IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.8/2002

In the matter between:

VUSI GININDZA 1ST APPELLANT

MASHUMI THWALA 2ND APPELLANT

AFRICAN ECHO (PTY) LTD 3RD APPELLANT

ARROW 4TH APPELLANT

VS

LINDIFA MAMBA 1ST RESPONDENT

SHILUBANE, NTIWANE & PARTNERS 2ND RESPONDENT

CORAM : BROWDE JA

: STEYN JA

: ZEITSMAN JA

JUDGMENT

Browde JA:

By summons issued in the High Court the respondents sued the appellants jointly and severally for damages for defamation. The first respondent claimed the sum of E1million while second respondent claimed E500 000.00.

The action arose out of three articles which were published in the "Times of Swaziland", Sunday on 28th November and 5th December

1999 respectively and in the Times of Swaziland on Wednesday 1st December 1999. It was alleged that the various appellants jointly and severally defamed both respondents in the three articles and that the respondents were each entitled to substantial damages. The quantum of damages claimed was no doubt calculated to bring to the attention of the court the seriousness of the defamation since the first respondent is, and was at all material times, a prominent attorney in Swaziland practising in partnership as a partner in the second respondent, a firm of attorneys practising as such in Mbabane. The contents of the articles will be referred to in some detail later in this judgment. Prior to the trial, at the pre-trial conference, the appellants conceded that the articles were defamatory of the first respondent and all that remained to be determined at the trial, in respect of the first respondent, was the quantum of his damages.

As far as the second respondent is concerned, the appellants pleaded that:-

(i) The second respondent being a partnership had no locus standi to sue for damages for defamation;

(ii) In any event none of the articles identified or referred to the second respondent either expressly or by implication, and had not therefore defamed the partnership;

Having regard to the consensus in respect of the defamatory nature of the articles and that they referred to the first respondent, the issues which were required to be resolved at the trial were the following:-

(i) the quantum of first respondent's damages;

(ii) whether the partnership was entitled to sue for damages for defamation and whether, if it had the locus standi to do so, the second respondent was defamed by any or all of the articles;

(iii) The costs of the action.

The appellants conceded that costs should follow the result as regards the first respondent. It was common cause having regard to the

nature, magnitude and the importance of the action, that both parties were justified in briefing senior counsel from South Africa.

At the conclusion of the trial Maphalala J awarded the first respondent damages in the sum of E60 000,00 together with costs and ordered that "costs of counsel be exempt from taxation" - this because the learned judge appears to have been under the impression that the parties had agreed that the first plaintiffs costs were to be exempted from taxation. Why he limited his order to counsel's fees being so exempt is not clear. The claim of the second respondent was dismissed on the basis of decided cases considered by the learned judge including CHURCH OF SCIENTOLOGY IN SOUTH AFRICA (INCORPORATED ASSOCATION NOT FOR GAIN) VS READERS DIGEST ASSOCIATION (PTY) LTD 1980(4) SA313 in which van den Heever J held:-

"A corporation cannot sue for defamation but may well be able to recover damages should it suffer patrimonial loss as a result of an unlawful attack upon its reputation as an integral part of its patrimony."

Maphalala J expressed the view that the second respondent "may be able to sue on the basis of the actio legis aquiliae."

In any event the learned judge came to the conclusion that nowhere in the articles was the second appellant mentioned by name and that the reputation of the second appellant was only "tangentially" if at all the subject of imputations in the articles. This fell short of proving they were defamatory of the second appellant.

Despite dismissing the claim of the second appellant the learned judge made no order of costs in regard thereto. Finally, he ordered interest to be paid on the damages awarded to the first respondent at the rate of 9% per annum "calculated from the date of demand to the date of payment".

Before us Mr. Kuny argued the following points on appeal against the judgment of Maphalala J, namely

(i) the learned judge erroneously found that there had been an agreement that costs were to be exempt from taxation in

terms of the Rules of Court and consequently erred in making the order that costs of counsel be exempt from taxation.

(ii) Having dismissed the claim of the second respondent the learned judge erred in making no award of costs in respect of that claim.

(iii) The learned judge erred in ordering that the interest applicable to the damages awarded should be "calculated from the date of demand to the date of payment." Mr. D. Smith SC, who appeared on behalf of the respondents, apart from opposing the submissions of Mr. Kuny, argued the cross-appeal brought by the first appellant against the quantum of damages awarded to him.

In regard to the question of costs raised by Mr. Kuny it was common cause before us that the learned judge was wrong in his belief that there had been an agreement on the terms he referred to. Mr. Kuny informed us that the agreement went no further than this -"we agreed that senior counsel was necessary on both sides and the court would be asked to make such an order. It would then be up to the Taxing Master to evaluate the fees charged". Mr. Smith argued that no agreement had been reached between the parties that counsel's fees should be exempt from taxation but submitted that the "true intention" of the parties was that the actual fees of senior counsel should be allowed. On that basis he submitted that counsel's fees should have been granted on the scale as between attorney and own client, always subject, so he put it, to the Taxing Master's discretion as to the reasonableness thereof.

There is difficulty in acceding to Mr. Smith's submissions. Firstly there is an inherent contradiction in allowing the actual fees charged by counsel on the one hand, and on the other hand leaving the reasonableness of such fees to be decided by the Taxing Master. Secondly, counsel could not tell us whether the scale of "attorney and own client" was ever awarded in the courts of this Kingdom and in any

event what it would mean if applied in this matter. Mr. Smith, when confronted with these difficulties, somewhat reluctantly agreed to what Mr. Kuny contended was the correct order in regard to costs, but submitted that it was not necessary for the appellants to have come to this Court on appeal to have the order by Maphalala J put right. This was submitted on the basis that "the parties are ad idem as to what the order of court should have been with regard to costs." That this submission cannot be accepted appears from the above-mentioned submissions of counsel which, at best for the respondents, show that the parties were not ad idem.

Consequently the appeal succeeds to the extent that the order of costs in the court below must be deleted and the following substituted.

"The costs of the first plaintiff must be paid by the defendants jointly and severally the one paying the others to be absolved, and such costs are to include the costs occasioned by the employment of senior counsel".

I turn now to consider whether the learned judge was justified in denying the appellants the costs involved in the second respondent's claim which was dismissed. The decision of the learned

judge appears from the record as follows:-

"I turn now to the question of costs which was argued before me. The parties agreed that in respect of the first plaintiff the costs are to follow the event and be exempt from taxation in terms of the rules. However, they disagree in respect of costs for the second plaintiff. Mr. Kuny took the view that if the second plaintiff does not succeed in proving its case and if its claim is dismissed it should incur the costs. That a significant portion of the suit has been taken up by the second plaintiff and a figure of about 20% would be attributable to the second plaintiff.

Mr. Smith argued a contra that it is not clear to what extent the inclusion of the second plaintiff had on the whole case as the case was argued as a whole.

I agree with Mr. Smith in this regard and would not make any award as to costs in respect of the second plaintiff.

It is not clear what is meant by counsel's submission to the learned judge that the "case was argued as a whole". Mr. Collin

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Ntiwane who is a partner in the second plaintiff firm gave evidence of his views of the offending articles and how, in his opinion, they affected the firm. The claim was also argued on behalf of the second plaintiff and in reply the court was referred to the decided cases on the subject. All of this obviously took up the time of the court which was not surprising having regard to the large sum of money demanded by the second plaintiff. Mr. Smith before us pointed to the fact that counsel for the appellants had suggested the figure of 20% as the proportion of the time taken to address the claim in the court below. He suggested we should adopt that as a basis for an award of costs in favour of the appellants if we should uphold their appeal on this ground. Mr. Kuny has informed us that he intended only to give some idea of what he thought the proportion should be and submitted that the final assessment should be left to the Taxing Master. There appears to be no reason why that would not be the correct path to follow as that is the usual way in which questions of this nature are solved. The learned judge's ruling is based on a misdirection, as the case was not argued as a whole, nor is it correct to deprive a party of the costs of an unsuccessful claim against it merely, on the ground as Maphalala J said, "that it is not clear to what extent the inclusion of the second plaintiff had on the whole case." (sic)

On this point, too, the appeal must succeed and the order of the court a quo must be altered to include the following sub-paragraph:-

"(vi) The second plaintiff's claim is dismissed with costs, such costs to include the costs incurred as a result of the employment of senior counsel. The costs of senior counsel are to be taxed by the Taxing Master without his being bound by the tariff."

The next point argued by Mr. Kuny was that the learned judge erred in awarding interest from the date of demand. This question was not debated in the court a quo although interest was claimed in the summons, from the date of demand. No reasons were given by the learned judge for his granting of the order in those terms and consequently we are at large to consider whether the order was correct

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in the circumstances. Counsel for the appellant has submitted that until such time as the amount of damages had been determined and awarded by the court the appellants could not have known what the first respondent's claim was worth and that the claim could not readily be quantified. The

claim was an unliquidated claim, so the argument went, and the quantum depended on factors such as how the court would view the severity of the defamation and the aggravating and mitigating circumstances of the publications. This precluded the possibility of any form of accurate tender being made particularly when it is borne in mind that the first plaintiff's claim was for E1 million.

Mr. Kuny referred us to an excerpt from KOCH ON DAMAGES FOR LOST INCOME 1st ED. 1984 which reads as follows:-

"(a) The rule of Roman Dutch law is that liability for interest does not attach to an obligation to pay unliquidated damages only ascertainable as to amount after a long and intricate investigation. An exception to this rule arises under circumstances where the amount of damages payable could have been ascertained upon reasonable inquiry. Interest on damages only begins to run once the defendant is in mora. By virtue of the wrongful act and the associated damage measured at the same point an uncertain indebtedness is created. In order to place the wrongdoer in mora it is necessary that the plaintiff demand the compensation due and that the quantum of the uncertain indebtedness be ascertained. An investigation is commonly needed to determine the indebtedness which crystallised at the time of wrongful act". (emphasis added)

That this opinion is correct can be demonstrated by reference to a long line of decided cases. In VICTORIA FALLS AND TRANSVAAL POWER CO. LTD VS CONSOLIDATED LANGLAAGTE MINES LTD 1915AD1 it was held that interest would not be awarded by a South African court in a damages action until the claim had become liquidated by the damages being agreed upon or quantified by an order of court.

This decision has been followed in many cases since then and counsel before us were unable to cite any decision involving an unliquidated claim in which interest was ordered to run from the date

of demand. Mr. Smith was, therefore, forced to fall back on South African cases such as EDEN AND ANOTHER VS PIENAAR 20001) SA 158 AND ADEL BUILDERS (PTY) LTD VS THOMPSON 2000(4) SA 1027.

Those cases both dealt with the position in South African law as a consequence of the 1997 amendment to the PRESCRIBED RATE OF INTEREST ACT of 1975 in terms of which both a liquidated and an unliquidated debt bear interest (the latter from the date on which payment is demanded or claimed by summons) at the rate prescribed by the Minister of Justice in terms of the Act. This Act now permits the Minister to prescribe rates of interest which would meet the submission raised by Mr. Smith that it is unfair to a plaintiff who is defamed as occurred in casu, to have to wait for his damages to be quantified while money was depreciating in value. Similar legislation does not exist in Swaziland and consequently the cases cited by counsel do not assist his cause. Until similar legislation is passed here the ravages of inflation must, unfortunately for the first plaintiff, be borne by the judgment creditor until judgment is pronounced. The fact that the relevant section of the South African Act is headed "INTEREST ON UNLIQUIDATED DEBTS" is sufficient indication that it was designed to overcome the law as it stood until the amendment dated 24th April 1997, namely, that interest on unliquidated claims normally runs from the date of judgment. See MV SEA JOY 1998(1) SA 487 at 506D.

Damages for defamation such those in casu are par excellence unliquidated and require thorough investigation before they can be quantified. The learned judge erred, therefore, in awarding interest from the date of demand. The final string to Mr. Smith's bow on this point was that interest was awarded on the basis in the judgment because the learned judge considered

interest to be part of the damages award. There is no substance in this submission. The learned judge enunciated all the facts which he took into account in arriving at the quantum awarded and it is clear that he considered the

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figure awarded to be the compensation to which the first plaintiff was entitled. Had he wished the interest to be part of the damages he would undoubtedly have said so and quantified it in his judgment, which, of course, he did not do.

The appeal on this point must succeed and the interest awarded by the learned judge altered to read "Interest thereon at the rate of 9% per annum, calculated from the date of judgment to the date of payment."

The remaining issue between the parties was the attack on the quantum of damages awarded by Maphalala J, on the grounds set out in the first respondent's cross-appeal. Mr. Smith strenuously argued that the learned judge, although he found the defamation to be a serious one, erred in finding that malice was not proved to have been present. He pointed to the publications themselves and contended that they were intrinsically malicious. The articles, no doubt, are highly defamatory of the first plaintiff. The first article alleged he was "caught cooking a settlement" with an attorney from the Attorney General's office and spoke of "a conspiracy" between them. The second publication, in reference to the settlement referred to, spoke of "court deals" that members of the Attorney General's office are "sometimes engaged in with private attorneys" and that "the taxpayer almost lost close to a million had it not been for the police officer who...cried foul over a settlement that (was) reached between private attorney Lindifa Mamba and Poet Simelane of the Attorney General's office."

The writer then clearly rubbed salt into the wound by stating:-

"With private lawyers it has been different. I have, with my own eyes, seen a dramatic transformation of outpatient-surveying legal lifers to Mercedes-driving bigtime shots in almost no time."

Then in the third publication the headline was "Lindifa wants the E700 000". This referred to the settlement figure which was agreed upon by the first plaintiff and Simelane. This was again referred to as follows -

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"The agreement was signed under highly suspicious circumstances and it smacks of fraud against Government."

It need hardly be stated that these represent highly defamatory remarks concerning a practising attorney. Mr. Smith then pointed to the fact that originally it was pleaded that the facts were true and that the newspapers were justified in publishing them in the public interest. This, counsel contended, was further proof of malice. It was also submitted that the learned judge overlooked that the appellants were the originators of the defamatory matter, that there were serious aggravating circumstance such as the large circulation of newspapers concerned and the fact that the publications were false. Mr. Smith submitted that the court a quo had "paid lip service to the presence of mitigation factors and the presence of aggravating factors". What counsel obviously meant by this submission was that the learned judge had not properly applied his mind to the aggravating factors in assessing the damages. In the course of his argument counsel referred to many concessions made by Mr. Kuny in the course of his argument in the High Court including:-

"there was no justification for the statement", "the statements were completely unjustified," "the defamation of the plaintiff (Mamba) was serious" and "the statements were shocking."

In the light of the foregoing Mr. Smith submitted that malice was proved and that the learned judge erred in finding it not proved. Although nowhere in the grounds of the cross-appeal is malice referred to, I am inclined to the view that there is substance in Mr. Smith's submission, even though the witness Makhubu who was called by the respondents and who was previously the editor of the Times of Swaziland, Sunday, did not support such a finding of malice.

Finally on this point Mr. Smith placed reliance on a dictum in NAIDOO EN ANDERE V VENGTAS 1965(1) SA 1 which reads:-

The publication and its defamatory nature having been admitted, the law presumes the existence of animus injuriandi; see WYNDHAM V WALLACH'S PRINTING AND PUBLISHING CO. LTD; 1907 T.S. at page 386; TROMP V

MCDONALD, 1920 AD 1 at page 2; KLEINHAS V USMAR, 1929 AD 121 at page 126. And onus of proving the contrary, upon a balance of probability, is on the defendant. Voet -47.10.20, puts it thus: (translation by de Vos) 'But, if the words spoken are such, that they, per se and according to their natural meaning import contumely, then an injurious intent is presumed in the speaker on whom lies the burden of proof that there was no malicious intent'. An in Tromp's case, supra, Innes, C.J., said, at page 2, that it is for the defendant to rebut the presumption if he desires to escape the consequences. See also Craig's case, supra at page 156H to page 157A".

Mr. Kuny with reference to this dictum submitted that the onus of proving malice is on the plaintiff who alleges it and that what is presumed from the publication of defamatory matter is something different namely animus injuriandi. He submitted further that malice is usually introduced in order to meet a pleaded defence, for example that of qualified privilege, and consequently malice is raised only in the replication. I do not agree that this is necessarily the correct approach.

In McKerron The Law of Delict 7th Ed. at page 197 it is stated:-

"Intrinsic evidence of malice is that which is derived from the words themselves. The words may be so violent or insulting as to justify the inference that the defendant was actuated by malice."

The learned author goes on to say that - "the existence of malicious motive will not necessarily be inferred from the mere fact that the language used is excessively strong." (emphasis added).

In this case we do not only have "the mere fact" referred to. The articles are highly insulting of Mr. Mamba who, and this is common cause, is a respected member of the legal profession in Swaziland. It is also common cause that there was no truth whatsoever in the allegations made against him - hence the apology which was published almost a year after the articles complained of. For these reasons I agree with Mr. Smith that the learned judge should have found that malice was present. The question remains, however,

whether this apparent misdirection necessarily affects the quantum of damages award.

The learned judge carefully considered all the aggravating factors to be taken into account. He found the following to be proved:-

i) The first plaintiff is a man of high standing in the profession who practices in the High Court where he is highly regarded.

ii) The defamation was "repetitive" as it was published in three articles in newspapers which are widely circulated and read by a large readership - "the distribution was 'immense".

iii) The imputation contained in the articles was of a very serious nature and that "if the imputation that the first plaintiff is dishonest, unethical, unprofessional, incompetent and inclined to mislead the court were to be believed, his career could be ruined."

It could not validly be held that the learned judge in any way failed to grasp the enormity of the defamation or the extent of the publication. He took into account all the material factors which justified a finding of malice and then, in my judgment for no good reason, decided that malice had not been proved. Malice is, of course, a component which materially aggravates the publication of defamatory matter. It is usually an indication that the defendant is mala fide and was actuated by some improper or indirect motive.

See McKerron (loc.cit) at page 197. On a reading of the articles, coupled with the original stance of the defendants that the facts were true in my judgment leads to the inescapable conclusion that the writer decided to target lawyers generally in scurrilous fashion and without caring whether Mr. Mamba suffered irreparable harm or not in the process. With respect to Maphalala J I am inclined to the view that he did not give sufficient weight to this aspect of the defamatory publications.

Comparing awards in other cases and in other jurisdiction is not necessarily helpful. The precise circumstances of each case have to be taken into account in order to ensure that comparisons can be validly made. Mr. Smith relied heavily, in the court below and before us, on the award of E10 000 00 in the case of SA ASSOCIATED NEWSPAPERS LTD V YUTAR 1969(2) SA 442 (A). He submitted that having regard to the depreciation in the value of money the award, if made today to Attorney-General Yutar, would have far exceeded the sum awarded. This may be so. But the circumstances of that defamation which included posters all over South Africa and publication in that country's widest distributed and read newspaper differ from those in casu. To compare the two awards and attempt to extrapolate from Yutar's case to this one could lead to false conclusions. Incidentally in relation to that case Maphalala J made two observations. Firstly, he said the defamation in casu was far worse than in that case and then later in his judgment said it "is of a slightly higher level of seriousness." In SALZMANN V HOLMES 1914 AD 471 Innes CJ said:-

The wide discretion allowed to a trial judge in this regard will not be lightly interfered with on appeal. But if the amount is palpably excessive, and clearly disproportionate in the circumstances of the case, then the court will not hesitate to cut it down." (emphasis added) This approach would obviously also apply if the award were too low.

In the case of PARITY INSURANCE CO.LTD V VAN DEN BERGH 1966(4) SA at page 478 Ogilvie Thompson JA put it thus:-

'The assessment of damage in cases such as this is notoriously beset with difficulty. It is well settled that the trial Judge has a large discretion to award what under the circumstances he

considered right (LEGAL INSURANCE CO. LTD V BOTES 1963 (1) SA 608 (AD) at page 614); and, further, that this Court will only interfere if there is a "substantial" variation between what the trial Court awards and what this Court considers ought to have been awarded (SIGOURNAY V GILLBANKS, 1960 (2) SA 552 (AD) at page 556), or if it considers that no sound basis exists for the award made as, for example, "where there is some unusual degree of certainty in its mind that the estimate of the

trial Court is wrong" (SANDLER V WHOLESALE COAL SUPPLIERS LIMITED, 1941 AD 194 at page 200)."

In the instant case I am of the view that this court is in as good a position as the court a quo was to judge the gravity of the defamation and the probable reasons for its publication. I am also of the view that had Maphalala J found, as he should have, that malice was present, he would in all probability have made a higher award of damages.

In my judgment, having regard to the conspectus of all the circumstances of this case the award of E60 000.00 is palpably too low and that an award of E85 000 00 should have been made. To that extent the cross-appeal succeeds.

To sum up the following order is made:-

1. The appeal is upheld with costs in the following respects:-

(a) It was necessary for the appellants to come before this Court to have the phrase in paragraph (iii) of the order of the Court a quo deleted which reads "and costs of counsel to be exempt from taxation" and to be substituted by "and the costs are to include the costs occasioned by the employment of senior counsel whose fees are to be taxed by the Taxing Master at his discretion without his being bound by the tariff.

(b) The order of the court a quo is supplemented by the addition of the following to sub-paragraph, (iv) The second plaintiffs claim is dismissed with costs such costs to include the costs occasioned by the employment of senior counsel whose fees are to be taxed as aforesaid.

(c) Sub-paragraph (ii) of the order of the court a quo is altered by the deletion of the word "demand" and the substitution therefor of the word "judgment".

2. The cross-appeal is upheld with costs including the costs occasioned by the employment of senior counsel, whose fees are to

be taxed as aforesaid, and the sum of E60 000 00 in sub-paragraph (i) of the order of the court a quo, is altered to read E85 000 00.

Both the appellants and the first respondent have succeeded in their appeals before us. In the circumstances it would be fair if each paid their own costs of appeal, and it is so ordered.

J. BROWDE JA

I AGREE

J.H. STEYN JA

I AGREE N.W.

ZIETSMAN JA

Delivered in open court on this ..7th June 2002