearing the defamatory words made of their mother. Although the words are not the same in each incident, the sting remains the same however, being that the Plaintiff was a killer responsible for her husband's death or put differently, that the Plaintiff killed her husband, Majembeni.

[11] There can be no doubt that the words uttered by the Defendant at least in so far as they attested that the Plaintiff killed her late husband were *perse* defamatory. In other words their defamatory meaning was not dependant on some interpretation or an innuendo, which in any event had not been pleaded. The question that arises in such circumstances to enable the court determine whether or not there was defamation and therefore liability, is whether there was publication of such words. I say this because although there are several elements required to prove defamation, the position of our law and as stated at paragraph 6 above, is that Publication of defamatory words or conduct referring to a particular Plaintiff, is an essential requirement which gives rise to two rebuttable Presumptions or inferences which are a presumption of unlawfulness and a presumption of *animus injuriandi* (intention).

Jonathan M. Burchell in his book, ***The law of Defamation in South Africa, 1985 Publication, Juta, page 67***, puts the position as follows:-

> "*In the South African Law of Defamation, the publication of defamatory words or conduct referring to the Plaintiff gives rise to two rebuttable presumptions (or inferences): A presumption of unlawfulness and a presumption of animus injuriandi*".

[12] Publication itself has been defined as "the act of making known a defamatory statement or the act of conveying an imputation by conduct, to a person or persons, other than the person who is the subject of the defamatory imputation"; according to John Burchell's, ***The Law of Defamation in South Africa" at page 67***.

[13] I therefore need to determine if in all the alleged instances of defamation referred to above there was any publication of the defamatory words. As regards the November- December 2010 incident no evidence was led of any person who heard the defamatory words other than Plaintiff herself. For publication to suffice authority is abound that the defamatory words should be made known to someone else other than the Plaintiff herself.

[14] The statement from Burchell's book referred to above at page 67 says as much and is echoed by such cases as ***Foodworld Stores and Others v Allie [2002] 3 all SA 200 (c) at 209 (g)- 210 (d***) as well as ***Bongani Makhubu v Super Spar Matsapha case no. 1766/06*** at page 4. Although in this matter there was shouting, of the words complained of there is no proof that anyone else heard them other than the Plaintiff herself. In fact her own son who was in the same house with her did

not, as he states in his evidence that he did not hear the exact words uttered although he was disturbed by the noise made by the Defendant.

[15] Since there is no proof that publication was made to a third person on the November- December 2010 incident, I am of the considered view, it cannot be said that on the said incident defamation has been proved as the matter fails on the first hurdle being that of publication. The point I am making is that although there was shouting I cannot assume that same was heard by third parties (particularly the defamatory words) given that the uttering of words without their being understood by those who hear them amounts to no publication in law. ***Sutter v Brown 1926 AD 155 at 164*** is instructive in this regard.

[16] The same thing however cannot be said as concerns the incident of the 28th May 2011. I have no hesitation there was publication because the defamatory words about the Plaintiff were published to the latter's son PW 2 and five others. I have no doubt from the evidence of PW 2 that the five boys, who were with him, heard the defamatory words. All these people were distinct from the person to whom the defamation was directed or was about.

[17] As publication was established in this regard, it follows that the other elements or requirements of defamation have to be presumed then. These are the unlawfulness and *animus injuriandi*. The case of ***Smith N. O.*** and ***Lardner- Burke N.O. v Wonesayi 1972 (3) SA 289 (RA) at page 300***, is instructive in this regard.

[18] The Defendant did not defend the matter which means that the presumptions of unlawfulness and *animus injuriandi* have not been rebutted.

[19] As a result of the foregoing considerations the plaintiff has proved that following the publication of the defamatory statements to her son and the five other boys, on the 28th May 2011, she was defamed by the Plaintiff.

[20] When the Defendant uttered the defamatory words referred to above to the Plaintiff's daughter, Siphephile Sifundza, there was in my view publication even though such publication was limited to the Plaintiff's daughter aforesaid as she is a person other than the plaintiff to whom the words were directed. As stated above, the said publication brought with it the presumption of unlawfulness and intention (animus injuriandi) on the part of the Defendant. The Defendant did not defend the matter which means that the presumption has not been rebutted.

[21] A finding is therefore inescapable that on the 28th May 2011, the Defendant published on two different occasions, defamatory statements of and concerning the Plaintiff, and thereby defamed her.

[22] I need to mention one more aspect of the matter which is that after the November- December 2010 incident of shouting at night the words to the effect that the Plaintiff had killed both her husband and defendant's father, Defendant had been reported to the Police where after the issue was deliberated upon in the Swazi Court resulting in him being fined a sum E 150. 00 upon being convicted. It is therefore disturbing to note

that notwithstanding the disapproval of his conduct by the court aforesaid, the Defendant still found it appropriate to publish the same defamatory statements of and concerning the Plaintiff. This should have a bearing on the quantum of damages.

Quantum of damages:

[23] Given the conclusion I have come to I am now required to consider an appropriate award to be accorded Plaintiff. The position is now settled that the determination of damages is a function primarily for the trial court. See in this regard ***Van DerBerg v Coopers & Lybrand Trust (PTY) LTD and Others 2001 (2) SA 242 at 259 E***.

[24] The Plaintiff's evidence that she was a commercial farmer, who lives in a Community of other farmers, stands unchallenged including her denial she ever killed her husband. She testified further that the Defendant's utterances have created tensions between her and her in-laws including her children. She speculated she was likely to be deprived of the farm she was operating by her in laws as it was property belonging to the estate of her late husband, yet same was her source of livelihood.

[25] I have taken into account however that, the publication was limited to a few members of her community and that it was also made to her own children. There is also no evidence that the defamatory statements were believed by the people to whom they were made or even that she has

been lowered in the estimation of members of her community except for the tensions she referred to as existing between herself and her in-laws. I have however considered the permanence of the stigma resulting from the defamation.

[26] It is a factor to consider as well that the Defendant never apologized to the Plaintiff. This he never did prior to her issuing summons or even afterwards. In fact the Defendant's conduct of publishing the defamatory statements even after having been fined by the criminal court says a lot about his attitude towards the Plaintiff and calls for censure.

[27] I am alive to the fact that in the award of damages in defamation matters, no two cases are likely to be identical or sufficiently similar so as to draw similar awards. In fact it was in consideration of this observation in ***Van Der Berg vs Coopers & Lybrand Trust (PTY) LTD and Others 2001 (2) SA 242 at 260 G-H*** that the learned Judge had the following to say:-

> "*The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The results represent little more than an enlightened guess*".

[28] Having weighed up all the circumstances of the matter, I am of the view that a sum of E 40 000.00(Forty Thousand Emalangeni) will be an appropriate award of damages in this matter.

[29] Consequently I now make the following order:-

29.1 Defendant be and is hereby ordered to pay Plaintiff the sum of E 40 000.00.

29.2 Defendant be and is hereby ordered to pay Plaintiff interest on the above sum fixed at 9% per annum from date of Judgment to that of payment.

29.3 Defendant be and is hereby ordered to pay the costs of suit.

Delivered in open Court on this the ……day of March 2012.

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N. J. HLOPHE

JUDGE