



**IN THE HIGH COURT OF SWAZILAND**

Case no. 1547/2007

In the matter between:-

**NSIBANDE GIRLIE THULIE**

**Plaintiff**

and

**SWAZILAND ELECTRICITY  
BOARD**

**Defendant**

**Neutral citation:**        *Nsibande Girlie Thulie v Swaziland Electricity  
Board (1547/07) [2013] SZHC124*

**Coram:**                        HLOPHE J

***Summary:***

*Action Proceedings – Claim for defamation –Defendant’s employees, whilst acting in the course of their employment allegedly referred to the Plaintiff as a thief –Whether there was publication of defamatory statements –Whether a*

*prima facie case has been made –Absolution from the instance –Whether case for absolution made.*

## **JUDGMENT**

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- [1] The Plaintiff instituted action proceedings against the Defendant, claiming that whilst acting within the scope and course of their duties, certain employees of the Defendant defamed her by allegedly referring to her as an old thief who had stolen electricity. The Plaintiff contends that by referring to her as a thief the Defendant through its employees was alleging *inter alia* that she was untrustworthy and or dishonest. As a result of the alleged defamation the Plaintiff claimed to have suffered damages in the sum of 2 Million Emalangeni.
  
- [2] The Plaintiff further claimed that the Defendant’s employees aforesaid went on to disconnect electricity supply to her shop, causing her stock particularly pork contained in her deep freezer to go bad to her prejudice. For the loss of income engendered by the pork going bad, the Plaintiff claimed to have lost a sum of E4 200 .00 and moved this court to award her same.
  
- [3] The Plaintiff went on to claim interest fixed at 9% per annum from the Defendant on each one of the claims referred to above. The Plaintiff further claimed costs of suit.

[4] Without herself expressly saying so, it is apparent from the tone of the pleadings that Plaintiff's case is founded on an *impendo* given that she alleges that over and above her being called a thief, it was understood by the people of her area as well as those from Defendant's place of work that she was a dishonest person without moral fibre who used to interfere with electric metre readings so as to have them record a lower amount than that really due.

[5] In its papers, the Defendant did not dispute the defamatory meaning attached to the words attributed to the latter's employees. It also did not dispute that its employees had disconnected Plaintiff's electricity supply. After admitting that its employees had mistakenly disconnected the electricity supply to the Plaintiff's place, it was denied that the Defendant's said employees had called Plaintiff an old thief. It was pleaded in the alternative that if the employees did utter such a statement they then did so outside the course and scope of their employment with the Defendant.

[6] When trial of the matter commenced the Plaintiff called three witnesses in all, after which the Defendant applied for absolution from the instance contending that the Plaintiff had failed to make out a *prima facie* case against the Defendant which entitled them to the case against them being dismissed there and then.

[7] The case as put forth by the Plaintiff's witness was that on or about December 2005, two of Defendant's employees, namely Mfanzile

Masuku and Steven Nxumalo came to her business place at an area called Mahlangatsha or Sibovu, whilst driving in a vehicle belonging to the Defendant. According to the Plaintiff upon their arrival the said employees abused her verbally and referred to her as an old thief who should be ashamed of herself. They alleged that she had stolen electricity by illegally connecting and tapping into the Defendant's line. She said when these accusations referred to above were being leveled against her, she was in the company of her neighbours and some members of her family who heard all that was being said. The two employees she alleged went on to disconnect Plaintiff's electric supply.

[8] Plaintiff denied having at any stage illegally connected electricity from the Defendant's lines or even stealing same at any point. With her electricity having been disconnected she said she called one of her sons, Mduduzi Magagula, a police officer to accompany her to the Defendant's Malkerns Depot, which was Defendant's local service station. Upon arrival at the said station, she says that the Defendant's attendant, also shouted at her in the presence of several of her colleagues and other members of the public who had come for various queries, saying that she was an old thief who needed to be ashamed of herself.

[9] She said her explanations she had not stolen electricity or connected illegally into the Defendant's line did not yield fruits as instead she was referred to the regional offices in Manzini where she was required to explain herself. It was during that time that she managed to establish

that in actual fact, the employees who came to her place had disconnected for a wrong party as the disconnection was meant for a neighbour to the Plaintiff, one Benjamin Maphumzana Sibandze.

[10] She led three further witnesses who confirmed the incidents of the reference to her as a thief and that of an acknowledgment by the company, the Defendant, that they had disconnected for a wrong party. Nobuhle Magagula, a daughter to the Plaintiff informed the court that she was at home with her mother the day the two employees of the Defendant arrived and started accusing her mother, referring to her as an old thief who was not ashamed for having stolen electricity or for having illegally connected into Defendant's electric line. She says this was in the presence of members of her family and neighbours. As they continued with their accusations, the said employees climbed the poles and went on to disconnect the electric supply to the Plaintiff's shop.

[11] As they effected the disconnections, there were pork carcasses kept in Plaintiff's deep freezer. The said pork went bad and had to be discarded. Each one of the said pork carcasses cost E 2 100.00 of which both of them cost E 4 200.00. This latter amount represented the loss of income Plaintiff claimed to have suffered as a result of her stock aforesaid going bad.

[12] PW4, one David Magagula, informed the court that he was a son to the Plaintiff, a Police Officer, in terms of work. He said he was at work when he was called by his mother who informed him that her electricity

had just been disconnected by the employees of the Defendant who went on to accuse her of being a thief yet she was innocent of the said allegations. His mother went on to call him to accompany her by going to the Defendant's local depot to resolve the problems. It was whilst at the said depot that he said he heard the lady attendant accusing his mother of being an old thief who had stolen electricity by illegally connecting to the Defendant's electricity lines. This she said was in the presence of several of Defendant's employees and members of the public. Because of this view, which he says was wrongly held of his mother, as she had never illegally connected into Defendant's line and therefore had not stolen electricity, they were made to go from one place to the other at the Manzini Regional Headquarters of the Defendant. It was to eventually transpire that the Defendant's employees had disconnected for a wrong party because the person who had allegedly illegally connected to Defendant's electricity was a certain Benjamini Maphumzana Sibandze and not the Plaintiff.

- [13] As indicated above, that the disconnection was against a wrong party was confirmed by PW2, one Benjamin Dlamini, a former employee of the Defendant who informed the court that he was still an employee of the Defendant company at the time and had noted that a wrong party had been disconnected. He stated that the Plaintiff had not illegally connected or stolen Defendant's electricity and that disconnecting her was improper. According to this witness the employees of the Defendant who disconnected the electricity were Mfanzile Masuku and Mfanasibili Sengwayo, who had been detailed by him among others to

disconnect for Benjamin Maphumzane Sibandze and not the Plaintiff. Whereas the Plaintiff had stated that the witnesses who disconnected her electricity supply were Mfanzile Masuku and Steven Nxumalo, this witness stated that the said employees were Mfanzile Masuku and Mfanasibili Sengwayo. Furthermore the date mentioned in the evidence of the Plaintiff was different from that mentioned in the pleadings. Whilst the date was in the pleadings said to be December 2006, in the evidence it was alleged, particularly by Plaintiff to be December 2005.

[14] At the close of the Plaintiff's case the Defendant's attorney, Mr. Shabangu moved an application for absolution from the instance contending that no *prima facie* case had been made against the Defendant for three reasons. Firstly that the employees of the Defendant who allegedly disconnected the electricity and went on to allegedly accuse the Plaintiff of being an old thief who should be ashamed of herself as alleged in the pleadings were different from those set out in the evidence. This, contends Mr. Shabangu means that a *prima facie* case had not been established as the people who allegedly defamed her differ in her evidence from those pleaded. It made it worse according to Mr. Shabangu that no amendment of the pleadings was made before the Plaintiff closed its case.

[15] On the second point it was contended by Mr. Shabangu that the dates on when the alleged incident occurred was also different in terms of the pleadings and the evidence delivered in court. This he submitted, also had the effect of the Plaintiff failing to establish a *prima facie* case.

[16] He submitted that according to the pleadings which remained unamended, the date on which the incident allegedly occurred was December 2006 yet in the evidence such date was December 2005. This difference it was submitted had the effect of making the Defendant fail to prepare for the case it was to meet.

[17] The third ground for the absolution from the instance by Mr. Shabangu was that for defamation to succeed there had to be established *animus injuriandi*. In this regard he submitted the words must have been uttered with the intention of injuring that particular person. In the matter at hand, it was established by the evidence that the words were mistakenly directed to or at the Plaintiff when in reality were meant for the person who had illegally connected on the Defendant's lines, who was established later to be one Benjamini Sibandze. It was contended that on this ground alone, a *prima facie* case for defamation had not been made.

[18] It was lastly argued that a *prima facie* case had not been made because the Defendant had employed the employees who allegedly uttered the words complained of as technicians and not publishers. The contention being that when they published the words complained of, they were not acting within the course and scope of their employment.

[19] I have no hesitation in finding that there is no merit in the contentions that a *prima facie* case has not been made because the evidence



revealed different people from those alleged in the pleadings as having uttered the words complained of just as the same thing applies to the difference in the dates as set out in the pleadings and those established by the evidence.

[20] There is at least no denial that the evidence does *prima facie* establish that the incident complained of occurred at the instance of the Defendant's employees who were at the time acting within the course and scope of their duties as Defendant's technicians.

[21] I have no doubt that in this case, the evidence should amend the pleadings as the other party is shown as having understood the case against him. I say this because the Defendant understood the case it faced and pleaded fully thereto. It did not deny same except to contend that the words uttered were not directed at her but at Benjamini Sibandze. In that case the issue is whether the evidence does establish a *prima facie* case to which Defendant is required to lead evidence in rebuttal. I cannot agree that because of the conflict on the dates as well as on the employees concerned, then a *prima facie* case has not been made where it is not in dispute that the incident complained of did occur, including the fact that it has not been disputed that the words complained of do carry the meaning attributed to them by the Plaintiff are defamatory.

[22] On the contention that there was no defamation because the defamatory words published were meant for somebody else, it seems to me that an

answer lies in what was said by Mason J in *Jooste vs Claasens* 1916 TPD 723 at page 732 when he put the position as follows:-

*“It seems to me therefore that a person who like the defendant on an unprivileged occasion repeats slanders to a third party in the course of ordinary conversation cannot escape liability by asserting or even proving that he was a friend of the plaintiff and had no intention of injuring him.”*

Therefore since the words uttered were defamatory or had a defamatory meaning and effect and were directed at the Plaintiff, the Defendant needs to lead evidence if anything to show it was, through its employees, not actuated by malice including whether or not there was no recklessness or negligence on the part of its employees attributable to the Defendant.

[23] In fact the position of the law is long settled in this regard which is that “*animus injuriandi* will be presumed where the words are clearly and obviously defamatory, and the Defendant will be liable unless he succeeds in convincing the court that he was not in fact actuated by *animus injuriandi*”, as is stated in Jonathan M. Burchell’s **The Law of Defamation in South Africa** 1985, Juta & Company Ltd at page 150. That it was not actuated by *animus injuriandi*, the Defendant can only show through leading its own evidence and not through an application for absolution from the instance.

[24] That being the case I cannot agree that a *prima facie* case has not been made against the Defendant and the application for an absolution from the instance is dismissed, with costs being ordered to be costs in the course.

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**N. J. HLOPHE**  
**JUDGE**

**For the Plaintiff:** Miss Mkhabela

**For the Defendant:** Mr. Z. Shabangu