IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1737/15

In the matter between:

PHILA BUTHELEZI **1ST PLAINTIFF**

CEBSILE NGWENYA **2ND PLAINTIFF**

And

MBONGENI NDLELA **1ST DEFENDANT**
SWAZI ECHO (PTY) LTD T/A TIMES OF SWAZILAND **2ND DEFENDANT**

Neutral Citation: *Phila Buthelezi and Another vs Mbongeni Ndlela and Another (1737/15) [2020] (174) 16th September 2020.*

Coram: **MLANGENI J.**

Last Heard: **11th June 2020**

Delivered: **16th September 2020**

Summary: *Law of delict - damages claim arising from publication by the print media of allegedly defamatory stories and photographs.*

Private investigators broke into a residential flat while the plaintiffs were asleep and naked, and proceeded to take photographs thereon, mentioning that they were acting on the instructions of a minister of state. Photographs got into the hands of the defendants who are owners and publishers of the articles.

Plaintiffs pleading innuendo, question arising whether plaintiffs' failure to plead that the articles were prima facie defamatory was fatal to the claim, especially where the publication is of a prima facie defamatory nature.

Prima facie defamatory material – what constitutes.

Public interests – what constitutes.

Defendants not leading any evidence, relying only on issues raised during cross-examination.

Defences raised in the plea considered, including alleged truthfulness of the stories and absence of animo injuriandi.

Cross examination seeking to establish a defence of reasonableness of publication, which posits that publication of untruthful material may be justifiable if the circumstances of the publication are reasonable, reasonableness including taking steps to verify truthfulness.

Costs where quantum claimed is unreasonably high.

Held: *failure to plead that the publication is prima facie defamatory is not fatal to a claim for defamation in a case where the evidence does disclose defamation.*

Held, further: *publication of material which is known to have been obtained unlawfully may, under certain circumstances, raise a presumption of animo injuriandi.*

Held, further: *in the present circumstances the publication does establish animo injurandi.*

Held, further: *the defence of reasonable publication cannot avail where there is animus injuriandi.*

Judgment entered for the plaintiffs, with costs.

JUDGMENT

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[1] In democratic societies the right of the media to inform, educate and engage the public is well entrenched and beyond question. In the case of INDEPENDENT NEWSPAPERS HOLDINGS LTD AND OTHERS v WALLEED SULIMAN Nugent J.A. expressed the position in the following manner:-

> **"Consistent with venerable democratic traditions the protection of press freedom recognizes that society is generally best served by having access to information rather than having it concealed. Any inroad upon that protection will be countenanced by law if, and to the extent that, the inroad is both reasonable and justifiable in an open and democratic society based upon human dignity……"**[1]

Ota AJA, quoting O'Regan J. with approval, said much the same in the case of AFRICAN ECHO (PTY) LTD AND TWO OTHERS v INKHOSATANA GELANE ZWANE. I quote Her Lordship presently: -

> **"In a democratic society……the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information**

[1] Supreme Court of Appeal Case No. 49/2003, para 69.

and with a platform for the exchange of ideas which is crucial to the development of a democratic culture……they are inevitably extremely powerful institutions….and they have a constitutional duty to act with vigour, courage, integrity and responsibility."[2]

[2] This right has to be exercised within the parametres of the law. It must never be allowed to translate into a tool of abuse and humiliation, and when it does, as in this case, those responsible must be called to order. In the case of ARGUS PRINTING, AND PUBLISHING CO. LTD & OTHERS v ESSELEN'S ESTATE the court made the following trenchant remarks:-

"The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons…..must yield to the individual's right, which is just as important, not to be unlawfully defamed.[3]"

This speaks to the need to weigh the conflicting interests against one another, none being of more importance than the other.

THE FACTS IN BRIEF

[3] On the 13th October 2014, in the still of the night, a private investigator known as Zweli Martin Dlamini was not asleep. He and his team, known as Zwemart, were in Siteki town in the Lubombo Region waiting to pounce upon their target, and pounce they did, in a manner

[2] (77/2013) [SZSC] 83 at para 5-6.
[3] 1994 (1) SA 1, para 25 B-E

reminiscent of a scene in a movie. The plaintiffs were cozy in the second plaintiff's bedroom, naked and unsuspecting, when a group of four people, led by the said Zweli Martin Dlamini, burst into the bedroom and, without a word, proceeded to take pictures of the two lovers in the state that they were in. The pictures that were taken there and in that manner got into the hands of the defendants and subsequently the Times of Swaziland dated 23rd October 2014 carried a front page report on the incident. The report was accompanied by pictures that were taken during the incident of intrusion. This trial is a sequel of that unpleasant incident of about six years ago.

[4] The first plaintiff is an elected Member of Parliament (MP), representing Matsanjeni North Inkhundla. The second plaintiff is an acting Magistrate who, at the material time, was a public officer employed in the office of The Master of the High Court as an Assistant Master in the Lubombo Region, based in Siteki town. It is common cause that the plaintiffs are in a love relationship which started on or about February 2014.

[5] The second plaintiff was residing in a Government apartment in Siteki. At the centre of this suit are the harrowing events that I briefly described above, which occurred on the 13th October 2014. The First and Second plaintiff each claim an amount of E2,000,000.00 from the defendants as damages arising from publication of the allegedly defamatory material that was obtained by Zwemart during the intrusion upon the plaintiffs.

THE PLAINTIFFS' EVIDENCE

[6] Both plaintiffs gave oral evidence in support of their respective claims against the Defendants, and their account of what transpired on that fateful night is much the same. According to the first plaintiff he had come to Siteki to visit his girlfriend, the second plaintiff, overnight. At night the two lovers retired to the bedroom. They were alone in the flat. Whilst they were in bed they heard the bedroom door burst open. They were naked, the only form of cover was the bedding. They looked to see who was coming in through the door and at that time they **"encountered flashlights of cameras"** taking pictures of them in that state. They tried to cover themselves with bed sheets and bed covers while the intruders were taking photographs. The intruders were four – two male and two female. In the course of the episode the first plaintiff managed to scurry into the bathroom to get dressed up. The second plaintiff remained in the bedroom, doing whatever she could to fend off the marauding intruders. According to the first plaintiff when he went back to the bedroom, now dressed, he found the first plaintiff covering herself with a bed sheet. A gentleman by the name Zweli Martin Dlamini was forcefully removing the bedsheet that the second plaintiff was using to cover herself up, while continuing to take pictures.

[7] The plaintiffs' car keys, house keys and cellphones were taken by the intruders. Words were uttered by Zweli Martin Dlamini to the effect that the plaintiffs were committing adultery, and that the invasion was at the instance of the then Minister for Justice and Constitutional Affairs whose instructions were that the team must break into the apartment and take photographs of the plaintiffs in nudity. The minister, according to the first plaintiff, was one Sibusiso Shongwe. The intruders gained entry into the flat by breaking a window, and they exited through the door and left. The plaintiffs subsequently made a

report to the police and a criminal case thereon is still pending in court, to date.

[8] Earlier on I observed that the plaintiffs' account of the episode are much the same. I will therefore largely highlight additional information that was mentioned by the second plaintiff which was not mentioned by the first plaintiff. The second plaintiff testified that when the first plaintiff ran to the bathroom to get dressed he covered himself with a bed cover. She was not dressed, and she used bed sheets to cover her body. Zweli Dlamini assaulted her for concealing her body. She took his camera and threw it away and he continued assaulting her, with fists. When the first plaintiff came back to the bedroom the second plaintiff was on the floor, covering her face. At that stage one of the two ladies suggested that they should leave as they had found what they wanted. She further testified that the first plaintiff was hurt in the hand during the scuffle. The intruders then calmed down and started talking normally. Zweli Martin Dlamini asked them why they were committing adultery. In Siswati he said **"Niphingelani?",** and added that they were sent by the Minister to verify that the two were indeed committing adultery.

[9] It is common cause that on the 23rd October 2014, which is about ten days after the intrusion, the Times of Swaziland ran a leading story about the incident, which was captured on the front page in bold and extensively reported on in the subsequent page. The caption was in bold on the front page. It was as follows: -

"MP, JUDICIAL OFFICER CAUGHT IN BED"

Below it, in smaller print, there were further captions as follows: -

- **“Private investigator breaks into Assistant Master’s house at night.**
- **Say they were hired by Minister to tract the two.**
- **They are charged with invasion of privacy”**

[10] The main report, at page 2 of the publication, was headed **“MP, Master’s Employee Caught in Bed,”** and the Master’s employee was named as Cebsile Ngwenya, the second plaintiff. The newspaper report, by the first defendant, continued in the following manner: -

> **“The married MP was busted by a team from Zwemart Private Investigators last Monday. Pictures and video clips of the two have since been presented to a minister, known to the Times Investigations Desk, who had hired the private investigators ….this publication is in possession of the video clips and pictures.”**

Below this one there is a smaller report in which the private investigators confirmed that they were acting upon the instruction of a Minister who **“asked not to be revealed for now.”**

[11] When the story was published on the 23rd October 2014 the first plaintiff was out of the country on official business. According to the report he was contacted while overseas to comment on the report and he declined to do so until he came back home and got more information on the matter. This aspect was the subject of a dispute during cross- examination, the defence putting it to the first plaintiff that prior to publication of the article he was asked to comment on the incident and he insisted that the only time he was asked to comment was after the publication, not before.

[12] The court was handed documents **“PA1”** and **“PA2”** which are copies of the newspaper reports of the 23rd October 2014. Document **“PA2”** has two photographs of the second plaintiff. On one paragraph she is on top of a bed. The head, torso and thighs are covered with bedding. One arm and both lower legs are exposed. On the second picture her face and much of her body is covered with bedding. The picture of the first plaintiff shows his upper body only, which is covered by a gold T-shirt, the position of his arms up in apparent supplication. In his evidence he said that he was then out of the bathroom, dressed, and pleading with the intruders to desist from what they were doing.

[13] The nub of the plaintiffs’ claim against the defendants is at paragraphs ten (10) and eleven (11) of the particulars of claim. I capture the paragraphs in full below: -

> **“10. Consequently it is stated by the plaintiffs that the article was intended by the author to be understood by the ordinary readers of the publication to mean that;**
>
> **10.1 The plaintiffs are of loose moral integrity who have no control over their sexual urge.**
>
> **10.2 The plaintiffs have the proclivity and tendency to engage in canal activity irrespective of the fact that the first plaintiff is a married man with a family.**
>
> **10.3 The plaintiffs are of loose moral standards who have not only abused their offices but have**

also led a lifestyle that defied the standing that they ought to uphold as officers of the government.

10.4 The plaintiffs abused government premises in furtherance of their illicit affair.

11. The article, coupled with the photos, was malicious and defamatory to the plaintiffs in that their reputation was dismissed in the estimation of the readers of the Times of Swaziland.

11.1 The article was published recklessly and vexatiously in that that the first defendant failed/or neglected to consider whether the publication of the article and the photos was in the interest of the public."

[14] Clearly, the plaintiffs' particulars of claim are inelegant, verbose and convoluted, portraying an insufficient understanding of what averments are necessary to establish a cause of action in defamation. Without laboring this point I make reference to paragraph 12.2 where the plaintiffs allege that the publication lowered **"the plaintiffs' self-esteem and further disintegrated their dignity",** and at para 12.3 it is averred that to the readers of the newspaper the plaintiffs were portrayed **"as individuals of loose moral standards that have no respect for themselves, their families and the offices that they occupy."** Surplusage cannot come in any worse form than that. However, this shortcoming that I have highlighted is not *per se* a basis for concluding that the plaintiffs have not established a cause of action.

[15] It appears to me that the plaintiffs have pleaded on the basis that the words and the pictures complained of are not *per se* defamatory but are capable of defamation in their secondary meaning, which would either be innuendo or what the words imply[4]. I say this because it is settled in our law that where the words complained of are *prima facie* defamatory, there is no need for the plaintiff to attribute any specific meaning to them. The onus then falls on the defendant to justify the publication on one ground or another, e.g. truthfulness, public interest, etc. In the present case the plaintiffs have said a lot of things about how the article and the pictures were perceived by themselves and the ordinary reader. According to the defendants the plaintiffs, having attributed a specific meaning to the publication, are bound by it, and if they fail to establish it on a balance of probabilities they are liable to fail in their action. For this argument the defendants are relying on the case of NEW AGE PRESS LTD AND ANOTHER v O'KEEFE[5], which I will come to later on.

[16] However, in their oral evidence the plaintiffs' position was that the report of the 23rd October 2014, at pages 1 and 2 of the Times of Swaziland, was *prima facie* defamatory in that its natural and ordinary meaning is that they were **"caught"** doing something wrong, that there was something untoward, either morally or legally or both, about the situation they were found in. In day-to-day language we talk about a criminal being caught red-handed, an adulterer being caught in the act, etc. There is no doubt in any mind that the word **"caught"** *prima facie* supposes that the plaintiffs were doing something wrong, and that it is *prima facie* defamatory if the plaintiffs were in fact not

[4] See Note 3 above.
[5] 1947 (1) SA 311 (W)

engaged in an immoral or unlawful conduct. Further, on paragraph 2 of the main article of the 23rd October 2014 the reporter states that the **"married MP was busted by a team from Zwemart Private Investigators last Monday".** In this country the word **"busted"** is commonly used by the print media nowadays in relation to the criminal conduct of illegal dealers or conveyers or farmers of dagga which is a prohibited substance in this country.

Lastly on this aspect, I make reference to a sub-article which is a page 2 of the main report referred to above, dated 23rd October 2014. The sub article is headed **"NOTHING WRONG WITH MPs DATING UNMARRIED WOMEN."** This sub-article quotes Mbalekelwa Ndwandwe, then Parliament Chief Whip, as saying that **"if the woman he is accused of being found in bed with is not married, there is no problem."** So the defendants have actually recorded that this was an accusation against the plaintiffs and clearly if it is factually incorrect then it is defamatory, unless the defendants advance a legitimate justification.

[17] By the time the trial got underway, it had become common cause that the plaintiffs were actually not involved in any immoral or illegal conduct when they were invaded by the intruders. This is because the defendants apparently subsequently became aware that the first plaintiff's marriage is in accordance with customary rites, which does not exclude a relationship with someone else. The defendants also became aware that the second plaintiff was not married to anyone at the time, and therefore eligible for a relationship with the first plaintiff. In their oral evidence the plaintiffs put this aspect of the matter beyond doubt.

[18] What is clear is that when the unsavoury mission was carried out against the plaintiffs the assumption was that they were in an illicit love relationship and the intention was to expose them, to bust them, hence the caption that they were **"caught in bed."** This is confirmed by the plaintiffs who, in their evidence, say that once there was a relaxed conversation in that flat of horror, one Zweli Martin Dlamini asked them why they were committing adultery. The court was not told how this question was answered, hence it is not possible to tell with certainty if the defendants became aware of the true position prior to publication of the article of the 23rd October 2014 or not.

[19] Interviewed by the second defendant's reporter on the mission to bust up the plaintiffs, Zweli Martin Dlamini described the episode as one of the most interesting ones they have ever dealt with. He added that: -

> **"All we want is that the matter be soon taken to court so that we can reveal more. We have a lot to tell in court."**

Interesting it may have been to him, but objectively it evokes a sense of opprobrium and distaste.

[20] The question that arises, therefore, is this: can I disregard the plaintiff's direct evidence only on the basis that their particulars of claim are on a different but parallel trajectory?

[21] In their discovery schedule the plaintiffs make reference to **"various articles published in the Times of Swaziland."** These include

articles other than the one that is copiously pleaded in the particulars of claim. They were published by the defendants on subsequent editions, as follow-up to the one of the 23rd October 2014. Defence counsel correctly criticized this as inadequate or improper discovery, for lack of specificity. Plaintiffs' counsel's retort was that this criticism should have been raised when the discovery papers were received by the defendants rather than to leave it till the trial got underway, but the major attenuating factor is that this series of publications that the plaintiffs discovered was also contained in the defendants' documents which they intended to use in cross-examination and did use very extensively. These documents were received by the court as **"DA1-54".** Moreover, in their **"bundle of further discovered documents"** the defendants introduced three different newspaper publications – Times of Swaziland dated 10th November 2014, Times of Swaziland dated 28th November 2014 and Sunday Observer dated 8th February 2015. Clearly, the respective litigants regarded this diverse material as relevant for purposes of resolving the dispute and both sides made reference to it, the defendants being particularly extensive and tenacious on the issues they raised during cross-examination, based on these documents.

[22] Moreover, the pre-trial minute settles this issue. Clause 3.1 of the said minute stipulates the following: -

> **"The court is required to decide whether the plaintiffs were defamed as a result of the invasion and publication and whether they suffered any damages……."**

[23] It therefore appears to me that to disregard the evidence that I heard from the Plaintiffs only because the particulars foreshadow innuendo, would have the effect of defeating the purpose of trial proceedings, which seeks to optimize ventilation of all relevant issues between the litigants.

[24] I now come back to the case of NEW AGE PRESS Ltd[6] which the defendants rely upon. My understanding of that judgment is that it does not support the argument that in the absence of an allegation that the material complained of is *prima facie* defamatory, the court may overlook any other evidence that is capable of sustaining a defamation claim. In that matter it was reported that the Respondent had **"sold"** his union by accepting bribes from workers' employers, and in his pleadings the Respondent had proceeded to attribute a specific meaning to the report. An exception was raised that the particulars did not disclose a cause of action because, among other things, it was not alleged in the declaration that the words are defamatory *per se.* The exception was dismissed, the court relying on the erudite words of Schreiner J.A. who said the following: -

> **"Where a defendant excepts to a defamation declaration in order to raise the issue of the defamatory quality of the words complained of his only valid ground of exception, where no secondary meaning is alleged in the declaration, is that the words are not in their ordinary sense capable of bearing a defamatory meaning; where a secondary meaning is alleged in the declaration the exception must rest on the two-fold ground that the words are incapable in their ordinary sense of bearing a**

[6] See note 5 above

defamatory meaning and that in the circumstances alleged in the declaration they are not capable of bearing the meaning attributed to them in the innuendo"[7]

Flowing from the above, I have come to the conclusion that the omission by the plaintiffs to allege that the words and the pictures are defamatory *per se* is not fatal to their claim, and the claim has to be considered on the basis of the totality of the evidence.

ALLEGED DEFAMATION

[25] In their evidence in chief both plaintiffs sought to establish the defamatory effect of the publication of the stories and the photographs. There is no doubt that they were devastated by the intrusion upon their privacy, and the publication was like adding salt to injury. Both plaintiffs were unwavering in their position that:-

25.1 if the defendants did not publish the article and the pictures there would be no defamation claim against them;

25.2 having decided to report on the incident, they could have served public interest well without going as far as they did.

For instance, if the relationship was of public interest they could have reported on it without the humiliating details of how they were pounced upon in bed in the middle of the night; that there was no necessity for publication of the pictures of the two battling to cover their naked bodies. In short, the story could have been told equally effectively in a much more dignified manner. They could well have published the picture of the Honourable MP's motor vehicle parked at

[7] National Union of Distributive Workers v Cleghorn and Harris, 1946 AD.

the second plaintiff's flat at night and leave the rest to the imagination of the reader. The manner in which it was done left very little to imagination.

[26] The first plaintiff was, at the material time, an elected Member of Parliament for Matsanjeni North Inkhundla. His evidence is that the news of his being **"busted"** had a devastating effect on him personally and on his political career and position as a Member of Parliament. Being a public figure, and an outspoken Member of Parliament, this publication had a nation-wide reach. While he was on a business trip in the United States of America he was receiving messages from colleagues and acquaintances asking why he was committing adultery. Even his chief was quoted saying that he would call the first plaintiff to answer. He stated that the stigma from that publication still follows him even today. He further stated that the use of the words **"caught"** and **"busted"** was malicious, especially since his comment was not sought prior to the publication, a position that he maintained despite pounding cross-examination. In respect of the reaction in his community at Matsanjeni, he had this to say:-

> **"After this publication my community back at home heard he bad side of me as if I was a man who committed adultery. My dignity has been impaired by this publication…..[It] has shown me to the community or society as a person of loose morals…….even in social media when they talk about people who are not behaving well I am an example following this publication……this article was false and misleading and it created a bad picture of me."**

[27] For her part the second plaintiff described the effect of the publication upon her. She observed that the news on the intrusion upon them was reported on successive publications of the Times of Swaziland, clearly suggesting that the attack on their names was sustained. At the material time she was a public officer employed as Assistant Master in the Lubombo Region. The reports, according to her, portrayed her as a home-wrecker who related with a married man, that the word **"caught"** and **"busted"** suggested that she was doing something bad or wrong, which was not the case. She further testified that she was contacted by the newspaper reporter prior to publication of the report but she was not asked about the nature of her relationship with the first defendant. She was only asked about the break-in and the photographs and she responded to that. At the time of this trial the witness is serving as a magistrate, albeit in an acting capacity.

[28] Giving a background about how she came to be regarded as being at the centre of the famous **"estates policy"** of the then Minister for Justice and Constitutional Affairs, Mr. Sibusiso Shongwe, her account suggested that her involvement in that issue was misrepresented and exaggerated, that she did not refuse to implement the minister's touted policy but merely asked The Master to furnish a written instrument for purposes of future reference. This is the explanation she gave when she was summoned to the Judicial Services Commission (JSC) to answer on the matter, and contrary to the version advanced by the defendants in cross-examination, of the defendants, that meeting was not a disciplinary meeting. The witness further stated that she does not involve herself in the first plaintiff's parliamentary business, that he does not discuss that with her and that she only reads about it in newspapers. In further demonstration of this, she stated that although the first plaintiff knew that she was called by the JSC, he did

not get to know what transpired in that meeting. Well, I am not quite persuaded about that. He would need to be absolutely disinterested in what goes on in her professional life, to not want to know what transpired in the meeting between her and her employer. That said, I do not find this to be such an important factor as to go towards credibility. Her attorney put it to her that the defendants say that in the pictures that were published she was clothed, which she denied and asserted that she was naked and covered in bedsheets. Further, it was put to her that the defendants say that the publication is essentially true because they were indeed in a love relationship and she denied the truthfulness of the report, saying : -

> **"They did not write about the relationship. They wrote that we were caught naked in bed."**

WHAT IS THE DEFENDANTS' DEFENCE?

[29] Having found that the publication is *prima facie* defamatory, in that its natural and ordinary meaning is that the plaintiffs were in an illicit love relationship, committing adultery, it then falls upon the defendants to justify the publication on one ground or another. Material is *prima facie* defamatory if the words used, in their ordinary and natural meaning, reflect adversely on the moral character of that person, such as **"dishonesty or any other kind of dishonourable or improper conduct[8]."** The defendants did not lead any evidence, so whatever their defence can only be deciphered from the issues that they raised through cross-examination of the plaintiffs. The starting point, however is their plea.

[8] See Dr Johnnes Futhi Dlamini v The Swazi Observer And Others (1319/2016) [2017] SZHC 86 at para 19.

29.1 at paragraph 4.2 of their plea, the defendants aver that since the first plaintiff is married in accordance with Swazi Law and Custom, there is no stigma that can attach to him having a relationship with any person other than his wife. What this overlooks is that at the time of publication, and because of the content of the publication, the reader could not possibly be aware of this, and this is where the sting of the defamation occurred the most. And, as a matter of fact, the defendants did not at any point in time bring it to the attention of their readers that the first plaintiff was married under Swazi Law and Custom.

29.2 At paragraph 5.2 of their plea the defendants aver that there was no invasion of privacy because the pictures published of the plaintiffs were pictures of them fully clothed. This, of course, is factually incorrect.

29.3 At paragraph 5.3 of their plea the defendants allege truthfulness of the report, that the essence of the report is true because the plaintiffs are in a relationship. This overlooks the fact that the report was not about a relationship, it was about the two being caught or busted in bed, and I have already said what the objective import of that is.

29.4 At paragraph 7.3 and 7.4 the defendants posit that the publication was objectively reasonable and was made without *animo injuriandi*. A report that is factually incorrect, and the subject of the report is not given an opportunity prior to publication, to confirm or deny it, cannot be objectively reasonable[9]. On *animus injuriandi*, the report in its totality firmly shows that the defendants acted with intent. They knew the motive behind the intrusion, and they deliberately withheld the

[9] See note 8 above.

name of their principal while disclosing in full the particulars of their victims.

[30] During cross-examination of the plaintiffs a certain line of defence emerged, which was not specifically pleaded in the plea. It is that the publication was made in the public interest. The background to this line of defence was canvassed at length through probing questions that were put to the plaintiffs. I summarise it below:-.

30.1 The then Minister for Justice and Constitutional Affairs, Mr. Sibusiso Shongwe, perceived that the laws applicable to the distribution of deceased's estates in the country were unfair to widows, especially those married in accordance with Swazi Law and Custom, in that it accords them a child's share only. He embarked upon a highly publicized mission to rectify this by formulating a policy whose essence was that upon the death of their husbands, widows should receive half of the estate. It is unclear to me what the formula would be in a situation of polygamous marriages, but this is of no relevance to the present matter.

30.2 It is apparent that while the widows may have rejoiced over the minister's vision and gusto, elsewhere the move was not receiving the support that the minister may have hoped for. In parliament, particularly, there was palpable resistance and at the forefront of this resistance there was Honourable MP Phila Wiseman Buthelezi, the first plaintiff in these proceedings. In his evidence he informed the court that he was in the Portfolio Committee of the Ministry of Justice, hence his interest in the subject was in the normal course of business. His position, as well as that of other Honourable Members of the House of

Assembly, was not against the idea of correcting the wrongs of the 1902 legislation on intestate estates. Rather, as formulators of statutory laws, their position was that the approach adopted by the Minister was wrong in that an administrative policy cannot be used to amend parliamentary legislation in the form of a statute. According to the first plaintiff, the point of departure was as simple as that. This position was echoed by Honourable MP Marwick Khumalo, as reported in the Times of Swaziland of July 17th 2014, where he was quoted saying **"Minister Sibusiso Shongwe's heart was in the right place as far as trying to solve a problem that has existed for a long time, but it was his approach that was not suitable."**

30.3 The minister was determined to do it in his way, and indeed he eventually publicly announced the policy. Parliament, with the first plaintiff in the forefront, ordered him to withdraw the policy. He did not, and contempt proceedings were instituted against him. It is at the height of this stalemate that the first plaintiff adopted the position that it was all a waste of time because the minister was not going to comply – the right thing to do was to remove him from office through a vote of no- confidence.

30.4 At this time the second plaintiff was Assistant Master of the High Court stationed at Siteki and she, like others in a similar position, were expected by the minister, and apparently by The Master of the High Court, to implement the Minister's policy. The second plaintiff's evidence is that she was willing to implement the policy but she required a written instrument for purposes of future reference which would protect her in future if and when issues arose. For this her immediate boss, The Master of the

High Court, hauled her to the Judicial Services Commission to answer for the position that she had adopted. This was a small part of political intrigue that was going on in the country, which saw the then Prime Minister of the country withdraw the policy on behalf of his charge, the Minister. What happened thereafter is immaterial to these proceedings.

[31] The essence that was being brought up in the cross-examination was that what was happening in Parliament and what was contemporaneously happening at the office of The Master at Siteki was no co-incidence, that the plaintiffs were acting in unison to frustrate the minister's estates policy, and that the first plaintiff had an interest in the estates policy, which he should have declared, and that all that he did in Parliament on the subject of estates was driven by his personal interest. At the end of the cross-examination of both plaintiffs, I was still unable to understand what it is that the plaintiffs stood to personally gain by resisting the estate policy. For the first plaintiff's part, he testified that he did that in the normal course of duty, to protect the august House from improper procedure. For the second plaintiff's part, she testified that she was willing to implement the policy but she required protection in the form of a written instrument, in case problems arose in future and she required justification.

[32] In the defendants' heads of arguments, at paragraph 15, the position is summarized in a manner that I cannot improve upon, and I quote the head in full below:-

> **"It is apparent from detailed background which was put to the plaintiffs that both were involved in the 'estates issue' which had become a highly controversial political**

confrontation in which the first plaintiff, as Member of Parliament, played a prominent, public and well-publicised role. The second plaintiff had also adopted a position with regard to the estate issue and a directive of the Master of the High Court. The Minister was clearly suspicious of the possible connection between the two because of the strident steps taken against him in Parliament by the first plaintiff."

There is an important difference between material of public interest and material which the public has an interest to know about (see SWAZILAND DEVELOPMENT AND SAVINGS BANK v THE TIMES OF SWAZILAND)[10]

In the quest to enhance revenue, the media often falls into the trap of seeing the two as one and the same thing. For example, a reader of average intelligence may well have been interested to know who the first plaintiff was dating, but ordinarily this should not be a matter of public interest – it belongs to the private domain. In this particular case, what makes the defendants' position much less defensible is the fact that they published information which they knew had been obtained unlawfully. On this aspect Sapire ACJ had the following to say in the Swazibank matter:-

"Where the information sought to be published was obtained by means of an unlawful intrusion upon privacy then, generally, any publication of such information would be unlawful."

The present case falls squarely within this category. An interesting question that arises is this: does the publication of information that is known to have been obtained illegally raise a presumption of *animo*

[10] Civil Case No. 1613/96, per Sapire ACJ

injuriandi? Perhaps the answer lies on the facts of each particular case. In the present case it certainly does.

[33] It is needless to point out that it is the Minister's suspicion that led him to engage Zwemart to do what was done, and the defendants were on hand to take it to the public domain and did so in spectacular fashion.

[34] I am not persuaded that there was sufficient conflict of interest to sway the first defendant who, in evidence, described himself as a man who takes his work seriously, and his active participation in parliamentary business of all subjects is well-documented, borne out by the many offices that he occupies in Parliament including that of being Chair of Chairs. Currently, he is chairman of the Public Accounts Committee (PAC). In the first defendant's favour I also note that when he was nominated to be a member of a Parliamentary Select Committee to deal with the perceived intransigence of the Minister, he declined the nomination on the basis that he had adopted a firm position on the matter, hence his contribution would not be from an open mind. In a way, this was to acknowledge that he was likely to be biased as he went about the work of the Select committee. A report on this is at page 9 of the book of pleadings, under the sub-title **"ABOUT MP BUTHELEZI."** The report states that after the first plaintiff had suggested a vote of no confidence against the Minister, he declined nomination into the committee, stating that **"through his submission he had already indicated that he did not think much of the Minister and, therefore it would not be fair to the house if he was in the committee"** If he was truly conflicted in relation to his girlfriend, the second plaintiff, it is more likely than not that he would have acted accordingly.

[35] But even assuming that he was, as a matter of fact, conflicted and the defendants genuinely sought to bring this to the attention of the public, they could and should have done so without humiliating the plaintiffs in the manner that they did. Accordingly, the defence of public interest cannot succeed on the facts before me.

[36] The last ground of defence advanced by the defendants, again through cross-examination, is that even if the publication is factually incorrect it may nonetheless be justifiable upon consideration of all the circumstances of the case, to publish the facts in a particular way and at a particular time. The authority that is offered for this proposition is the South African judgment in NATIONAL MEDIA LTD AND OTHERS v BOGOSHI[11]. This case enunciates the notion of reasonable publication, and the defendants argue that in *casu* the publication must be seen in the context of the political events at the time, in which the defendants both featured. These events were outlined above at paragraph 30 of the judgement.

[37] In the BOGOSHI CASE Hefer J.A. observed that in determining whether the publication was reasonable or not, account was to be taken of the nature, extent and the tone of the allegations. In *casu* the nature of the publication is scandalous, the extent is overboard and the tone is scurrilous. In totality, the publication points firmly towards *animus injuriandi,* especially because the motive behind the intrusion was known to the defendants, and while the defendants' names were front-

[11] 1998 (4) SA 1196 (SCA).

page material, that of the Minister was, for a while, concealed, clearly to protect him while the defendants were thrown under the bus.

[38] It appears to me that reasonableness cannot co-exist with *animus injuriandi.* Assuming that BOGOSHI has been fully embraced in this jurisdiction, for the reasons that I have stated above it cannot avail the defendants in this case. Moreover, the onus is upon the defendants to establish all the facts upon which they rely to show that the publication was reasonable. In a case such as this, where the defendants have not presented any direct evidence, they have surely missed the boat.

[39] On the totality of the evidence it is reasonable to infer that the defendants allowed themselves to be used in a do-or-die political battle between the Minister and the Plaintiffs, and I do make this inference. I make reference to page 48 of the defendants' documents marked **"DA1-54",** to a Times of Swaziland report dated 24th October 2014, a day after the first publication. Striking while the rod was hot, the defendants wrote the following: -

> **"EXPOSE POLITICALLY MOTIVATED"**
>
> **"The private investigators were hired by a cabinet minister to carry out the investigation. The minister is known to this publication, however, he will not be revealed for now……the investigation was done to gather evidence about a possible connection between the two"**

[40] We now know that the publication did much more than establish a connection between the two. In the conspectus of the matter, I hold that the plaintiffs succeed in this action.

QUANTUM OF DAMAGES

[41] **"……reputation is the fundamental foundation on which people are able to interact with each other in social environments and that 'the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the charter rights'. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society."[12]**

What this says is that everyone has a reputation that deserves protection by law. Where the reputation is unduly attacked, the victim is to be compensated through an appropriate award of damages.

[42] Against the above there is the salutary caution that damages in a defamation suit should not be a windfall but a solatium to assuage the aggrieved party.[13] In the case of DR JOHANNES FUTHI DLAMINI v THE SWAZI OBSERVER AND OTHERS[14] Hlophe J., making reference to several precedents in this jurisdiction, identified relevant factors for consideration[15] in a quest to arrive at a fair quantum of damages. I mention them presently: -

[12] Per Hefer J.A. in the Bogoshi Case, Supra.
[13] Mogale and Others v Siema, 2008 (5)SA637 (SAC)
[14] See note 8 above.
[15] At para 59 of the judgment.

i) Character and status of the plaintiff;
ii) The nature and extent of the publication;
iii) The nature of the imputation……
iv) Probable consequences of the imputation;
v) Partial justification;
vi) Retraction or apology;
vii) Comparable awards which should take into account the devaluation in monetary value.

[42] It is common cause that at the material time the plaintiffs were of good standing in society. They both had good jobs, and in both cases the jobs were in the public eye. It is to be expected that on a daily basis they interacted with many different people. The first plaintiff, at the material time the youngest member of parliament, was an active, assertive and vocal politician who was probably in the public eye more than the second plaintiff, and this is clearly a relevant consideration. Against this I must consider that this adverse publicity did not hamper the progress of the careers of the plaintiffs. At the material time the first plaintiff was an Assistant Master, now she is an acting Magistrate, a position that clearly comes with more responsibility and attention. In 2014 the first plaintiff was an ordinary member of the House of Assembly but his involvement in numerous committees was a clear indication of his niche in politics. In the year 2018 he was re-elected to Parliament, and at the time of trial he is Deputy Speaker in the House of Assembly. So clearly, if it wasn't for the remarkable sting of publication the plaintiffs would have been in line for an award in the range of E200, 000.00 for the first plaintiff and E100, 000.00 for the second plaintiff. I note, for instance, that in the recent case of DR JOHANNES FUTHI DLAMINI, where the attack had less sting, the amount of E200, 000.00 that was awarded appears to me to be reasonable in

view of his position as a well-known medical practitioner and successful businessman.

[43] In this jurisdiction the highest award at this moment is in the case of AFRICAN ECHO (PTY) LTD and TWO OTHERS v INKHOSATANA GELANE GELANE ZWANE[16] where an award of E550, 000.00 was confirmed by the Supreme Court. There is no doubt that the publication in that matter was not only shocking but had far-reaching implications for the plaintiff, including that her position as Acting Chief of Kontshingila was open to question, given that her paternity was therein attributed to a certain Mahlangu when she was known as a Simelane. In the case before me the effect of the publication cannot be equated to that.

[44] In exercise of my discretion, I consider that the plaintiffs' reputation in this matter will be adequately vindicated by the quantum that I make below: -

First Plaintiff = E350, 000.00

Second Plaintiff = E175, 000.00

[45] On the issue of costs, which will follow the event, the defendants argue that the amount of E2, 000,000.00 which was claimed apiece on behalf of the plaintiffs was so excessive as to induce a sense of shock. In this case it is particularly so because the plaintiffs' attorneys were involved in the Gelane matter and will have known that the present facts are not at the same pedestal, and that the quantum was extremely unlikely to exceed the amount of E550, 000.00. Attorneys have an

[16] (77/2013) [SZSC] 83,3RD Dec 2014.

important role in guiding their clients on realistic quantum to be claimed in particular circumstances. A grossly unrealistic figure must surely attract censure. The reason for this is not difficult to see. It is conceivable, indeed likely, that a realistic figure could be an incentive for an out of court settlement, in which case all the litigants would be saved legal costs. Where the figure claimed is astronomical, as in this case, the defendant has little option but to dig in his heels, at a considerable cost. I am therefore allowing the plaintiffs only a percentage of their wasted costs.

[46] I therefore make the following orders: -

46.1 The plaintiffs' claim succeeds.

46.2 The Defendants be and are hereby ordered jointly and severally to pay the plaintiffs the following respective amounts: -

First plaintiff = E350, 000.00

Second plaintiff = E175, 000.00

46.3 Plaintiffs' costs to be recovered up to sixty (60) per cent

46.4 Interest on the said amounts from date of judgment to date of final payment.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Plaintiffs: Attorney N.D. Jele

For the Defendants: Advocate P.E. Flynn, instructed by Musa M. Sibandze Attorneys