

IN THE SUPREME COURT OF SWAZILAND

**Held at Mbabane
No.44/2009**

Appeal Case

In the matter between:

THE EDITOR (TIMES OF SWAZILAND)

1ST APPELLANT

AFRICA ECHO (PTY) LTD

2ND APPELLANT

ARNOT PUBLISHING CO. (PTY) LTD

3RD APPELLANT

AND

MARTIN AKKER

RESPONDENT

CORAM: J.G. FOXCROFT JA

A.M. EBRAHIM JA

S.A. MOORE JA

FOR THE APPELLANTS P.E. FLYNN

FOR THE RESPONDENT J.M. van der WALT

JUDGMENT

Ebrahim JA:

The facts

[1] On 8th August, the Respondent (who was the plaintiff in the court *quo* and who will be referred to hereinafter as “the plaintiff”) received a writ of attachment to execute against the property of a judgment debtor. The plaintiff was, and is, a deputy sheriff of the High Court of Swaziland. The judgment creditor was Unitrans Swaziland (Pty) Ltd and the judgment debtor was Prime Trucking and Logistics (Pty) Ltd. It is not clear from the papers what the amount of the judgment was, though the figure of E9 000 is mentioned at page 105 of the record.

[2] The plaintiff went the same day to the premises of the judgment debtor, where certain trailers were pointed out to him. He says that he attached one of the trailers.

[3] I should say that there is considerable confusion in the record about the number of trailers involved.

[4] The plaintiff at page 164 of the record talks of attaching one trailer and the distribution account (page 174) mentions only one trailer. Nkambule J’s judgment (page 183) talks of two specific trailers, valued at E65 000 (each? The record does not make it clear). The writ against the buyer in the sale in execution is for E195 000, which would be the value of 3 trailers at E65 000 each. It is, incidentally, hard to understand how they could still be valued at E65 000 when they were clearly defective and had to be repaired.

[5] On 12th August the judgment creditor’s attorney advised him not to proceed with the sale as the judgment debtor had undertaken to pay the debt. It appears that the undertaking was not honoured and that the plaintiff was instructed to proceed with the attachment and sale.

[6] The sale in execution was scheduled for 13th December 2002.

[7] The plaintiff contacted the judgment creditor's attorney for directions, and was told to await the outcome of the application, which was to be heard on 13th December 2002. The plaintiff later was given to understand that the application had been placed before the Chief Justice, who refused to make any order, his grounds being that the application had been filed late. The managing director of Tetsembiso gave a different story, to the effect that the matter was placed before the court after the sale in execution had been concluded and that the court accordingly declined to make any order.

[8] The plaintiff contacted the attorney who told him that there was no court order and that he should go ahead with the sale, which he duly did on 13th December. The trailer was sold and released at E17 000.

[9] On 17th December 2002 a fresh notice of motion was served on the plaintiff by the attorneys for Tetsembiso Investments, seeking to have the sale set aside. The action was brought against the plaintiff, the judgment creditor, the judgment debtor and Mr. Charles van Wyk, the person who had brought the trailer. The plaintiff did not defend the matter but left the matter in the hands of the judgment creditor's attorney. It appears from Nkambule J's judgment that a court order was issued on 21st December 2002, to the effect that the trailers should not be removed or disposed of pending outcome of the application. Nonetheless, it seems that they were sold to a buyer in South Africa.

Nkambule J's judgment

[10] Nkambule J handed down his judgment on 24th March 2005. It does not appear from the record why it took such an inordinately

long time for a supposedly urgent matter to be heard. In it, he made a number of findings adverse to the plaintiff, without having had the benefit of having heard the plaintiff:

- That the plaintiff had sold the trailers knowing that they belonged to Tetsembiso and not to the judgment debtor;
- That the plaintiff had sold the trailers in spite of an undertaking not to proceed with the sale;
- That the plaintiff was in breach of duty.

[11] The learned judge took it upon himself to recommend that the plaintiff be suspended and that disciplinary measures be taken against him. Costs were awarded against the plaintiff, the judgment debtor and the purchaser.

[12] Following the judgment, a writ of execution in the sum of E195 000 (as mentioned above, it is not clear where this figure came from) was issued against Mr. van Wyk, the purchaser of the trailer(s). It was not issued against the plaintiff or the judgment debtor. There was no order for the return of the trailers themselves.

Setting aside of part of Nkambule's judgment

[13] The plaintiff became aware of Nkambule J's judgment in May 2005 and made an application on notice of motion for an order setting aside the judgment, insofar as it related to the plaintiff, particularly in respect of the recommendations made by the learned judge. Maphalala J granted the application on 3 August 2005. It is not entirely clear whether Maphalala J's order also set aside the order of costs made against the plaintiff by Nkambule J.

[14] In my view, the inescapable inference from the fact that Maphalala J granted the order is that he accepted that the plaintiff had not committed the acts which had led to Nkambule J's

recommendation against the plaintiff. He could not otherwise have made such an order. This would also, in my view, accord with the probabilities. The duty of the Deputy Sheriff is to execute writs issued by the court. If a third party wishes to prevent him from doing so, it is incumbent on that party to have the court's order varied. It is not for the Deputy Sheriff to stop an advertised sale without the authority at least of the judgment creditor, and certainly not on the mere say-so of the third party.

Newspaper report about Maphalala's judgment

[15] A report appeared in the press, written by one Sonnyboy Fakudze. The report stated that the judgment of Nkambule J had been set aside by Maphalala J, and gave accurate details of what Nkambule J's judgment had stated. There is a handwritten notation beside the photocopy of the report, giving the date of the report as 7th July 2005. This does not tie in with the date written on Maphalala J's order (3 August), so one or other date is clearly incorrect. However, nothing turns on which date is correct.

Allegedly defamatory newspaper report

[16] In January 2007, the newspaper article which is the subject of this case appeared. It will be noted that this was nearly two years after Nkambule J's judgment was handed down and more than 18 months after Maphalala J's order was issued.

[17] The writer of the article did not interview the plaintiff before the article was published, nor did he refer to the earlier article referred to above or to the order made by Maphalala J. His reasons for not doing so are unconvincing or entirely lacking. He certainly made very little effort to get the plaintiff's side of the story. There can have been no deadline or urgency. The subject was clearly not news when the article was written; it was very much historical.

Is it defamatory?

[18] The remarks quoted in the article, are unquestionably defamatory, implying, as they do, dishonesty and incompetence on the part of the plaintiff. That is, at any rate, how the ordinary reader would understand them: that the plaintiff was being made to produce goods worth E195 000 on account of his dishonesty and incompetence.

[19] As Murray J (as he was then was) stated in *Visse v Wallach's Printing & Publishing Co. Ltd; Visse v Pretoria News & Printing Works Ltd* 1946 TPD 441 at 447:

"The test to be applied by the court in determining whether the words are reasonably capable of the alleged defamatory meaning is the effect on the mind of the ordinary newspaper reader, an average reasonable person of ordinary intelligence - Basner v Trigger 1945 AD at 32 - who reads the article with ordinary care, but not as "an astute lawyer or a super critical reader would read the passage" - per Wessels JA in Johnson v Rand Daily Mail 1928 AD at 204."

See also *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993(2) ZLR 359 (H) at 367-370, and the numerous authorities there cited by Robinson J: See also *Joubert The Law of South Africa, Volume 4*, paragraph 239 and the authorities cited therein.

Truth of the article

[20] Most of the article (reproduced on page 10 of the record) is an accurate summary of parts of Nkambule J's judgment. However, it is untrue in one major respect: the plaintiff was not ordered to pay E195 000 or to return goods to that value. The headline, too, is also misleading in this regard. The article is also untrue in that it is only

half the story: the adverse findings made about the plaintiff's conduct had been set aside.

Malice

[21] The writer's conduct is certainly an example of slovenly journalism, but in my view it goes further. No good reason is given for why he chose to resurrect this stale matter. There is a suggestion that the information came from another deputy sheriff who for some reason was a competitor of the plaintiff. That alone should have caused the writer to be on his guard. But it has been held that failure to investigate or to get comment from the person who is the subject of a story is indicative of malice: see *Chinamasa v Jongwe Printing & Publishing Co. (Pty) Ltd & Anor 1994(1) ZLR 133 (H)* at 167-168 per Bartlett J.

See also *Botha v Pretoria Printing Works Ltd 1906 TS 710* where Innes J says:

"The public acts of public men are, of course, matters of public interest, and criticism upon them does a great deal of good provided corrupt motives are not imputed. But the character of a public man is not only a possession precious to himself, but is, in a very real sense, a public asset. If any person knows anything against the character of a public man which makes him unfit for the position which he occupies, such person is not only justified, but bound, to inform the public of the facts, and to substantiate them for the public benefit if necessary. But if he makes attacks without verifying his facts, and is not prepared to justify them, he incurs a liability for substantial damages. These are elementary truths which are apt to be overlooked. We are entering upon a period when there may be great public excitement, and much public criticism; and I think the Court should, by its attitude, impress

upon all concerned that attacks upon the private character of public men are not to be lightly made, and that if they are made, apart from privilege, they must be justified.”(emphasis added)

[22] It was said in *Botma v. Horwitz* 1910-1917 GWL, 139:

“Malice does not necessarily mean spite or ill will but may refer to a defendant’s recklessness and the imprudent, and indiscreet manner in which he acts” (per Lange, J (141) for damages for malicious prosecution).

[23] There was no good reason why the writer could not have got the plaintiff’s version, nor why he disregarded Maphalala J’s judgment. Had he made the necessary enquiries, he would quickly have discovered that there actually was no story at all.

Damages

[24] The defendant’s conduct is aggravated by:

- The status of the plaintiff;
- The lack of contrition;
- The lack of correction or apology;
- Malice.

[25] The status of the appellant was highlighted by the learned judge *a quo* in the following terms:

“The plaintiff herein has described himself without challenge, as a duly appointed Deputy Sheriff for the Manzini District; current Chairman of the Deputy Sheriffs Association of Swaziland; an appointed Deputy Sheriff in the Republic of South Africa (RSA); a member of the South Africa Board of

Sheriffs; Sheriff of the High Court of South Africa Mpumalanga Region; member of the International Union of Sheriffs (headquartered in Paris, France); member of the Registrars' Advisory Council of South Africa (concerned with advising registrars of courts); Facilitator for the International Union of Sheriffs (an outfit involved in the training of Sheriffs), and a member of the South African Institute of Auctioneers".

[26] In my view the respondent is clearly a person, as evidenced by these achievements, a person of considerable standing and stature in his chosen field of expertise. I therefore do not believe that an award of E100 000 is excessive.

[27] In *Salzmann v Holmes* 1914 AD 471 at 480 at 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".

[28] In the case of *Parity Insurance Co. Ltd v. van den Bergh* 1966(4) at page 478 *Olgivie 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 (Sigourney 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)”.

[29] I have also had regard to the case of *Young v. Shaikh 2004(3) SA 46 (C)* wherein R150 000 was awarded for defamatory statements made. In that case, the defendant offered an apology which did not happen in this matter.

[30] In this case not only was no apology tendered but nowhere in his evidence is there an indication on the part of the journalist who compiled the offending article that he exhibited contrition. I take note of the authorities referred to us by the learned counsel representing the appellants, in which he has highlighted the awards of damages in a number of cases which range from as low as R500 to R30000. In all these cases the awards for damages were made pre 1998. Having regard to the depreciation in value of currency since then, I believe the sums awarded would have far exceeded the amounts awarded had they been awarded at the present time. This is what happened in the case of *Vusi Ginindza and Others v. Lindifa Mamba and Another, Appeal Case No.8/2002* where this Court increased the award made by the High Court from E60,000 to E85,000. Also in the case of *Young v. Shaikh (supra)* an award of R150,000 was considered appropriate in what was regarded as a case of serious defamation.

[31] The defamatory article in respect of the current matter was published in a widely circulated newspaper. The respondent is of some standing in society and in the particular field of his profession. It cannot be said that the appellant acted out of a sense of duty or made the statement in the heat of debate. There have been no expressions of regret or apology. In my view his conduct was both

reckless and irresponsible. See *Simpson v. Williams* 1975(4) SA 312 (N); *Buthelezi v. Poorter* 1974(4) SA 831 (W); *Pienaar v. Argus Printing and Publishing Co. Ltd* 1956(4) SA 310 (W) and *Kuper; SMA Survey of the Principles* on which damages are awarded for defamation 1966 SALJ 477.

[32] I respectfully associate myself with what was said by *Magid AJA* in the case of *The Editor, The Times of Swaziland and African Echo (Pty) Ltd and Albert Shabangu Appeal Case No.30/2006* where he stated:

“It must be borne in mind that an award of damages in a defamation case is to afford some solatium for the injury done to the plaintiff. And no doubt, having regard to the social and political status of the respondent, a court would be inclined perhaps to err on the high side in awarding him damages for defamation”.

[33] I also take note of what he said in the case of *Ashmond Ngwenya and Swaziland Posts and Telecommunications Corporation Jubilee Printing and Publishing Appeal Case No.20/09* where he observed “I mention this in particular because this Court has observed a practice that has grown up in this jurisdiction to claim grossly excessive damages in cases...” I have no difficulty with these observations but hold the view that on the facts of the case at hand, the award made of E100, 000 was not excessive in view of the finding of malice, properly made against the appellants.

[34] I turn now to deal with the issue of costs. Initially, the respondent sought damages in the sum of E2, 000.000 but his counsel in her submission to the Court, at first instance, reduced the sum claimed to E250, 000. The learned judge *a quo* granted an award of E100, 000.

[35] The appellant's counsel submitted that as the respondent had grossly inflated his claim for damages and had persisted in his claim in his evidence until the submissions were made on his behalf, the court should have expressed its displeasure by denying him his costs. I cannot agree. Firstly, counsel for the respondent accepted prior to the conclusion of the hearing that the demand of E2, 000.000 was not appropriate. Secondly, the fact that the claim initially made was excessive did not in any way materially affect the manner in which the trial evolved. No extra evidence was led nor were any extra costs incurred in the way the hearing proceeded.

[36] Both counsel agreed that interest on the award made should run from the date of judgment and not from the date of publication of the article.

[37] Accordingly -

(a) the appeal is dismissed with costs including the certified costs of counsel as provided for in Rule 68(2) of the High Court Rules, the taxing master being directed to consider allowing such larger amounts on taxation than Section 4 of the tariff prescribes, as he thinks reasonable;

(b) interest on the award made is to run from the date of judgment of the court *a quo* to the date of payment.

A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE S.A.MOORE

JUSTICE OF APPEAL

Delivered in open court on this day of May, 2010.