



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 811/2012

In the matter between:

MDUDUZI VUSANE VILAKATI

Plaintiff

and

DUMISANI MAMBA

First

Defendant

MBULALENI MAPHALALA

Second

Defendant

NKOMOFANE MAMBA

Third

Defendant

Neutral citation: *MduduziVusaniVilakati v Dumisani Mamba & 2 Others*
(118/2012) [2015] SZHC 75 (07thMay, 2015)

Coram: **M. Dlamini J.**

Heard: **13th November 2014**

Delivered: **7th May, 2015**

Reason for protecting dignity – “intention of perpetrator essential element” – it is not words per se which result in injuria– plea of qualified privilege – “where a defamer acted lawfully within the limits of his authority no liability for defamation will arise even...” – in order to determine lawfulness one has to subjectively examine the motive in the mind which actuated his publication

or utterances of the defamatory matter – defence of fair comment is based on the ground for justification -

Summary: The plaintiff claimed for the sum of E100,000 plus interest following defamatory utterances. Defendants disputed the claim.

Particulars of claim

[1] The plaintiff set out as follows in his summons:

- “6. *On or about 20th February 2012 at or near Mahlabatsini, kaNgcamphalala area in the Lubombo District, Defendants acting in common purpose stated to community members of Mahlabatsini, of and concerning the Plaintiff that he was a cattle rustler and that he stole three (3) of their cattle.*
7. *The statement by the Defendants is wrongful and defamatory of the Plaintiff and was made with intention to defame Plaintiff and to injure his reputation as a respected traditional healer in the Mahlabatsini community.*
8. *The statement was understood by the members of Mahlabatsini community and was intended by Defendants to mean that Plaintiff is dishonest in that he steals cattle.*
9. *As a result of the Defamation Plaintiff has been damaged in his reputation as a traditional healer and a law abiding citizen and has suffered damages in the sum of E100,000.00 (One Hundred Thousand Emalangen).*

Viva voce evidence

[2] Plaintiff, (PW1) gave evidence in his own case. On oath he identified himself as a resident of MahlabatsinikaNgcamphalala area and a traditional healer.

[3] It was on a Monday 2012 around 11.00 a.m.,having left his homestead to run an errand commissioned by his brother, when he received a call from his wife, PW2. He learnt that defendants in the company of a crowd were at his homestead.

[4] Defendants demanded his wife to produce cattle that had been stolen by him the previous night. He advised his wife to grant defendants and the mob permission to search for the said cattle in his homestead. A response was that the defendants were declining the offer to search the homestead but nevertheless demanded the stolen cattle. PW1 informed PW2 to advice defendants to enquire from the builders who were carrying on construction and resident at his homestead as to whether he did arrive with stolen cattle the previous day. Although his wife did communicate this message to defendants, it fell on deaf ears as they refused to enquire from the constructors. He then suggested to his wife to enquire from the mob, as same were his neighbours, as to whether they heard any motor vehicle leaving the previous night. A response was communicated to him by the wife that the crowd stated that they only saw his motor vehicle leaving during the afternoon and not at night.

[5] It was PW1's further evidence that the defendants then took away his wife and children. They went on foot for a long distance. His wife was pregnant at that time and ill. He later gathered that First defendant demanded his wife to produce the cattle failing which he would hack her to death with a bush knife he was carrying.

[6] Second defendant threatened to kill her if she failed to admit that PW1 stole the cattle while 3rd defendant said that he will burn his homestead together with his children.

[7] When they reached their destination, they encircled his family and ordered them to direct PW1 to produce the cattle or else face death. As his wife had her cellular phone on, he heard his wife crying as Second defendant was tying them and explaining that he was now in the process of killing them. It is then that he called the police. His family was released upon the arrival of the police.

[8] Again on the following day, the defendants and their companions came. He was again not at home. He met them on the road leading to his homestead. He passed them and headed for home. They followed him. He called his brother and narrated the matter. His brother advised him to run away. He did not oblige. His brother telephoned the police who arrived and found some of them inside his compound speaking to him. The police ordered them to go away.

[9] On Thursday, they came back in the company of the Chief's headman. The headman informed him that the Mambas were complaining that he stole their cattle. He invited him to come for discussions. He decided to write a letter explaining that he did not know their cattle. He further authored that should they disbelieve his story, they should enquire from his neighbours as to whether they did hear the sound of a motor vehicle carrying cattle as the car would create a rattling noise from the bars containing the cattle and the rough road path leading to his home. His neighbours did testify that they did not hear any noise. However defendants were dissatisfied.

[10] As days went by, their cattle were recovered by police in a certain farm. Police perused the stock exchange permit which reflected the name of the purchaser and the identification number of the motor vehicle. His name

and his motor vehicle were not reflected in this document. PW1 prayed that this court grant him the orders in the particulars of claim.

[11] PW1 was cross examined. In order not to burden this judgment, I will refer to this cross examination later in this judgment.

[12] PW2 was DumisileNtombikayiseVilakati. On oath she stated that on 20th February 2012, a Monday, she proceeded to meet her fellow community women for Royal assignment. She joined the women along the way. She found them with the defendants. As soon as she joined them, Second defendant stated that they were following motor vehicle tracks from the dipping tank. They told them to join them. They refused. Third defendant said that they would regret on their return as they would find their homes burnt and children killed. They again refused to join them and proceeded with their journey. As they were along the way, three women came and informed her that the defendants were summoning her.

[13] She went back and found defendants by her gate. Second defendant enquired from her as to whose tracks of a motor vehicle were the one he was observing as they were from the dipping tank. He said that cattle were loaded into the motor vehicle whose tracks were on the ground around 1.00 a.m. She responded that at that time her motor vehicle was at home. They caused her to lead the way into her homestead. While by the cattle byre, they noticed footprints of the child who had driven cattle in the morning. At that juncture, Second defendant ordered everyone to stop and inspect the foot tracks. He saw the child whose foot print were inspected. He called him and ordered him to stop the footprint that was being examined. Second defendant then said that the footprint was the one that he saw at the dipping tank where the cattle were stolen. They proceeded home where again PW2

identified tracks of a motor vehicle and stated that it was where the stolen cattle were off-loaded.

[14] The defendants then summoned everybody to go under a tree. Third defendant addressed the gathering saying that they were following motor vehicle tracks which was used in stealing cattle from the dipping tank at 1.00 am. She replied that at that time she was asleep in the company of plaintiff at her home. First defendant however said that she should tell the truth as to where plaintiff was that night. She insisted on her previous response. First defendant repeated his demand and she stated that there was no other truth. She then requested them to enquire from the constructors who were at her home during that time. Second defendant directed her to call her husband. She obliged by mobile phone. Plaintiff informed her that she should tell them to conduct a search at his compound. She conveyed this to the defendants but they refused. They ordered her to go with them to the dipping tank. First defendant ordered a small boy from her homestead to come along as the footprints at the dipping tank matched his. This boy ran away. Along the way they met another boy who was from her home and demanded that he join them. As they were going past her neighbour, she requested Second defendant to enquire from her neighbour whether he heard a motor vehicle moving towards her home that night. Second defendant refused to enquire. They went and while by the main road, they entered a homestead nearby where Second defendant informed them that they were from plaintiff's home and plaintiff had taken their cattle at night. The owner of the homestead said that he saw a motor vehicle around 10.00 p.m. but did not know where it was from.

[15] At the dipping tank, PW2 was ordered to inspect the tracks of the motor vehicle and foot. She obliged and concluded that the tracks were not

associated with her. She duly informed the defendants. First defendant said that she was implying that they were lying and threatened to hit her with a bush knife he was carrying. Second and Third defendants were carrying knob-kerries. They then enclosed her in a circle. She called plaintiff through her mobile phone reporting that they wanted to kill them. He informed her that he had already called the police. Second defendant said that they were not afraid of the police. They threatened to hit one of her boys and they tied him with a rope on the neck. At that point, police arrived and took them home.

[16] She was cross examined briefly. She was asked as to how old was the boy that was ordered to inspect the footprints. She stated that he was seventeen. She was asked as to why he ran away and she replied that he was afraid of being killed. She was asked as to who spoke and she stated that it was the Third defendant. It was put to her that it was not for the first time for plaintiff to be investigated by police for cattle rustling. She replied that she was not privy to such. It was suggested to her that she was from a rural area and she could walk long distances. She agreed. She was asked as to how long defendant made her to walk and she responded that it was for one and a half hours and that she used a car to travel to the dipping tank.

[17] PW3, Richard MtsetseleliNgcamphalala gave evidence on oath. He testified that he knew plaintiff as a resident of MahlabatsinikaNgcamphalala. In a certain morning the defendants came saying they were following tracks of a motor vehicle. They ordered him to join them. They were a large group. The three defendants showed them tracks of a motor vehicle. He enquired as to how such tracks could be differentiated as there was a motor vehicle that he saw moving in the morning. They said that the tracks were from the dipping tank. They

moved and met women on Royal errand. Defendants ordered them to join them as the tracks might lead to one of their homesteads. Third defendant asked as to how they would feel if they found their homesteads and children burned as they were depressed by the loss of their cattle. The women did not join them. They came to the junction of the road. They then took the road leading to plaintiff's homestead. It was his evidence that at the junction, the tracks of a motor vehicle had disappeared. Second defendant enquired as to how they would enter plaintiff's home as the wife was among the women that they left to proceed with their mission. They ordered some of the women to go and call her. She came and joined them. They proceeded to plaintiff's homestead. Second defendants then identified footmarks and stated that they were identical to the ones they saw at the dipping tank. The other defendants also agreed with Second defendant. They saw a boy and called him.

[18] They proceeded to the feed lot of plaintiff and defendants inspected the area and suggested it appears cattle were off-loaded. They enquired on the whereabouts of plaintiff. Everyone then sat down and defendants addressed the meeting. They called plaintiff who gave them permission to search his homestead and that he was not aware of the whereabouts of the lost cattle. They complained that they could not search a man's homestead in his *absentia*. Plaintiff's wife gave them permission to search. However, the search was not done. Defendants then suggested that they take plaintiff's wife and her boys to the scene of crime. While they had just moved a distance away, First defendant complained that plaintiff was constructing houses while they were losing their cattle. Along the way they met Celumusa who was ordered to join them. As Celumusa was from Big Bend doing shopping he was ordered to take the items to plaintiff's home. He complied and the group left.

[19] Under cross examination he was asked as to why he singled out only the three defendants. He stated that they were the ones who spoke and were the ring leaders. He pointed out further that the defendants were not community police in the Ngcamphalala area. They did not belong to the Ngcamphalala area but the Mamba. The three defendants did try to find a community police of the area but he was not present at his home where they went to. It was his evidence further that a community police for one area does not extend his jurisdiction to another area. He was asked as to what they did to show disapproval of defendants' action. He replied that they did not do anything as they were armed and angry. Further they had nothing to lose as they merely responded to an alarm by defendants.

[20] The next witness for the plaintiff was Detective Sergeant BhekaMabuza(PW4) who informed the court on oath that he knew plaintiff as a resident of Mahlabathini. There were two stock theft cases reported by 1st and 3rd defendants. They investigated the matter and discovered that their cattle were stolen and sold to Matata Feedlot. As a result, two suspects were arrested viz. Marwick Gumbi and DumezweniNgwenya. The case was pending before Siteki Magistrate's court. It was his further evidence that they never found any evidence linking the plaintiff to the theft of stock nor was plaintiff ever interrogated for the said offence.

[21] Under cross examination, he revealed that when First and Third defendants reported the stock theft case, they never mentioned names of suspects and the report was made in their personal capacity as complainants. He disputed that the report was made in their capacity as community police as they reported that the cattle stolen belonged to them.

[22] Plaintiff then closed his case. Defendants gave evidence in rebuttal.

[23] DW1 identified himself as Thomas MbulaleniMaphalala, Second defendant *in casu*. On oath, he informed the court that he was a community police and a member of the dipping tank. On a certain day he received information that two herds of cattle were stolen from the dipping tank. He, together with First defendant proceeded to the dipping tank and inspected the scene. They noticed tracks of a motor vehicle and presumed that a motor vehicle was used to convey the stolen cattle. They also noted footprints of the people responsible for driving the cattle into the vehicle. They realised further that the motor vehicle was reversed to an electricity pole where the cattle were tied and thereafter loaded into it. They decided to follow the tracks of the motor vehicle. They then protected the foot prints. The tracks led them to the Ngcamphalala community. Upon realising that the said tracks were leading them to another chiefdom, they solicited assistance of the Chief's runner and a member of police community from the Ngcamphalala Chiefdom. They did not find the community police as he was reported to be at Siphofaneni. The motor vehicle tracks eventually led them to plaintiff's homestead. They also noticed a footprint by the plaintiff's gate. They then requested plaintiff's wife to call plaintiff. She obliged and plaintiff gave them permission to search. They declined to search in the absence of plaintiff.

[24] They requested the Ngcamphalala community to come with them to the dipping tank in order to show them similar tracks of the motor vehicle and the footprints. As they left, they saw another footprint and plaintiff's wife explained that it was for a member of her family whom she pointed at. They ordered the boy to join them. However this boy ran away. While by the gate of plaintiff they met another boy and they also ordered him to

follow them. At the dipping tank they pointed at the tracks of a motor vehicle and person. They then held a meeting and enquired as to the buyers of the stolen cattle. They interrogated the boy who stated that the style of loading was used by his father. As they proceeded with the interrogations, they admitted that plaintiff's motor vehicle left to get meat and it returned at about 10.00 p.m. They ate the meal until morning. Plaintiff's wife then called plaintiff to come in order for them to be free. The police came while they were continuing with the interrogations.

[25] DW1 gave a lengthy testimony. I shall revert to the rest of it under adjudication in order to avoid repetition. Similarly, he was cross examined at length.

[26] The second witness on behalf of defendants was Nkomofane Mamba, Third defendant. He testified under oath. He was a representative of the dipping tank. When he went to the dipping tank he saw that cattle had been loaded into a motor vehicle. The cattle were removed from a kraal and tied on a pole. The motor vehicle had reversed to load the cattle. The buyer of the cattle who was using this style of loading was plaintiff. They decided to follow the tracks of the motor vehicle. They led them to plaintiff's homestead. Plaintiff suggested they search his homestead. They refused to do so. Police arrived while they were at the dipping tank. They enquired from plaintiff's wife as to whether she had been assaulted. Plaintiff's wife responded that she had not been assaulted.

[27] Thereafter plaintiff went to Musa Methula's house and requested for three men to accompany him to the homestead of Luke Ngcamphalala as Mambas did not know how to conduct an investigation. He would show

them the people responsible for stealing the cattle. Plaintiff assisted them to find the cattle. Further, plaintiff wrote a letter saying anyone who had evidence on how he stole the cattle should sign it. They never signed. They were surprised at the present law suit.

Adjudication

Principle of law

Section 18 (1) of our Constitution reads:

“The dignity of every person is inviolable”

[28] Commenting on dignity, **Lord Nicholls at Reynolds v Times Newspaper Ltd and Another [1999] 4 ALL ER 609 (HL 619b – 622h at 622h,** wisely surmised:

“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well being; whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper (or gathering), a reputation can be damaged forever, especially if there is no opportunity to vindicate ones reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely.”(words in brackets, my own)

[29]

Innes CJ in Sutter v Brown 1926 AD 155 at 163 propounded:

“Speaking generally, the question whether a statement is defamatory is a question of law for the decision of the court; it depends upon proper interpretation of the language used.”

The learned judge then highlights:

“In defamation, as in all injuriae, the intention of the perpetrator is vital. But the court cannot dive into the mind of a defendant; it can only interpret his language as it would be understood by reasonable men; he is assumed to have meant what his language thus interpreted would convey.”

Evidence before court

The plaintiff testified”

“Around 11.00 am. towards 12.00 noon, my wife telephoned me that the defendants were in my home with a crowd. They said they had come to collect their livestock I had stolen during the night.”

PW2 testified:

“When we were above my home, we saw footprints of the child who had driven cattle to the dipping tank that morning ... 2nd defendant said the footprint was the one he saw where the cattle were loaded.”

She proceeded:

“We left and went into the yard and by the gate 2nd defendant saw tracks of a motor vehicle which left to get sand. He said this is where the cattle were off loaded.”

She also stated:

“They called us to go under a tree near home. 3rd defendant delivered his speech saying, ‘As you see us, cattle has been lost at the Mambas’ area and we are following tracks of tyres which has led us to this homestead. The cattle were lost at 1.00 a.m.’”

[30] This witness further informed the court that the defendants pressured her to admit that her husband was not at home during the time the cattle were stolen and further to show them where the cattle were. She further pointed out:

“Before we reached the dipping tank, we entered a Makhanya homestead next to the clinic. 2nd defendant informed them that they were from plaintiff’s home and that they discovered that Mr. Vilakati (plaintiff) took their cattle at night.”

[31] Her evidence was also not attacked by the defendants. She was briefly cross examined:

Mr. Ndzinisa: *“I am instructed that it was not the first time your husband was investigated for cattle rustling. He was once investigated by Constable Mabuza of Siphofaneni Police station?”*

PW2: *“I do not know that.”*

[32] From this evidence which was not disputed during cross examination and the line of cross examination, it is clear that defendants did utter the words pleaded in the particulars of claim viz. *“that he was a cattle rustler and he stole their cattle.”* However, that as it may, it does not necessarily follow that the action of defamation is sustainable. Further enquiry needs to be done in order to ascertain whether plaintiff’s cause of action is justifiable. It is not the words *per se* which result in the *injuriae*. As often pointed out when dealing with actions of this nature, the utterance, *“you are an honest accounted”* may in one circumstance be defamatory while in another be

capable of innocent interpretation. Similarly, the sentence, “*You are a real murderer*”, may in one situation be capable of lowering one’s dignity while in another be devoid of the same. As demonstrated by **Innes CJ** in **Sutter supra**, *animus injuriandi* must be established and the *onus* rest with the plaintiff. **Gatley, “Libel and Slender”, 8th Edition** page 21 neatly summed up this principle of our law as follows:

“the meaning of particular words frequently depends on the circumstances in which they were published. There are no words, however serious on the face of them, which may not be explained away by evidence that in the actual circumstances they were not understood in a defamatory sense but in a way of jest or in a secondary and innocent meaning.” (also reported in **Golding v Torch Printing and Publishing Co. (Pty) Ltd and Others 1949 (4) 150** at 159)

[33] The honourable author further highlights:

“Not only does the meaning depend on the circumstances in which the words were published, it also depends on the state of public opinion at the time.”

[34] **Herbstein J** in **Golding v Torch Printing and Publishing Co. (Pty) Ltd and Others 1949 (4) 150** at 159 enunciated:

“The alleged defamatory words must not be considered as it were in vacuo but as part and parcel of the whole.”

[35] The defendants in rebutting liability pleaded:

“Serve to mention that in community meetings and out of a point of privilege any member of the society is entitled to state his or her opinion on matters affecting the community.”

[36] In *viva voce* evidence the defendants supported their plea by pointing out that they were members of the community police and therefore were

justified in their comments. In brief, they raised the plea of qualified privilege.

[37] The rationale for the defence of qualified privilege was well stated in **May v Udwin 1981 (1) SA 1** at page 18:

“The more so, as the reason why the said injury is not treated as an injuria and is not penalised lies in the fact that one who defamed a guilty person acted in the exercise of a public right, and such a person, we have seen above... does not commit an injuria even though he did have an intent to injure.”

[38] **Joubert JA** in **May supra** concludes from the above precept:

“That is to say, he is presumed to have acted lawfully and not to have abused his authority or to have exceeded the limits thereof. ...where a defamer acted lawfully within the limits of his authority no liability for defamation will arise even though he did so aminoinjuriandi.”

[39] Demonstrating the circumstance under which the defence of qualified privilege shall not be sustainable, the honourable Justice eloquently summed up the position of our law:

“...where a judicial officer (or any person holding public office) under the guise of performing his judicial (public) functions, has been actuated by personal spite, ill will, improper motive, unlawful motive or ulterior motive, that is to say, by malice, in his publication (or utterance as the case may be) of the defamatory matter in order to expose the defamed person to odium, or ill will, and disgrace.”(words in brackets my own).

[43] PW2 had pointed out as well that the three defendants were the ones who led the way, summoned the mob to gather under a tree, levelled the accusation that the plaintiff had stolen their cattle following the footprints and the tracks of a motor vehicle. Clearly, as admitted by the defendants in their evidence in chief, as soon as they reached plaintiff's community, their mandate ceased. To say in chief that they had invited the chief's runner and the community police of kaNgcamphalala is of no force by reason that they ought to have handed over to the kaNgcamphalala's authority and allowed them to address the mob and carry out the investigation if the allegations of investigations were anything to go by. By reason therefore that they failed to make a hand over but carried on with their duties as if within their jurisdiction (Mamba's), the defence of qualified privilege fails by reason that their right to hold public office ended while at the Mamba chiefdom and could not extend beyond.

[44] The defendants (Second defendant and Third defendants) further testified that they decided to follow tracks of a motor vehicle and footprints which led them to plaintiff's homestead following disappearance of two herd of cattle.

[45] From this summary of their testimony, I gather that they were raising a defence based on justification by means of fair comment.

[46] **Eloff J in Marais and Others v Richard and Others 1979 (1) S.A. 83** at 84 pointed out on this defence:

“The defence of fair comment is based on a ground for justification and not on a ground for exclusion of a guilty mind. The material components of the defence are that the words complained of assumed the form of commentary or opinion and were or would have been understood as such by the reasonable hearer;

secondly the comment must be fair; thirdly the facts or events to which the commentary relates must be true; and lastly the commentary must relate to a matter of public importance.”(underlined, my emphasis)

[47] Could the undisputed comment that the plaintiff “*stole cattle*” or a “*cattle rustler*” be a fair comment *in casu*? This is the question for determination.

[48] The term “fair” has been defined as follows by his Lordship **Eloff J** in **Maraissupra**:

“Any genuine expression of opinion is fair if it is relevant and it is not such as to disclose in itself actual malice.””(underlined my emphasis)

[49] *In casu*, the defendants followed tracks of a motor vehicle and footprints. Their evidence is that it led them to plaintiff’s home. Following the definition of the term “*fair*” one needs to ascertain whether the subsequent statement that the plaintiff had stolen the lost herd of cattle was fair or put directly “*relevant*” and without “*actual malice*” as per **EloffJ**. As pointed out by **Innes CJ** in **Sutterop. cit.** that “*the court cannot dive into the mind of the defendant*”, my duty is to objectively ascertain the state of their minds from the evidence presented.

[50] The plaintiff and his witnesses testified that the plaintiff invited defendants and their companions to enter his homestead and conduct a search of the missing cattle. Defendants, however, declined to do so. This evidence was corroborated by Second defendant who informed the court that while at the plaintiff’s homestead PW2 conveyed to them that the plaintiff was requesting them to conduct a search of the missing cattle. He then proceeded in chief:

“We said it would be unprocedural for us to search in his absence.”

[51] PW2 evidence is that she also advised the defendants to enquire from the boys who were constructing at his home as to whether plaintiff's motor vehicle left during the night. This again fell on deaf ears. Along the way, PW2 suggested that they enquire from plaintiff's neighbours as to whether his motor vehicle was heard driving past that night with rattling sound. The defendants again refused to make this enquiry. PW3 enquired from the defendants as to what measure were they using to determine the tracks of the motor vehicle that was used to steal the cattle as he had heard a motor vehicle using the same road that morning. Defendants decided to shun this question as per the evidence.

[52] From this evidence highlighted above, one wonders as to the reason defendants, having declined various opportunities to verify their suspicion, maintained as stated by PW2:

“they (defendants) said he (plaintiff) had stolen their cattle.”

[53] To add salt to the wound, in cross examination of PW2 they divulged:

Mr. Ndzinisa: “I am instructed that it was not the first time your husband was investigated by police for cattle rustling. He was once interrogated by Constable Mabuza of Siphofaneni?”

[54] The above points to one direction, i.e., the comments by defendants as stated in the particulars of claim and supported by *viva voce* evidence as pointed above are nothing else but actuated by malice and therefore void of fair comment.

[55] Further, PW4 testified that second and third defendants did report a stock theft case. Their cattle were later recovered. Two persons were charged

and they were during the hearing of this matter awaiting trial at the Siteki Magistrate Court. The plaintiff was never reported as a suspect by the defendants and was therefore not interrogated in respect of the defendants' lost cattle. In other words, there was no truth in the comment made by the defendants. The defendants themselves must have appreciated this as they declined several opportunities to verify from independent persons on whether plaintiff had stolen the cattle. The reason for their failure to do so is not very far as it was revealed under cross examination of the plaintiff that the reason defendants led a mob to his homestead and alleged that he had stolen their cattle was because plaintiff and second defendants were both traditional healers. They were competing for clients.

[56] The defence of fair comment stands to fall on the basis of the above grounds as well. It is my considered view on the basis of the totality of the above evidence that the plaintiff has discharged the *onus* of establishing the action of defamation as the preponderance of probabilities favours him.

Quantum

[57] **American Law Institute, Restatement of the Law, Tort, Vol. 4** para. 912 enunciates:

*“A person to whom another has tortuously caused harm is entitled to compensatory damages therefor if, **but only if, he establishes by proof the extent of such harm** and an amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit.”* (bold, my emphasis)– reported also in **International Tobacco Co. (S.A.) Ltd v United Tobacco Co. (South) Ltd SA 1** at page 17

[58] *In casu*, the plaintiff gave evidence, *“I reside at Mahlabatsini, kaNgcamphalala area. I am a traditional healer.”* Nothing further was

stated in evidence as to qualify the amount of damage suffered as a result of the defamatory comments made by the defendants. In such a circumstance, I am guided by the directions of **Tindal J** in **Klopper v Mazibuko 1930 TPD 860** at 865-6:

“This seems to me a case, therefore, where, though the plaintiff suffered some actual damage, he failed to give the evidence which he could have given to enable the Court to place a figure on such damage. That being so, in my opinion the magistrate ought not to have awarded any damages at all.

[59] Having found *in casu* that the plaintiff has discharged the *onus* that the comments by the defendants were defamatory in nature and in the interest of justice, it is my considered view that the matter stands to be postponed in order for the plaintiff to prove the quantum of damages suffered. I say this much alive to the principle of our law that cases should not be dealt with on piece meal basis. To uphold this principle, I shall order costs which appropriate in the circumstance when the matter is fully ripe.

[60] By reason of the above, the following orders are entered:

- 1) Plaintiff’s cause of action succeeds;
- 2) Matter is postponed for determination on quantum;
- 3) Costs reserved pending finality of the matter.

**M. DLAMINI
JUDGE**

For Plaintiff : X. Mthethwaof Bhembe Attorneys
For Defendants : N. Ndzinisaof Ndzinisa Attorneys

