IN THE HIGH COURT OF ESWATINI

JUDGMENT

Criminal Case No. 1298/2016

In the matter between:

PHILA BUTHELEZI **PLAINTIFF**

And

THULANI THWALA **1ST DEFENDANT**

SWAZI OBSERVER (PTY) LTD **2ND DEFENDANT**

NEUTRAL CIATION: **PHILA BUTHELEZI V THULANI THWALA & ANOTHER *(1298/2016) SZHC – 215 (14/10/2022)***

CORAM: **BW MAGAGULA J**

DATE HEARD: **03/10/2022**

DATE DELIVERED: **14/10/2022**

SUMMARY: - Rule 33 (4) of the High Court Rules – Plaintiff on the date of trial applies to the court to separate the issues. On one end, the court is called upon to interpret as matter of law if certain words which underpins the Plaintiff's defamatory claim are defamatory as a matter of law. The basis being that the Plaintiff has already sued another party successfully on the basis of the very offensive statement. On the other end of the spectrum, if the court interprets the alleged offensive words to be defamatory, then the court should separate the issues and allow evidence only on the question of quantum.

HELD: - In the plea, the Defendant's defence appears to be the context in which the words were used in the article. The context alleged by the Defendant can only be ascertained from the evidence to be adduced by the Defendant. It would therefore not be in the interest of justice to interpret the alleged offensive statement without the benefit of the context.

HELD: - Application dismissed, costs to be costs in the course.

Ruling in respect of an application in terms of Rule 33 (4)

Brief background

[1] The Plaintiff instituted action proceedings against the Defendants on the 26th July 2016 claiming damages in the amount of E1 000 000. This is pursuant to

a publication of an alleged defamatory article by the 2nd Defendant authorized by the 1st Defendant.

[2] The matter went it's full cycle in terms of the procedures set out in the rules of court, up until a request for trial was made to the Registrar. The matter was eventually set for trial on the 3rd October 2020.

[3] On the day of trial, Counsel for Plaintiff *vivavoce* moved an application in terms of rule 33 (4) of the Rules of court.

BASIS FOR THE RULE 33 (4) APPLICATION

[4] When motivating the application, Plaintiff's Counsel Mr N. D. Jele submitted the following;

4.1 There are certain findings that were made in another matter involving the Plaintiff and a different Defendant where the Plaintiff was awarded damages arising from a similar complaint.

4.2 It is on that basis that the Plaintiff applies for a separation of issues where the court should establish if the words complained of are on their own defamatory. The words complained of are "sleeping around". The court is therefore asked to determine, if it was correct for the Defendants to write and publish that the Plaintiff "was sleeping around". This should be done in the context of the Plaintiff being a married man, in terms of the Swazi Law and Custom. The overarching question being that,

would it then be said that someone who is married in terms of Swazi Law and Custom be said he is "sleeping around"?

[5] Mr Jele continued to submit that, it would be a waste of time and resources for the Plaintiff to be made to take the witness stand and give oral evidence. When the central issue is not the facts of what happened, but the interpretation of the word "sleeping around" in the context of the marital regime of the Plaintiff and against the background of the already decided cases where the Plaintiff is also a party.

[6] The decided cases that are referred to, are the following;

Phila Buthelezi 1st Plaintiff, Cebsile Ngwenya 2nd Plaintiff Vs Mbongeni Ndlela and Swazi Echo Limited trading as Times of Swaziland 2nd Defendant High Court Case 1737/15. The second judgment involves the same parties, but it's a matter decided by the Supreme Court of Eswatini, which is the matter of **Mbongeni Ndlela & 2 others Vs Phila Buthelezi and Cebsile Ngwenya Supreme Court Case No. 60/2020.**

[7] In both judgments, the current Plaintiff was the 1st Plaintiff in the *court aquo.* The 2nd Plaintiff was Cebsile Ngwenya. The essence of the Plaintiff's argument, is that there is no need for the Plaintiff to lead evidence, especially to demonstrate that the words that were published by the Defendant are defamatory. The basis being that both the *court aquo* under Case No.

177/2015 and the Supreme Court Case No. 60/2022 have already ruled that to publish that the Plaintiff sleeps around is defamatory.

Defendant's Position

[8] The Defendant through it's Counsel Mr Z. Shabangu, is opposed to the application moved by the Plaintiff. In as much as Mr Z. Shabangu was terse in his submissions and did not pointedly deal with the merits of the rule 33 (4) application. His grounds for opposition were mainly based on the fact that the parties were before court for trial and the trial should proceed. His submissions were that the court should reject the invitation to separate the issues as applied for by the Plaintiff's Counsel. The two cases cited entirely different from the matter at hand. In the event the Plaintiff is not inclined to take the stand or call other witness (es) to take the stand, he must simply close his case and the Defendant will take it from there.

Rule 33 (4)

The exact wording of the Rule is as follows;

33. (4) if it appears to the court mero motu or on the application of any party that there is any pending action, a question of law of fact which it would be convenient to decide either before any evidence is led or separate from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of.

What is the question of law or fact that the court is called upon to decide and separate?

[9] In terms of the submission by the Plaintiff's counsel, the court is called upon to decide whether the following words are defamatory as a question of law:

> *"MP Phila Buthelezi, who is both out spoken and sleeps around".*

The motivation advanced by the Counsel is that in previous judgments[1] it has already been decided that these words are defamatory. Therefore, there is no need for evidence be led to prove their defamatory character. If the court finds that the words are not defamatory, then that would be the end of the matter as there will be no need for further factual evidence to be adduced in that regard. However, if the court finds that the words standing alone are defamatory, the only remaining issue would be for evidence to be lead in support of the quantum.

Analysis and conclusion

[10] It is apposite for the court to consider what the Plaintiff has pleaded as it's case in the particulars of claim, before deciding on whether it is correct that the only interpretation that the court should make is the defamatory character of the words published. Consideration should be given to the decided cases, especially the **Times of Eswatini** matter[2]. In that judgment the newspaper had published the following caption;

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[1] Both of the High Court and the Supreme Court; referred to in paragraph 6 of this judgment.
[2] Supra

"The married MP was busted by a team from Zwertmart Private Investigators last Monday. Pictures and video clips of the two have since been presented to a Minister known to the investigation desk, who had hired the private investigators. This publication is in possession of the video clips and pictures".

[11] The basis for the Plaintiff's claim amongst other grounds, was that the article was intended by the author to be understood by ordinary readers to mean that the Plaintiff is of loose moral integrity, who has no control over his sexual urge. Further, that the Plaintiff has the proclivity and tendency to engage in canal activity, irrespective of the fact that the 1st Plaintiff is a married man and with a family.

[12] The other issue in **The Times Matter** is that the article that had been published incorporated pictures. The Defendants defence in the Times matter, was by and large that since the 1st Plaintiff is married in accordance with Swazi Law and Custom, there was no stigma that could be attached to him having a relationship with any other person other than his wife, as that was expected and normal from a man married under this regime.

[13] I juxtaposing with the defence adduced in the matter at hand, where the Defendants deny that the words in the context (my own underlining) of the article were wrongful and defamatory of the Plaintiff. Further the Defendants

deny that the words in the context in which it was written was intended and understood by the readers of the newspaper to mean that the Plaintiff was immoral in the respect alleged.

[14] What comes out in the comparison is that the words which the court is called to interpret in the matter at hand, which is that the Plaintiff is sleeping around are not the same words that were alleged to have been defamatory in the Times of Eswatini matter. In the latter matter, not only were the exact words not used, but there was the detail of what transpired when the Plaintiff and his girlfriends were invaded in the privacy of their bedroom. There were also pictures that were published depicting the parties as they appeared in the same location. The defamatory material which the readers were exposed to, was not only the words "sleeping around'. It was a full narration of how the drama played out when they were invaded, coupled with pictorial evidence.

[15] The other striking issue is the manner in which the defence in the matter at hand have couched their defence. In as much as Defendants admit that the words were published. However, they deny that when reading the words in the context of the article, they were wrongful and defamatory of the Plaintiff.

[16] Even if one interprets the stand alone words, being that the Plaintiff sleeps around and hold that they are defamatory hence the leading of oral evidence should dispensed with. How would the court benefit from the evidential value of the "context" as alleged in the Defendant's plea? The Defendants have alleged that the words were not wrongful and defamatory. How so? I assume

the answer to that rhetoric question will have to come out during the trial when evidence is led.

[17] The manner in which I comprehend the Defendant's defence is that the publication is not denied. The Defendants have pleaded that there is a context in which these words were published. In the end result when the context is factored in you may find that the same words were not wrongful and defamatory. How will this court get the context? The only way for that to be achieved is to allow a full ventilation of the issues before court. This will enable the court to get a holistic impression of the matter including the alleged context. More especially because the alleged offensive words were not the same words that were used in the Times Publication.

[18] In as much as I agree that the questions of fact to be determined need not be identical. However, the only way in which the court would get the context of the words used in the article, as the Defendant has pleaded in paragraph 5.2.1 and 5.2.2 of the plea, would be through a fully blown trial, where oral evidence is heard and the context is ascertained through evidence.

[19] I am very much alive to the concern by Plaintiff's Counsel that what underpins the cause of action is the invasion of the Plaintiff's bedroom and the allegations of him engaging in an extra marital affair, whilst being married in terms of the Swazi Law. Also that it has already been held by the court not to constitute a defence for the publication. However, as I have already stated, the offensive words are not the same. The content and depth of the articles are not

the same. The context as the Defendant has pleaded is absent at this stage. It is only fair that the Defendant be allowed an opportunity to demonstrate the context which they allege justifies the publication of the article.

[20] It is further my view, that the ultimate determination of matter is based on facts and law. The facts are those which if proved would sustain the cause of action relied upon. The legal contours for action proceedings are not the same for every case. In as much as the issues may be similar.

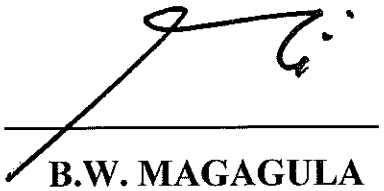
[21] Over and above the aforementioned reasons for my decision, I am also fortified by the discretionally tone that is accorded to the court in an application in terms of Rule 33(4). The exact wording used in the rule is captured as follows;

> *"The court may make an order directing the trial of such question in such a manner as it may deem fit and may order that all further proceedings be stayed until such question has been dispersed off".*

[22] The use of the word may indicates that the court has a discretion. It is not mandatory. Therefore, in exercising that discretion, it is my view that the interest of justice will be best served if the application is refused and the trial is allowed to proceed the normal way.

Order

1. Application in terms of rule 33 (4) is hereby dismissed.
2. Cost to be costs in the course.



B.W. MAGAGULA

JUDGE OF THE HIGH COURT

FOR APPLICANT: *Mr N. D. Jele (Robinson Bertram)*

FOR DEFENDANTS: *Mr Z. Shabangu (Magagula & Hlophe Attorneys)*