

IN THE HIGH COURT OF ESWATINI

CASE NO. 993/2023

HELD AT MBABANE

In the matter between:

MDUDUZI MLOTSA

PLAINTIFF

And

NORA MLOTSA

1ST DEFENDANT

DUMSANE MLOTSA

2ND DEFENDANT

NTOKOZO MLOTSA

3RD DEFENDANT

NEUTRAL CITATION:

*MDUDUZI MLOTSA AND NORA MLOTSA & 2
OTHERS (993/2023) [2023] SZHC – 202 (03/08
/2023)*

CORAM:

B W MAGAGULA J

HEARD:

22/06/2023

DELIVERED:

03/08/2023

SUMMARY: Application for default judgment in a delictual claim – Plaintiff together with other two witnesses led evidence - All the essential elements of defamation were pleaded and proved. Evidence was further led to proof that the alleged injurious statements were indeed uttered and publicized by the Defendant – the court was not persuaded that the quantum claimed is proportionate to the harm suffered by Plaintiff. Despite that the Defendant did not defend the action, it would not be in the interest of justice to grant the sum claimed in the particulars of claim. Having compared to other damages that were awarded in this jurisdiction, the court comes to the conclusion that damages in the sum of E120 000 is appropriate.

Held: Damages in the sum of E105 000 is awarded to the Plaintiff for defamation. The Defendants are further ordered to re-imburse the Plaintiff the sum of E1350-00 he expended to have the TLB to excavate the site where he was falsely accused to have buried firearms and explosives.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

- [1] It is not common to have a written judgment pertaining to an application for default judgment. Usually the judge makes an entry on the court file or the Notice of application for default judgment itself, to record or signify that default judgment has been granted.
- [2] In the matter at hand, I have deemed it necessary to pen down the basis for granting the default judgment, despite that the claim was not defended. This is to reflect how the court arrived at the decision.
- [3] On the 22nd June 2023, the Plaintiff's attorney Mr S. Mngomezulu appeared before court wherein as per the procedure, he applied for a date to lead oral evidence to prove the damages claimed. It is common course that in matters where the course of action is not a claim sounding in money, it is a prerequisite that the Plaintiff, despite the action proceedings not being defended, must lead oral evidence.
- [4] The matter was then allocated the 27th June 2023, as the date on which oral evidence in respect of the claim would be led. The Plaintiff supported the claim through the evidence of 3 witnesses, including his own. Before I dwell deeply to the evidence of these respective witnesses, I deem it appropriate to state the nature of the Plaintiff's claim, as set out in his particulars of claim.
- [5] The Plaintiff seeks to be compensated by 3 Defendants the sum of **E500 000-00 (Five Hundred Thousand Emalangeni)** as a result of an alleged

defamatory statements uttered by them, which he considered to have been wrongful and defamatory of him. As it appeared during the oral evidence in court, all the 3 Defendants seem to be related to the Plaintiff. This explains the proximity of their homestead to that of the Plaintiff. It appears that the entire land on which they all settled, forms part of the ancestral land held by the Mlotsa's. The 2nd and 3rd Defendants were said to be cousins of the Plaintiff. The Plaintiff told the court that the 2nd and 3rd Defendants are sons of his uncle (the Plaintiff's fathers and the 2nd and 3rd Defendant's father were brothers).

- [6] The basis of the offensive statements which are said to have been uttered by the Defendants, appear in the main, to have been said in three forums. Through the evidence of the Plaintiff's himself, it came out that a family meeting was convened by one of the Plaintiff's uncles Simon Mahashulane Mlotsa. This is after the latter had informed Plaintiff that he had been approached by the 1st Defendant who was aggrieved. The issue pertained to an altercation that had taken place at some point between her son, the 2nd Defendant and the Plaintiff. She also mentioned to Mahashulane that the Plaintiff had buried arms of war and explosive in the 1st Defendant's yard. Mr Mahashulane Mlotsa is said to have then convened the first meeting at the residence of 1st, 2nd and 3rd Defendants' so that this issue could be deliberated. Attending the meeting was the Plaintiff himself, the uncle (Mahashulane Mlotsa), all the Defendants and two community police members.

[7] It is in that meeting that the Defendants mentioned that they do not want to live with the Plaintiff in the same area, because he is troublesome. They also confirmed that the Plaintiff is keeping the said weapons. The Plaintiff proceeded to tell the court that he was never shown these arms of war by the Defendants. Subsequent to the first meeting, there was another meeting which was held at the Plaintiff's other uncle, Magcwagcwa Mlotsa. The attendees of this meeting was the Plaintiff, all the Defendants, the Plaintiff's wife, Mr Magcwagcwa's wife and also Mr Mahashulane Mlotsa.

[8] The Plaintiff proceeded to tell the court that during this meeting, the Defendants repeated the same allegations. They said the Plaintiff was not taking any steps to remove the arms of war and explosives which were buried in their yard (home). The Plaintiff told the court that he responded by offering to hire a heavy plant machine (TLB) to excavate the area where the arms of war were said to be buried. If only he can be directed to the specific place. This meeting took place on the 10th April 2023.

[9] The specific words that are alleged to have been uttered in siSwati are said to be the following;

“Batsi mine angikhiphe lelibhokisi leli netibhamu netinhlavu lengatigubhela ebaleni sinababe lomncane Peter Makhundu Mlotsa (who is now deceased)”.

[10] The above statement can be interpreted to mean that the Defendants said Plaintiff must dig out the box containing fire arms, ammunition which Plaintiff buried in their family yard together with his late uncle Peter

Makhundu Mlotsa. The court was then told that the said Peter Makhundu Mlotsa was the 1st Defendant's husband and the father to the 2nd and 3rd Defendant. During his lifetime he used to work in the mines in South Africa.

- [11] The court was informed that after the meeting had been concluded, the Plaintiff secured the services of a TLB from a company called Tivoli Investments. To prove that he indeed hired this TLB, the Plaintiff submitted exhibit "MM1" which was a receipt issued by Tivoli Investments receipt number 4274, reflecting that money was received from a certain Make Mlotsa, who paid a sum of **E2 250-00 (Two Thousand Two Hundred and Fifty Emalangeni)** on the 12th, although the month is not clear. It reflects as zero but there is the year 2023. The receipt was accordingly admitted as an exhibit.
- [12] The Plaintiff proceeded to narrate that on the agreed day for the excavation, the family gathered at the Defendant's home. They pointed out the area where the arms were said to be buried. Present on that day were all the Defendants, the Plaintiff's uncle Mahashulane Mlotsa. The operator was shown the place and he excavated and after he had dug it was apparent to all present that there were no arms of war that were dug out.
- [13] The Plaintiff told the court that the allegations that he had hidden arms of war were wrongful and were defamatory. The Plaintiff proceeded to tell the court that it became apparent that nothing came out during the excavation except a small piece of metal which was rusty. It appeared to have been a part of an old door frame. There was nothing resembling fire arms, guns or ammunition

that came out from the ground. It appears that during the digging, a police white double cab van arrived. On board were four police officers who introduced themselves as members of Lukhozi. They explained to all present that they had received a call that something was being dug in their family yard. They then enquired if whatever they were looking for was found. The answer was given by 1st Defendant and Plaintiff's uncle Mahashulane Mlotsa to the negative. The police subsequently left without arresting anyone.

[14] The Plaintiff continued to tell the court that he is now perceived by the people in the community of Engculwini that he is someone that keeps explosives and arms. He is now regarded as someone who is dangerous and a thug.

[15] The Plaintiff confirmed that before instituting the legal action, he had served a letter of demand on the Defendants. It was not complied with. In that letter of demand, he had asked the Defendants to retract the false allegations and compensate him for the expenses that he had paid to hire a TLB to excavate so that his name is cleared.

[16] The second witness that came to give evidence in support of the Plaintiff's case is Simon Mahashulane Mlotsa. In a nutshell, Mr Mlotsa confirmed all that the Plaintiff had said, especially pertaining to the two meetings that were held and to the events surrounding the excavation at the Defendant's yard, where it was apparent that no ammunition, guns and explosives were found. Much against what the Defendants had alleged.

[17] The TLB operator also came to court to give evidence. He told the court that he is Senzele Zwane. He confirmed that he is employed by Tivoli Investments as a TLB operator. He confirmed that on the 11th April 2023 the Plaintiff came to hire a TLB. He went to the Plaintiff's home the following day which was the wrong place.

[18] He was told that where the TLB was required was a place below the Plaintiff's home which is the main homestead. He proceeded to drive the machinery there. He was then directed to a certain place where Mahashulane, Make Nora and the other Defendants were.

[19] It is the 1st Defendant that told Mahashulane where the operator should dig. The operator confirmed that he excavated 1 (one) meter deep. He proceeded to dig another two (2) meters and only a small iron sheet which is an old door frame came out. He also confirmed that the police came and then left. After he finished the excavation, he drove the TLB back to his work place.

THE LAW

[20] **Jonathan M. Betcher** in his work **The Law of Defamation in South Africa (1985)** states the following;

[13] Prof. Burchell tell that *"the law of defamation seeks to protect a person's right to an unimpaired reputation" and that "(p)roof of publication of defamatory matter referring to the Plaintiff gives rise to*

two inferences (something referred to as presumptions): (a) an inference of unlawfulness or wrongfulness, and (b) an inference of animus injuriandi (subjective intention on the part of the Defendant to impair the Plaintiff's reputation with knowledge of unlawfulness). The Defendant bears an evidential burden of adducing evidence of a defence excluding unlawfulness (for instance, truth for the public benefit, fair comment, privileged occasion, consent, self-defence, necessity) or defence excluding animus injuriandi (for instance, mistake, intoxication or insanity)". Burchell continues to state that "(l)iability of the mass media under the civil law is strict. In other words, animus injuriandi (or even negligence) is not a prerequisite for their liability. The mass media may; however, escape responsibility by leading evidence to support a defence rebutting the inference of unlawfulness".¹

- [21] **Neetling Potgieter**; in the book **Law of delict 3rd Edition** at page 400 describes defamation as the intentional infringement of another person's right to his good name. The authors elaborate the meaning of defamation by stating that defamation is the wrongful, intentional publication of words or behavior concerning another person which has the effect of injuring his status, good name or reputation. See also **Leroux vs Dey 1211 (3) SA 27 CC 304**; **Tapwine Trading CC vs Cap Glassic wines (Western Cape) CC [1998] 4 – All SA 86 (c)**.

¹ Jonathan M. Burchell, *The Law of Defamation In South Africa* (1985) page 1

[22] It is therefore apparent from the above definition that the elements of injury must be present. Secondly, the act which is the publication of words or behavior is also part of the ingredients of the offensive act. Further, there must be an injury to personality through the defamatory effect of the words or behavior.

[23] Defamation being part of the law of delict, also presupposes that there must be wrongfulness, which is the infringement of the personality right to good name.

[24] There must also be the intent on the part of the offender, which is normally called by academics as the *animus injuriandi*. See *Khumalo vs Holomisa 2002 (5) SA 401*. It is also worthy of mention that it is not an element of defamation that the defamatory allegations must be false.² True defamatory words can also be actionable. See *Neetling, Potgieter, Roos*. Neetling on personality rights 200

APPLICATION OF THE LAW TO THE FACTS AT HAND.

Publication

[25] It has already been alluded to above, that it is part of the elements of an act of defamation that there must be publication. I will now traverse on the evidence presented to ascertain if indeed there was publication. The court was told that the alleged defamatory words were said in at least three meetings. During

² National Media Ltd vs Bogosh 1998 (4) SA 1196 (SCA) 1218

these meetings there were other persons other than the Plaintiff who were present who also heard the statements that was uttered by the Defendants.

[26] The first meeting was held at the residence of the 1st, 2nd and 3rd Defendants. Present was Mahashulane Mlotsa. Therefore, as per the evidence before court, the alleged harmful words were said by 1st and 2nd Defendant.

[27] The second incident that reflect some form of publicizing the offensive words in the form of spoken words which was said to other people other than the Plaintiff, happened at what the Plaintiff described as his uncle's homestead. The uncle is said to be Magcwagcwa Mlotsa.

[28] In that meeting, the court was told that the following were in attendance, who heard these words other than the Plaintiff. It was the Plaintiff's wife, Magcwagcwa Mlotsa, Mahashulane Mlotsa, and his spouse Magcwagcwa's wife as well.

[29] The exact harmful words that the Plaintiff told the court were said are the following; I will capture them in vernacular because the Plaintiff told the court that is the language in which there were said;

"Batsi mine angikhiphe lelibhokisi leli netibhamu netinhlavu lengaligubhela ebaleni sina babe lomncane Peter Makhundu Mlotsa".

[30] In my view, it is evident that the requirement of publication was satisfied. The offensive words were made known or disclosed to at least one person other than the Plaintiff himself.

[31] This requirement was confirmed by the court in the following South African decisions; **Leroux vs Dey 2011 (3) SA 274 (CC) 304; African Life Assurance Society Ltd; African Guarantee and Indemnity Ltd, African Consolidated Investments Co-operation Ltd vs Robinson and Co. Ltd and Central News Agency Ltd 1938 MPD 277 395.**

[32] Once publication is established, the Plaintiff must prove that the Defendant was responsible for the publication.³ It must also be stated that as a general rule publication is attributed to the Defendant if he was aware or could reasonable have expected that an outsider would take cognizance of the defamation.⁴

Defamatory effect - wrongfulness

[33] I have already stated earlier on in this judgment that defamation lies in the infringement of the person's right to his good name. Therefore, in order to be considered a wrongful defamation, the objectionable publication must not only impaired individual's good name (factual infringement of personality) but must also be objectively unreasonable or *contra bonus mores*

³ Pretorius vs Niehaus 1963 (4) SA 109 (o) 112.

⁴ Van – Vlietis; Collection Agency vs Schreuder 1939 TBD 265 - 269

(infringement of a norm)⁵. When one considers the nature of the statement that was said, being that the Plaintiff at some point is alleged to have buried a box full of fire arms and ammunition, at the Defendants premises, is *prima facie* wrongful.

[34] A normal law abiding citizen is not expected to dig and bury fire arms and ammunition in someone else's property. First and foremost, the possession or keeping of fire arms without following the provisions of the Fire Arms and Ammunition Act, is *prima facie* unlawful. Therefore, if one is alleged to be keeping fire arms, then it can be perceived as an infringement of a norm or objectively unreasonable or *contra bonus mores*.

[35] In this regard, I also come to the conclusion that the alleged words that were said are wrongful. As such, they meet the other requirement of defamation, which is wrongfulness.

CONCLUSION

[36] A Plaintiff who proves that the publication is defamatory and that it referred to him provides only *prima facie* proof of the wrongfulness.⁶ In that case, a presumption of wrongfulness then arise, which places the *onus* on the Defendant to rebut it.⁷ The Defendant may do this by proving the existence of

⁵ See *Waldis vs Vonulmenstein* 2017 (4) SA 503 (WCC) 509

⁶ See *National Media Ltd vs Bogoshie* 1998 (4) SA 1196 (SA 1202); *Khumalo vs Holomisa* 2002 5 SA 401 (CC) (SCA) 191.

⁷ *Ibid*

a ground of justification for his conduct.⁸ It is common course the Defendants despite being served with a letter of demand and subsequently being served with summons initiating legal proceedings, decided not to defend. This is where they could have availed themselves an opportunity to demonstrate the existence of a ground of justification to say the Plaintiff buried arms and ammunition on their yard.

[37] The court has considered the return of service that was filed by the Deputy Sheriff who served the legal process in this matter. He is Mathews B. Potgieter. It is reflected on the return of service that the combined summons were served on the Defendants on the 22nd May 2023. It was effected at their place of residence at Engculwini area.

[38] I am persuaded that the reputation of the Defendant was lowered as a result of the objectionable statement that was uttered by the Defendants. It was not only made to the relatives of the Plaintiff, but the evidence reflect that in the first meeting, there were other people that were not the relatives of the Plaintiff. Being Umgijimi, (the Chief's runner), Babe Mtsetfwa who is said to be a member of the community police.

[39] When the Plaintiff was asked in chief by his attorney as to how do the people perceive him within the Engculwini community? His answer was as follows;

⁸ See *Marais vs Richard* 1981 (1) SA 1157 (a)

"It is now common knowledge that I am keeping explosives. I am now regarded as someone who is dangerous and a thug".

[40] In the matter of **Ngcobo vs Shembe 1983 (4) SA 66 (d) 71**, it was held that the alleged defamation must have the effect of harming the Plaintiff's good name in the eyes of all reasonable persons in society.

[41] Other than the people that have been mentioned above, the TLB operator who was carrying out the excavation, also told the court that he was told that what the purpose of the excavation was to find guns. He must then have become aware that there were allegations that there were guns there, and it was the Plaintiff that is said to be hiding the guns. Therefore, there is another member of the society. Who else in the society could he have subsequently told about his mission and experience that day? It reasonable foreseeable that in the community of Engculwini, the issue of the Plaintiff burying guns must have been discussed in one way or the other.

[42] The Plaintiff applies for default judgment in the sum of **E500 000-00 (Five Hundred Thousand Emalangeni)** as claimed in the particulars of claim.

[43] Theoretically, with regard to assessment of none patrimonial loss or injury to personality, damages are determined by means of the comparative method.⁹ The utility or quality of the personality interests in question before and after

⁹ See Neetling, Pot heater, *Ibid* at pages 289 para 5.4

the delict are compared in order to establish the existence and extent of the loss. In this way information is obtained on the nature, seriousness, extent, intensity and duration on the objective part of the loss as well as the impairments of the Plaintiff's feelings¹⁰.

[44] In applying the principle as outlined above I observe that in as much as I have found that there was some form of publication because other people other than the Plaintiff were told of the offensive statement. However, the extent, intensity and duration of the publication is not so wide. A publication is wide and extensive where the publication is made in a newspaper or other media platforms. Especially where the offensive statement is read by a wide audience.

[45] In the matter at hand, the recipients that heard the message cannot be many. It was probably some people in the community of Engculwini. Even those, may have heard it indirectly from other people whom may have spread the word. The evidence that is before court relating to the direct people to whom the offensive statement was publicized to, are limited. They can actually be counted as reflected in the evidence. It was the members of the extended family being the uncles, their spouses, the strangers are the Umgijimi, the community police member and probably the TLB driver.

¹⁰ See Van Dermerwe vs Road Accident Fund (Women's legal center trust as amicus curiae) 2006 (4) SA 230 (CC) 253;

[46] It is my considered view, that to then claim to be compensated a sum of **E500 000-00 (Five Hundred Thousand Emalangeni)** for a limited publication is on the high side.

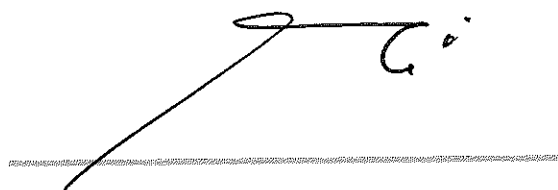
[47] In the matter of **Sipho Makhabane vs The Weekend Observer and 2 Others High Court Case No 1681/2007** where a Plaintiff who had claimed **E1 000 000 -00 (One Million Emalangeni)** for damages in respect of defamation for an offensive publication in a newspaper. The court granted him **E300 000-00 (Three Hundred Thousand Emalangeni)**. This is a case where the Plaintiff is a gospel artist that is not only known in this jurisdiction, but widely popular in the neighboring countries and elsewhere. Hence, the sting of the offensive statement must have been quite hurtful to him. This cannot be said to be the case in the matter at hand. The offensive utterances in this matter were not widely publicized.

[48] I accept the amount claimed in respect of the money expended for the plant hire. The three (3) hours TLB excavation that he had expend to excavate the Defendant's yard in order to exculpate himself.

[49] The court also takes into account that there was no apology or retraction of the defamatory statement that was uttered by the Defendants.

[50] Due to the foregoing, I award the Plaintiff as follows;

- a) Damages for defamation of character E105 000-00 (One Hundred and Five Thousand)
- b) Damages for the cost expended hiring the TLB $E450 \times 3 = E1350-00$
- c) Cost of suit.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiff:	Mr S. Mngomezulu	(Mngomezulu Attorneys)
For the Defendants:	No appearance:	Default Judgment