



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

Reportable

Case No: 1717/11

In the matter between:

**CYRIL M. KUNENE**

**PLAINTIFF**

and

**ZWELI DLAMINI**

**1<sup>ST</sup> DEFENDANT**

**SWAZI MIRROR**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation** : **CYRIL M. KUNENE V ZWELI DLAMINI AND SWAZI MIRROR**

(1717/11) [2013] SZHC 164 (9 AUGUST 2013)

**Coram** : **MABUZA J**

**Delivered** : **9 AUGUST 2013**

**Summary** : **Defamation – No defence raised – Action undefended - Damages – Assessment of – Award in each case has to depend on facts of particular case – Court to make realistic assessment of what it considers just and fair in all circumstances.**

## JUDGMENT

MABUZA J

[1] The Plaintiff herein is the Principal Secretary in the Ministry of Commerce, Industry and Trade and has held that position since 2009; otherwise he has been a Principal Secretary in the Civil Service for 15 years. In this matter he is suing the Defendants who are Zweli Dlamini and the Swazi Mirror. At the time of this incident Zweli Dlamini, the 1<sup>st</sup> Defendant was a reporter employed by the Swazi Mirror. The Swazi mirror is the 2<sup>nd</sup> Defendant and is a newspaper publication circulating within Swaziland.

[2] The Plaintiff issued summons against both Defendants jointly and severally the one paying the other to be absolved for payment of damages in the amount of E2,000.000.00 (Two million Emalangeni) Costs of suit and further and alternative relief. The Defendants did not enter appearance to defend the matter.

[3] The cause of action arises from an article which was published by the 2<sup>nd</sup> Defendant in its publication of 4<sup>th</sup> – 11<sup>th</sup> February 2011 which article was allegedly defamatory to the Plaintiff. The article was allegedly authored by the 1<sup>st</sup> Defendant as investigative reporter thereof.

[4] On the front page of the Swazi Mirror (2<sup>nd</sup> Defendant) are the eye catching words:

“Top Government official paid E100,000.00 bribe” These words are in huge bold black and red letters. Below these are yellow words which state:

“PS CYRIL Kunene mediated the matter”. On the top left insert is a picture of the Plaintiff.

[5] The story itself appears on page 2 and the headline which is in bold letters reads thus:

“Woman demands back E100,000.00 bribe from Top Government official”

Once more a picture of the Plaintiff appears in the centre of the page and insert is a picture of the 1<sup>st</sup> Defendant, Zweli Dlamini identified as the investigative reporter and author of the article. Above the picture of the Plaintiff are the words “PS Cyril Kunene mediates”

[6] The story is not about the Plaintiff even though at first glance it appears to be about him. The story is about a local business woman named Zanele Dlamini who is alleged to be demanding close to E100,000.00 which she allegedly paid to an Under Secretary in one of the government Ministries. The said Zanele accused a senior government official name withheld of pocketing a sum of E96,400.00, which was in exchange for various government tenders. The government official is said in the article to be a member of the Tender Board, a body which is responsible for granting government tenders. When the 1<sup>st</sup> Defendant contacted the said official she denied Zanele’s allegations that she had accepted a bribe in cash in return for tender favours.

[7] The story further revealed that the Plaintiff acted as a mediator between the two fighting women. The government official when contacted by the 1<sup>st</sup> Defendant confirmed that the Plaintiff had called both herself and Zanele to try and solve the impasse. She further requested that the story be dropped because the matter had been addressed. The story reads that the Plaintiff called the meeting between the government official and Zanele on the 2<sup>nd</sup> February 2011. After this meeting Zanele changed her tune and requested the 1<sup>st</sup>

Defendant to drop the story as she feared that if it were published she would be unable to obtain her money from the Ministry.

- [8] When the Plaintiff gave oral evidence at the hearing hereof on the 7<sup>th</sup> August 2012 he said that on the 4<sup>th</sup> - 11<sup>th</sup> February 2011 he saw a publication in the Swazi Mirror (2<sup>nd</sup> Defendant). The publication was headlined a “top government official paid a bribe of E100,000.00”. The Plaintiff’s picture was published alongside the article. He also noticed a reference to himself that stated “PS Cyril Kunene mediated the matter”.
- [9] He told this court that his concern with the publication was that he knew of no mediation that he had been involved in regarding any incidence of bribery. He stated that he was taken aback and felt that this was a malicious article against him aimed at injuring his image. He further stated that his understanding of the article was that he had intervened and mediated and helped resolve amicably a matter wherein the two parties were involved in corrupt activities and that he had opted to deal with it diplomatically without reporting it officially as a case of corruption.
- [10] He denied ever being involved in any mediation in a matter where bribery was discussed. Furthermore, the headline of the article gave the reader the impression that he (the Plaintiff) was the top official who had been paid a bribe of E100,000.00 until the reader read the small print that the article did not refer to him. Likewise the story on page 2; he says that it gives the impression that when the reporter wished to see him he declined because he was holding secret meetings with the parties and that he had to consult first with the government official before meeting the reporter. This suggested that the Plaintiff had something to hide which was not true.

[11] The Plaintiff's version of the events is that before the publication of the story on the 4<sup>th</sup> – 11<sup>th</sup> issue of the 2<sup>nd</sup> Defendant the 1<sup>st</sup> Defendant paid a visit to the government offices where the Plaintiff is employed. The 1<sup>st</sup> Defendant expressed his wish to discuss an alleged bribery matter against one of the Plaintiff's officers. As the officer concerned was present, the Plaintiff invited the officer to brief him about the allegation. The briefing lasted about five minutes while the 1<sup>st</sup> Defendant waited outside. After the briefing the 1<sup>st</sup> Defendant was invited into the office and a discussion took place between the 1<sup>st</sup> Defendant, the government official and the Plaintiff. At the end of the discussion the Plaintiff requested the 1<sup>st</sup> Defendant to continue with his investigation and to advise him of the outcome as this would determine how he would best deal with the matter administratively as head of department and financial controller.

[12] After the meeting with the 1<sup>st</sup> Defendant and the government official, the Plaintiff stated that he was surprised when he saw a story about him run by the 2<sup>nd</sup> Defendant in its issue of 4<sup>th</sup> – 11<sup>th</sup> February 2011. The story stated that the Plaintiff held a meeting to mediate the bribery dispute between the two parties, namely the government official and the supplier. He says that the meeting that he had between the supplier and the government official was when the former came to inquire when he would be paid for services which he had rendered to the Ministry during the COMESA summit of 2010. The issue of payment was discussed and resolved amicably. There was no discussion in respect of any bribery at all that had allegedly taken place between the parties as suggested by the Defendants. The publication of the 4<sup>th</sup> – 11<sup>th</sup> February 2011 was handed in as Exhibit A.

[13] As a result of the publication of the 4<sup>th</sup> – 11<sup>th</sup> January 2011, and its consequent embarrassing contents, the Plaintiff says that he had to explain to his colleagues namely other Principal Secretaries within the government, and members of his family why he had mediated a bribery and corruption issue instead of reporting same to the relevant authorities. Members of his family were shocked about the contents of the publication.

[14] The Plaintiff approached his attorneys and instructed them to write to the Defendants and request them to correct and retract what had been published and to remove the publication from circulation because of the damage it was causing and because it was a weekly newspaper the publication continued unabated. His attorneys B.Z. Attorneys indeed wrote to the Defendants on the 8<sup>th</sup> February 2011 (see Exhibit B). The Defendants did not respond to the letter nor did they correct, retract the article nor remove the newspaper from circulation.

[15] The Plaintiff says that he had an interaction with the 1<sup>st</sup> Defendant who thereafter sent a questionnaire (Exhibit C) to him on the 8<sup>th</sup> February 2012 after the article had been published. The questionnaire was copied to the Minister of Commerce, Industry and Trade. The contents of Exhibit C are questions which relate to the alleged bribery by Zanele of the government official and how the Ministry concerned was handling same and whether or not the issue of bribery was discussed during the meeting between the Principal Secretary and the two parties concerned. The Plaintiff correctly wonders why this questionnaire was not sent prior to the publication of the article. Nevertheless, the Plaintiff responded to the questionnaire per letter dated 11<sup>th</sup> February 2011 (Exhibit D). It is not possible to paraphrase Exhibit D as it is lengthy and full of data. However, the sense of it is similar to the oral evidence that the Plaintiff has given before this court; in

particular the conversation that he had with the 1<sup>st</sup> Defendant at the Ministry offices earlier.

[16] Of particular interest is that in Exhibit D the Plaintiff reminds the 1<sup>st</sup> Defendant of their conversation during the meeting at the Plaintiff's offices; namely that he told the 1<sup>st</sup> Defendant to please press ahead with his investigations and publish his findings. He encouraged the 1<sup>st</sup> Defendant to be thorough because as controlling officer he had a direct interest if funds had been used wrongly or if there were traces of corruption in the Ministry. The Plaintiff further disclosed in Exhibit D that the issue of the bribe was never discussed at the meeting between him, the government official and the business person. And that the meeting was not held in secret but at his office during working hours in the normal course of business.

[17] Notwithstanding the Plaintiff having written the aforesaid letter, the Defendants simply ignored it and did not act on its contents nor did they respond to it nor did subsequent articles correct the situation. Instead in a subsequent publication of the 18 – 25 February 2011 (Exhibit E) the Defendants again published an article wherein they refer to the Plaintiff. The article appears on page 4 – 5 and is entitled “a half a million spent on questionable tender bill”. A picture of the Plaintiff is in the centre of the article. At first glance the article appears to refer to the Plaintiff and yet it is not about him, but it does refer to the Ministry for which he is Principal Secretary. A portion of the article refers directly to him and is entitled “Only a commission of inquiry can force me to talk – PS”.

[18] This portion of the article appears to relate to the publication of the 4<sup>th</sup> – 11<sup>th</sup> as it states that the Plaintiff has refused to divulge any information pertaining to the case where a

business woman is claiming to have bribed a government official. The Plaintiff is said to have responded that only a commission of enquiry could force him to disclose what went on during a closed meeting with the two parties and not the media. The 1<sup>st</sup> Defendant who is also the author of the article of the 18<sup>th</sup> – 25<sup>th</sup> February 2011 discloses that this response from the Plaintiff was elicited during investigations conducted by the 2<sup>nd</sup> Defendant on yet another case where the government engaged a company called Khesma Investments who decorated a marquee during the COMESA Summit.

[19] When the Plaintiff gave oral evidence before this Court he made reference to the allegations contained in the publication dated 18<sup>th</sup> – 25<sup>th</sup> February 2011 wherein it is suggested that he had sought to protect the officer concerned by stating that he could only answer questions during a commission of enquiry. The Plaintiff stated that he mentioned a commission of enquiry during their discussion in his office and this was in the context when he was asked about details between the government and the contractor. His response was that he would only respond if there was an internal investigation audit or commission of enquiry.

[20] The cause of action herein is based on the publication of the 4<sup>th</sup> – 11<sup>th</sup> February 2011 and not on the publication of the 18<sup>th</sup> – 25<sup>th</sup> February 2011. My admission of the publication of the 18<sup>th</sup> – 25<sup>th</sup> February 2011 is on the basis of similar fact evidence and the adverse reference to the Plaintiff in the article referred to therein.

[21] The Plaintiff says that he was summoned by his Minister who required him to give an explanation about the contents of the copy of the questionnaire which had been sent to



her. Because of the trauma that she experienced his mother who is almost 80 years old collapsed when she saw the articles in the 2<sup>nd</sup> Defendant about the Plaintiff.

[22] The Plaintiff testified that because of the defamation contained in the impugned article there is a malignant lingering impression in the mind of the public about him. He says that a month ago he was called by a journalist who stated that he was following up on this story. The journalist's line of questioning was whether or not the Plaintiff was aware that the Anti-Corruption Commission was investigating the Plaintiff because of his failure to report the case of a corrupt government officer as the Anti-Corruption Act made it a requirement to report what he should have perceived to be a corrupt act. The Plaintiff says that he responded by saying that he could not respond to the journalist's question for fear of sabotaging the investigation if ever it was indeed taking place.

[23] The Plaintiff was aggrieved because the impression the author and article published by the 2<sup>nd</sup> Defendant of the 4<sup>th</sup> – 11<sup>th</sup> February 2011, created was that the Plaintiff was by mediating also part of the bribery scam which was incorrect, wrongful and unlawful. He further stated that the said article caused damage to his good name and standing and constituted defamation of character. He stated that he has been a controlling officer being the Principal Secretary for various government Ministries and had an unblemished record of serving the government of Swaziland diligently and as such was a man of good standing within his place of work and in public.

[24] The Plaintiff felt that in the circumstances fair compensation in damages would be the amount of E2,000,000.00 (Two million Emalangeni) claimed in the summons being in respect of defamation of character (E1,800,000.00) and *contumelia* (E200,000.00)

- [25] As stated earlier on in this judgment the Defendants elected not to defend the suit making the evidence of the Plaintiff remain unchallenged and uncontroverted.
- [26] The Plaintiff says that he bases the quantum claimed on the fact that he has been a Principal Secretary and controlling officer for 15 years and that during this time he has not a blemish of dishonesty or bribery to his name. He is also an upright citizen of good standing, reputation and character. He is thus offended that there would be any suggestion by the Defendants that he mediated on a bribery and corruption issue instead of reporting it to the relevant authorities. He is also offended by the suggestion that by mediating the bribery and corruption issue he was in effect protecting a corrupt government official who was under his direct supervision.
- [27] Is the article complained of defamatory per se? The article certainly conveys the impression that the Plaintiff had a secret meeting with the business woman and the government official. It also conveys the impression that during the alleged meeting the Plaintiff mediated between the two affected parties. Because soon thereafter the business woman seemingly placated refused to divulge any further information about the matter whereas before the meeting she was extremely voluble. There is nothing wrong or sinister in my view for a meeting between the two parties and the Plaintiff to have taken place. The Plaintiff is the Financial controller and Principal Secretary and it would have been in everyone's interest for him to get to know the cause of the conflict and to try and resolve it and it was wrong for the 1<sup>st</sup> Defendant to speculate and to conclude that the Plaintiff was mediating a bribery and corruption conflict in view of the fact that he was not invited to the meeting.

[28] I find that the Plaintiff has satisfied the standard of proof which is required in such matters and that is proof on a balance of probabilities, that he was defamed by the article complained of.

[29] The next issue for consideration is what is the quantum of damages that is competent to be awarded to the Plaintiff. I am alive to the fact that I have to strike a balance between the competing rights of the parties. On the one hand I have to consider the right to dignity of the Plaintiff and on the other hand the right to freedom of expression of the press. Section 18 (1) of the Constitution states that:

“The dignity of every person is inviolable”; and

Section 24 (1) states that:

“A person has a right of freedom of expression and opinion.”

[30] The claim of E2,000,000.00 (Two million Emalangeni) is in my view extremely excessive. The Plaintiff is a public functionary. The job comes with a measure of constant criticism to which the Plaintiff should by now not have a thin skin. In the Concourt judgment in the case of **McBride v The Citizen** case CCT 23/10 the learned judge Justice Cameron in his judgment discussing the definition of fair comment:

“Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly held opinion, without malice on a matter of public interest on facts that are true.”

Elsewhere in his judgment this is what he says:

“It is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of public affairs”.

[31] While the Defendants were entitled to express views on the Plaintiff’s actions because of their right to freedom of speech and indeed in the words of the 18<sup>th</sup> century philosopher Voltaire:

“I may not agree with what you say but to death I will defend your right to say it”.

[32] However such views should be based on true facts. In *casu* the article complained of was not based on true facts and a defence of fair comment could not avail the Defendants even if they had raised it.

[33] Corruption is a very serious scourge in our society which the Government and all right minded people have condemned and called for its eradication. The Plaintiff was in my view justified to feel vilified by the allegation that he had mediated upon an act of bribery and corruption instead of reporting it to the relevant authorities.

[34] The article(s) published in the 2<sup>nd</sup> Defendant were written by the 1<sup>st</sup> Defendant who at all material times had not only engaged in carrying out his duties as a reporter, he had also engaged in carrying out functions on behalf of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant wrote the articles and his employer the 2<sup>nd</sup> Defendant published them. Consequently, they are both liable to compensate the Plaintiff herein jointly and severally one paying the other to be absolved.

35] The Defendants did not publish any apology; they failed to retract or correct the story when requested to do so by the Plaintiff.

[36] In awarding damages I must strike a balance between an amount that is not palpably excessive or so unreasonable as to be out of all proportion to the injury inflicted. In principle the damages which a publisher of defamatory matter is compelled to pay are regarded as a penalty imposed upon him for the wrong which he has done by violating the injured party's right to retain his good name and fame untarnished, and they are awarded to the injured person to compensate him for his injured feelings and the hurt to his dignity and reputation. See **Die Spoorbond and Another v SA Railways and Harbours** 1946 AD at 1005. The elements to be taken into account in estimating the amount to be awarded are thus the *contumelia* suffered, the loss of reputation and the penalty. See **Gelb v Hawkins** 1960 (3) SA AT 693 h; **Salzmann v Holmes** 1914 AD at 480.

[37] In this case the Plaintiff's reputation was not affected in the corridors of power because he has continued to enjoy the confidence of those in Government and the public. He was not suspended, demoted or dismissed, there was not even an enquiry mounted against him by his employer in connection with the article. I cannot however, overlook the fact that the defamatory statement originated and emanated from the Defendant, it was not a report of a defamatory statement made by another which would be less aggravating.

[38] The damages awarded against a newspaper should generally be less where it is merely reporting statements by others which are held to be defamatory than where the newspaper makes a defamatory statement in the course of expressing its own views about the

Plaintiff. I have to take into account in the Defendants' favour that they did not defend the matter, they at no time sought to assert the truth of the defamatory matter nor did they seek to attack the reputation of the Plaintiff in a defence or otherwise while these considerations may not materially affect the *contumelia* element of the damages to be awarded, they do reduce the element of damage to reputation and the punitive element. See **SA Associated Newspapers Ltd en 'n Ander v Samuels** 1980 (1) 24 at 26.

[39] As stated earlier the Plaintiff's evidence with regard to his seniority, good standing and reputation as a Principal Secretary and Public Servant was not challenged. In my view the defamation complained of is serious because it ascribes highly improper conduct to the Plaintiff in the performance of his duties as a Principal Secretary, and the articles complained of implies that there was a deliberate perversion of the course of justice by the Plaintiff. There is however no evidence that defamatory statement was believed or that the Plaintiff has in fact been lowered in the esteem of his colleagues and others or that he has suffered any consequence of note as a result of the defamation apart from the personal affront to his dignity.

It was held in **Van der Berg v Coopers & Lybrand Trust (Pty) and Others** 2001 (2) 242 at 260:

“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 result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it

and thereby fosters litigation. Having said that does not detract from the fact that a person whose dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings”.

[40] Weighing up all the circumstances to which regard may properly be had, I am of the view that an appropriate award of damages would be E75,000.00. The Plaintiff did not add any prayer for interest only costs of suit.

[41] In the event I make the following order:

(a) Judgment is granted against the Defendants jointly and severally, the one paying the other to be absolved in the sum of E75,000.00; and

(b) Costs of suit.

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**Q.M. MABUZA**

**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. B. Zwane

For the Defendants : No appearance