IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 77 /2013**

In the matter between:

AFRICAN ECHO (PTY) LTD. t/a TIMES	1ST APPLICANT
OF SWAZILAND	
THULANI THWALA	2ND APPLICANT
MANDLA BHEMBE	3RD APPLICANT
AND	
INKHOSATANA GELANE ZWANE	RESPONDENT

Neutral Citation: *African Echo (Pty) Ltd. t/a Times of Swaziland vs. Inkhosatana Gelane Simelane (77/2013) [2016] SZSC 20 (30th June 2016)*

Coram: **DR. B.J. ODOKI, JA**

S. P. DLAMINI, JA

C. MAPHANGA AJA

M. LANGWENYA, AJA

M.J. MANZINI AJA

Heard: **03 May 2016**

Delivered: **30 June 2016**

Summary: *Civil Procedure – Application for Review of decision of the Supreme Court – Section 148 (2) of the Constitution – Defamation – whether article published by the Appellants was defamatory of the Respondent per se – Respondent a politician and public figure awarded damages of E550.00-00 by the High Court – whether damages grossly excessive - Supreme Court upholds decision and award of High Court – Application for review of decision of Supreme Court on grounds of misdirection on the power of Supreme Court to interfere in the discretion of awarding damages – No proof of exceptional circumstances or serious misdirection causing gross injustice established – Application for review dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI, JA

[1] This is an application for review of the decision of the Supreme Court, brought under Section 148 (2) of the Constitution for an order in the following terms:-

> ***"1. That the judgment of the Supreme Court under Case No. 77/2013 granted on the 3rd December 2014 be and is hereby reviewed and corrected or set aside.***

2. That the appeal against the judgment of the High Court under Case No. 2362/2009 be and is hereby upheld with costs.

3. That the costs of this Application including the costs of Counsel in terms of Rule 68 (2) are to be paid by the Respondent in the event of opposition."

[2] The Application was accompanied by the Founding Affidavit of Martin Dlamini, employed by the 1st Applicant as Managing Editor, and a supporting affidavit of Silindile Mngomezulu, an Attorney who appeared in this matter in the High Court.

[3] On the 7th March, the Respondent filed a notice to oppose the Application, and on 22 March 2016, the Respondent filed an answering affidavit.

[4] The brief background to this Application is stated in paragraphs 15 to 19 of the Appellant's Founding Affidavit as follows:-

"15. The Respondent had instituted an action claiming damages in the sum of E2,000,000.00 (two million Emalangeni) for defamation arising from the publication of an article on 9 May 2009 which reported claims by a certain Ambrose Mahlangu that he was the respondent's father. The claim was significant in that if Mahlangu was

indeed the Respondent's father this would affect her right to the chieftaincy in Kontshingila where the Respondent was the acting chief.

16. In brief, Particulars of Claim the Respondent alleged in paragraph 9 that the published words were wrongful and defamatory in that they were intended and understood to mean that the Respondent was "… an imposter who has usurped the chieftaincy of Kontshingila when she is not entitled to so act by virtue of the fact that she is not a Simelane."

17. In paragraph 6 of the plea the applicants denied the allegations that the article was wrongful and defamatory and pleaded that the article was in essence truth and that the publication was in the public interest.

18. The Applicants pleaded an alternative in paragraph 7 of the plea which was referred to in argument and the judgment as the "Bogoshi defence"

19. The Applicants further pleaded that the Respondent had not suffered damages and that the damages claimed were excessive."

[5] The Learned Judge in the court *a quo* found for the Respondent, and awarded her damages in the sum of E555, 000-00, with interest at 9% per annum from date of judgment to date of payment, as well as the costs of the suit.

[6] The Appellants being dissatisfied with the above judgment lodged an appeal to the Supreme Court on the following grounds:

> ***"1. The court a quo erred in law and fact in finding that the meaning ascribed to the words complained of by the Defendant was not different to the one pleaded and accordingly not dismissing the Respondent's action on that basis.***
>
> ***2. The court erred in that even if the court correctly found that the meaning ascribed to the words complained of by the Respondent were not different to the meaning pleaded, in not upholding the Appellant's defence that the publication of the words concerned was not unlawful because the Appellants were not aware of the falsity of the articles and their publication was made objectively, reasonably and without animus injuriandi.***
>
> ***3. The court erred in that even in the event it correctly found for Respondent, which finding Appellant challenges on the basis set out above, the award of E550.00-00 was with all due respect excessive in all the circumstances of the matter and with due regard to all relevant precedents, the value of currency and other applicable considerations including but not limited to the effect that an award of this nature has on the flow of information to the public.***
>
> ***4. With regard to the ground of appeal above, the Honourable court erred in finding, that there was evidence that the Appellant took sides in the chieftaincy dispute and that the publication was made with malice."***

[7] On the 3rd December 2014, the Supreme Court dismissed the appeal with costs and affirmed the judgment of the court *a quo*

[8] The Appellants now seek the review of the judgment of this court on the grounds set out in their Founding and Supporting Affidavits.

[9] The seven grounds of review can be summarized as follows:

1. That the Supreme Court's interpretation of the pleadings and consequently its finding that the article complained of was defamatory *per se* was grossly unreasonable and that its conclusions constitute misdirection in law.

2. That the High Court misdirected itself when it took judicial notice that it was **"downright-defamatory"** according to **"Swazi culture"** to publicly refer to someone as being of a different surname than one he knows himself or he is known of since there was no evidence to support this finding, and the Supreme Court failed to give due weight to the misdirection.

3. That the Supreme Court misdirected itself in law on the Bogoshi judgment when it held that **"the Bogoshi decision was based on the uniquely liberal constitution of South Africa which exhibits marked difference to our constitution and should be approached with trepidation."** The Supreme Court's assessment of the evidence of the reasonableness of the publication was grossly unreasonable by rejecting the evidence of Mr. Mahlangu without proper analysis.

4. That the Supreme Court misdirected itself in law in the interpretation of the Applicants' argument in respect of defamation of politicians when it stated that it was necessary ***"to dispel the notion that the Respondent being and politician an indeed a public servant in general is deprived by virtue of her status in government, of the normal protection afforded to individuals by the law of defamation"***, when the Applicants did not propound such notion.

5. That the Supreme Court misdirected itself in law and made unreasonable findings in respect quantum of the award of damages when it failed to exercise its discretion to reduce the award of E550.000-00 which was grossly excessive and inconsistent with the quantum awarded in comparable cases.

6. That the Supreme Court took into account irrelevant considerations when in the course of an argument on the quantum of damages the court commented that the article was an attack on Swaziland's institutions which was irrelevant to an action for defamation.

7. That the Appellants were denied the right to *audi alteram partem* as the interventions of the court and reluctance to permit Counsel for the Appellants to develop the arguments in respect of the submission that the award was grossly excessive created the impression that the court had prejudged this issue.

[10] In his Supporting Affidavit, Silindile Mngomezulu an attorney who appeared in the Supreme Court during the hearing of the appeal stated in the affidavit as follows:

> ***"4. I was present in court throughout the argument of the appeal and it was my impression that the behavior of some of the judges of the Supreme Court was hostile to the extent that it is respectfully submitted that the right to audi alteram partem was denied to the Appellants.***
>
> ***5. It is my humble submission that the restrictions of the court and the interventions during arguments of the Appellant's Counsel created the impression that the court had prejudged the matter.***
>
> ***6. Upon my return to the office, I informed my employer Mr. Musa Sibandze that in my view the conduct of the court severely hampered the right to effectively present the Appellants argument. Mr. Sibandze asked me to prepare a record of proceedings. I then made numerous attempts to get a complete transcript of the record of the proceedings and despite my best efforts I was unable as the entire argument was not recorded or has been lost and as such it would not be retrieved.***
>
> ***7. This unfortunately constitutes a serious deficiency, which in my view would hamper the arguing of the review as the record would fully demonstrate the conduct of the court during the arguing of the Appeal"***

[11] In her Answering Affidavit, the Respondent raises several points *in limine* relating to the delay of the Appellants in bringing this

application for review and denies allegations contained in the grounds for review raised by the Appellants.

THE REVIEW JURISDICTION

[12] The Appellants submitted that review was now permissible under Section 148 (2) of the Constitution only where there are exceptional circumstances in the interest of justice and fairness. It was the contention of the Appellants that in order to maintain public confidence in the administration of justice, there is a need to provide a remedy where there is a significant injustice and absence of alternative remedy. The Appellants argued that the Supreme Court would have power to reopen the appeal even if Section 148 (2) did not exist but its powers would be more limited. Reliance was placed on the case of **PRESIDENT STREET PROPERTIES (PTY) LTD. vs. MAXWELL UCHECHUKWU [2015] SZSC 11 (29 JULY 2015)**. The Applicants maintained that this was a proper case for review.

[13] The Respondent submitted that Section 148 (2) of the Constitution provides for an extra ordinary and special form of review which is permissible in exceptional circumstances only. It is designed to correct a manifest injustice caused by an earlier judgment for which there is

no remedy. See: **VILANE AND ANOTHER vs. LIPNEY INVESTMENTS (PTY) LIMITED** Court Case No 78/2013.

[13] It was the contention of the Respondent that Section 148 (2) should not be used in circumstances where an applicant simply seeks to reargue issues that it had convassed either in the High Court or in the Supreme Court or to raise fresh arguments that were initially available to it but which it did not raise in the appeal itself as to do so would amount to nothing more than an attempt again to appeal the judgment in question, and to obtain a second bite at the cherry.

[14] The Respondent further argued that in the case of **PRESIDENT STREET PROPERTIES vs. MAXWELL UCHECHUKWU** *(Supra)* the court stated that Section 148 (2) must be applied as a matter of necessity with caution since ***"it goes against the underlying principle that the court must prevent the recapitulation of the same action and must always endeavour to put an end to needless litigation."*** See also **DALLAS BUSANI DLAMINI vs. COMMISSIONER OF POLICE [2015] SZSC 39 (29 July 2015)**.

[15] It was therefore the submission of the Respondent that Section 148 (2) does not envisage a situation where a party is given an opportunity to have issues previously adjudicated to finality reheard simply because they are disappointed with the result. It also does not entitle a party to seek a review simply on the basis that there is an error of law, where such error of law is not material or does not affect the outcome of the decision

[16] It is trite law that the Supreme Court has jurisdiction to review any of its decisions given by it as provided by Section 148 (2) of the Constitution which provides:-

> ***"2. The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court."***

[17] It is provided in Section 148 (3) that;

> ***"(3) In the exercising of its review jurisdiction, the Supreme Court shall sit as a full bench."***

In accordance with Section 145 (3) of the Constitution, a full bench of the Supreme Court shall consist of five justices of that court.

[18] Although neither Parliament nor the court has prescribed the grounds or conditions upon which the review may be conducted, the Supreme Court has held in several decisions that it is competent to exercise its review powers which are based historically on its inherent powers to remedy gross and manifest miscarriage of justice. These decisions include **VILANE AND ANOTHER vs. LIPNEY INVESTMENT (PTY) LTD Court case No. 78/2013, PRESIDENT STREET PROPERTIES (PTY) LTD vs. MAXWELL UCHECHUKWU AND OTHERS [2015] SZSC 11 (29 JULY 2015), COMMISSIONER OF POLICE AND ANOTHER vs. DALLAS BUSANI DLAMINI Civil Case No. 39/2011, THE PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE AND OTHER vs. XOLILE SUKATI Civil Case No. 45/2014, [2015] SZSC 38 NUR AND SAM (PTY) LTD. AND ANOTHER vs. GALP SWAZILAND (PTY) LTD. [2015] SZSC 04 (9 DECEMBER 2015), SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD [2015] SZSC 06 (9 DECEMBER 2015).**

[19] In **PRESIDENT STREET PROPERTIES (PTY) LTD CASE** (supra) the Supreme Court affirmed its review jurisdiction and attempted to lay down its scope, in the absence of the law or rules prescribing the grounds or conditions under which the jurisdiction should be exercised. The court observed:

"[26]In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction, this court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as a Supreme Court. Either way, the ultimate purpose and role of this court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. The exceptional jurisdiction must be properly employed, be conducive to and productive of higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is functus officio or the matter is res fudicata, or that finality in litigation stops it from further intervention. Surely the quest for superior justice among fallible beings is a never ending pursuit for our courts or justice, in

particular, the apex court with the advantage of being the court of last resort."

[20] After citing authorities from various jurisdictions, Dlamini AJA identified some of the conditions which might justify review as follows:

"From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice, or absence of effective remedy."

[21] In **SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD.** (Supra) this court identified a number of important principles that can be distilled from the court judgments cited above. These principles were summarized in paragraph [32] as follows:-

"1. In order to maintain certainly in cases already decided, the courts must be cautious against allowing a party to bring a matter back to court or the same cause of action simply because he is dissatisfied with the outcome.

2. ***Section 148 (2) was not promulgated to permit litigants limitless chances to have cases previously adjudicated to finality reheard simply because they are disappointed with the result.***

3. ***The court's review jurisdiction can only be exercised where there is a patent an obvious error of fact of law.***

4. ***There is a distinction between an appeal an review so that review jurisdiction is not an appeal "and is not meant to be resorted to as an emotional reaction to an unfavourable judgment".***

5. ***Not every decision will be impugned because it is wrong and not every misdirection or error of law will be a ground of review but will rather amount to a ground of appeal.***

6. ***Only exceptional circumstances justify the application of Section 148 (2) including fraud, patent error, bias, new facts, significant injustice or the absence of an alternative remedy.***

7. ***The jurisdiction of the Supreme Court under Section 148 (2) is exceptional, and is to be invoked not to***

allow a litigant a second bite at the cherry, in the sense of another opportunity of appeal or hearing at court of last resort, but to address only a situation of manifest injustice irremediable by normal court process.

8. The court's review jurisdiction must be narrowly defined and employed with due sensitivity, to avoid opening a flood gate or reappraisals of cases otherwise finally disposed of, in accordance with the res judicata doctrine."

[22] The substantial question is whether the Appellants have established sufficient grounds upon which this court should exercise its review powers in their favour taking into account the principles stated above. It is therefore necessary to consider the grounds advanced by the Appellants having regarding to the principles enunciated above. Before I do so, it is pertinent at this stage to deal with the points *in limine* raised by the Respondent.

THE POINTS *IN LIMINE*

[23] The first point raised *in limine* by the Respondent was the unreasonable delay in the institution of review proceedings. The Respondent avers:-

> ***"9. The Applicants launched the present Application on 19th February 2016, seeking to review and/or set aside a judgment of this Honourable Court which was handed down on 3rd December 2014. The Applicants have waited for a period in excess of fourteen months before instituting the present review application. I submit that the delay in unreasonable unjustifiable and on a conspectus of the relevant facts, the Applicants should be held to have waived their right to review and/or challenge the judgment of the Supreme Court.***
>
> ***10. It is trite principle that proceedings for judicial review of decisions of the courts should be initiated without delay and necessarily within a reasonable time. The delay by the Applicants in the present is most unreasonable and prejudicial to me."***

[24] The Respondent recounts how the Appellants have contributed to the delay in the finalization of the action proceedings by launching

unwarranted and spurious application for recusal of the presiding judge in the High Court which was dismissed and then appealed to the Supreme Court which also dismissed the appeal.

[25] The Respondent avers that the main appeal was further delayed by the absence of the record. She states that ***"This delay is significant because in light of the issues obtaining in the matter, her status, dignity, position as a leader remained in doubt for a considerable period whilst the matter was pending before courts. The uncertainty had a detrimental effect on me and it is most prejudicial for me to be put through the same trauma after such a lapse of time"***

[26] The Respondent further states,

> ***"10.4 I was subjected to severe legal costs as the trial in the High Court lasted some fourteen days, then there were two recusal proceedings then an appeal as well. As an individual squaring off against a large corporate, I submit that I am entitled to protection against the***

persistent litigation by the applicants, particularly after such considerable delay.

10.5 ***The matter in question affects my identity, position and status in society in general; my position as a traditional leader; my status as President of the House of Senate, my status as a wife and mother to my children. It is imperative that there should be finality on such issues, given the consequences of the publication.***

13.1 ***I submit that the Applicants are in essence being opportunistic in launching an application for review after a passage of fourteen months ago. The delay is so unreasonable as to justify the dismissal of the review application outright, or amongst other reasons the doctrine of finality which is a central feature of the rule of law."***

[27] The second point in limine raised concerns the doctrine of peremption. On this point, the Respondent submits as follows:-

"15. on the 15th December 2014, the Applicants paid the entire judgment amount and interest to my attorneys. The Applicants also subsequently paid the agreed costs, inclusive of the costs of the High Court matter as well as those of the Supreme Court. My attorneys duly remitted the judgment amount to me.

16. I submit that having paid the judgment amount, a singular act that evinces acquiescence to the judgment; from aprobating and reprobating on the same having acquiesced to the judgment then turn around without explanation or justification to seek to challenge the judgment. In light of the fact that the Applicants acquiesced to the judgment, and a period of just under fourteen months have lapsed since the act of acquiescence, it is no longer open to the Applicants to subsequently seek to challenge the judgment by way of review.

17. By making the payment, the Applicants indubitably demonstrated that they did not intend to challenge the judgment, particularly because the remedy of review was available to them at that stage. I

therefore submit that the facts of the matter lead to the incontrovertible conclusion that the Applicants by their conduct acquiesced to the judgment. This is buttressed by the fact that no notice whatsoever was ever given to my attorneys, that the Applicants intended to institute these review proceedings.

18. On this basis, the court should apply the doctrine of peremption and dismiss the application for review with costs"

[28] The third point *in limine* is the absence of the transcript of the arguments in the Supreme Court. The Respondent submits that the Appellants unreasonably delayed in trying to secure the record of proceedings by approaching the Registrar of the Supreme Court twelve months after the hearing of the arguments in the Supreme Court. The Respondent contends that this court cannot be called upon to review proceedings based on the events that occurred during the course of arguments, where the transcript of those proceedings is not available to the court and the context within which the allegations attributed to the Honourable Judges were made. The Respondent maintained that the absence of the record is fatal to the Application for review

particularly because the Appellants' wish to rely on the events that transpired during the conduct of the appeal hearing.

[29] The fourth point *in limine* is that the application for review of the Supreme Court decision is impermissible in the absence of an Act of Parliament or Rules of Court permitting such. The Respondent submits:-

> ***"27. It is submitted that in order for Section 148 (2) of the Constitution to become operative, there needs to be in place, and Act of Parliament, setting out the scope and nature of the review contemplated in section 148. In the absence of the grounds and/or conditions set out in an Act of Parliament as envisaged in the Constitution, it is impermissible for this Honourable court to exercise review powers or alternatively for it to exercise such review powers in the absence of a rule of court that is predicated on the Constitution. It is a matter of procedural fairness that the review should b e governed by statutory framework.***
>
> ***28. I submit that in the present matter, the Applicants seek to reargue or raise fresh arguments which***

were available to them at the inception of the matter but for inexplicable reasons, they elected not to pursue them."

[30] The last point *in limine* is that there is no basis for review. The Respondent submitted that it is impermissible for the Appellants to appeal against the judgment to appeal against the judgment of the Supreme under the guise of review, because they pursued the review knowing full well that they did not have the record of proceedings. It was the contention of the Respondent that the allegations of misdirection of law or gross unreasonableness are without foundation and are nothing more than an attempt to have the merits of the judgment reconsidered by another court.

[31] In the rest of her affidavit, the Respondent denied most of the allegations made in the founding affidavit of the Applicants and the submissions contained therein will be addressed together with the submissions in the Respondents' Heads of Argument.

[32] In her replying affidavit, Ms. Silindile Mngomezulu, an attorney for the Appellants, admits that there was a problem with recording of

evidence in the High Court but denies that most of the evidence recorded was incorrect. She submits that the duty to ensure proper recording evidence rests on the Registrar of the High Court. She states that the problem of the record of proceeds was brought to the attention of the Supreme Court but that the deficiency of part of the record was of no consequence since the evidence relied on in this view was fully transcribed from the recordings.

[33] Ms. Mngomezulu denies that there has been unreasonable delay in the institution of the review proceedings since reasonableness is determined in accordance with the circumstances of the particular case. In the circumstance prevailing at the time of judgment and for over seven months thereafter review proceedings were untenable.

[34] It was submitted by the Applicants that the other cause of delay was the uncertainty regarding Section 148 (2) of the Constitution. The absence of an Act or Rules stipulating grounds for review of a judgment of the Supreme Court raised reasonable doubt as to the viability of a review. It was argued that it was only at the end of July 2015 that this court pronounced that such a review was indeed permissible in the absence of an Act or Rules, a decision the Applicant's attorney were waiting for.

[35] The Attorney further contended that the fact that the Applicants paid the judgment as required by the Supreme Court judgment does not detract from the reviewable nature of the judgment. It is maintained that the extra ordinary circumstances existed at the time which should not be permitted to prejudice the Applicants' right in terms of the Constitution to proceed with a review which is in the interests of the fair and just administration of justice. The Applicants denied that the payment of the judgment amount indicated that they had acquiesced in the judgment.

CONSIDERATION OF THE POINTS *IN LIMINE*

[36] I shall now consider the points *in limine* raised by the Respondent. The first preliminary point is the submission regarding unreasonable delay in instituting the review proceedings. In her Heads of Argument, the Respondent documents instances where the Applicants have not been diligent in filing their papers within the time frame set by the rules.

[37] In the first instance, the Applicants launched the present application for review on the 19th February 2016, to review a decision handed down by this court on the 3rd December 2014. In the second instance the Applicants filed their replying affidavit over three weeks late. In the third instance, the Applicants filed their heads of argument two weeks late. It was the contention of the Respondent that on the account of blatant disregard of the rules of court and practice

direction, this honourable court should censure the conduct of the Applicants by refusing to enroll the review application and dismissing it with costs. Reference was made to the following decisions:-

UNITRANS SWAZILAND LIMITED vs. INYATSI CONSTRUCTION LIMITED Appeal Court 1997, **OKH FARM (PPTY) LIMITED vs. CECIL JOHN LITTLER AND FOR OTHERS**, Appeal Case No.56/2008., **USUTU PULP COMPANY vs. SWAZILAND AGRICULTURAL AND PLANTATION WORKERS' UNION;** In re: **SWAZILAND PLANTATION WORKERS' UNION**, Appeal Case 21/2011.

[38] It is common ground that Section 148 (2) of the Constitution does not prescribe the period within which review proceedings should be instituted. This was expected to be prescribed by an Act of Parliament or Rules of Court which have not been made. In the absence of the said law or rules, it seems to me that the common law principles or the practice of the courts as developed from time to time regarding the exercise of such jurisdiction in other courts may be of guidance.

[39] Although there is generally no prescribed time limit within which proceedings for review must be brought, it is clear that they must be instituted within a reasonable time. See: **HERBSTEIN AND VAN**

WINSER, THE CIVIL PRACTICE OF SUPERIOR COURTS OF SOUTH AFRICA, 3rd edition, page 764.

[40] There has been debate on whether unreasonable delay is by itself sufficient to bar review proceedings, even in the absence of actual prejudice to the respondent. However, recent decisions now appear to recognize prejudice as an important factor in the decision of applications for condonation of the delay in instituting review proceedings: See **HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF SUPERIOR COURTS OF SOUTH AFRICA** (*supra*) page 765.

[41] What is unreasonable delay depends on the circumstances of each case, in the absence of the time frame prescribed by law or rules. It seems to me that a delay of over one year before instituting review proceedings is unreasonable given the need to bring matters of litigation to finality and closure so that the parties can reorganize their lives.

[42] The reasons given for the delay in this matter do not seem to justify such a long delay. The problems experienced in obtaining the record

may be genuine but this review could have been instituted without a full record of proceedings in the Supreme Court since the documents filed in the Supreme Court were in existence, as well as the impugned judgment. The question of bias or unnecessary interventions during the submissions of Counsel for the Applicants could be dealt with by affidavit as it has been done in this application.

[43] The other reasons for the delay were the prevailing circumstances in the court which made the Applicants believe would not get a fair hearing. It is difficult to believe this allegation since the court was operational during the said period.

[44] The other reason given for the delay was the uncertainty about the operation of the review jurisdiction. In my view it was not necessary to wait for the Supreme Court to pronounce itself on this matter before the Applicants instituted review proceedings because it was clear that the Constitution had vested the Supreme Court with review powers under Section 148 (2).

[45] The delay in instituting review proceedings was also unreasonable because it occasioned prejudice to the Respondent by allowing the

proceedings to hang on her head for a long period even after the Supreme Court had decided the matter in her favour. The Applicants had paid the decretal amount to her, which she had spent, assuming that the Applicants had acquiesced in the judgment and that they would not bring her to court again:

[46] This brings me to the second point *in limine*, that is, the doctrine of peremption. This doctrine has been expounded in a number of cases including **HLATSHWAYO vs. MARE AND DEAS 1912 AD 232, D. ABNER vs. SOUTH AFRICAN RAILWAYS AND HARBOURS** 1920 AD 583 **BHEKIWE VUMILE HLOPHE vs. STANDARD BANK OF SWAZILAND** Case No 13/2015, **HARTLEY ROEGSHAAN AND ANOTHER vs. FIRST RAND LIMITED AND ANOTHER** Case No. 27612/2010.

[47] The doctrine of peremption was well enunciated in the case of **HARTLEY, ROEGSHAAN AND ANOTHER vs. FIRST RAND LIMITED AND ANOTHER** (*supra)* where the court stated,

> "[13] According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has

acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both appropriate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too.

[14] The doctrine of peremption was enunciated in HLATSHWAYO vs. MARE AND DEAS (*supra*) where Lord De Villiers held that ***"Where a man has two courses of action open to him and he unequivocally takes one cannot afterwards turn back and take the other".*** Similarly in **D. ABNER vs. SOUTH AFRICAN RAILWAYS AND HARBOURS** (*supra*) Javies CJ stated,

> ***"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such that as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. In doubtful cases***

acquiescence, like waiver, must be held non-proven. See <u>BHEKIWE VUMILE HLOPHE vs. STANDARD BANK OF SWAZILAND,</u> Court of Appeal Case No. 13/2005."

[48] In **<u>HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA</u>**, 3rd Edn. page 716, it is stated,

> ***"Under the Common Law, a person who has acquiesced in a judgment cannot appeal against it. Acquiescence can be inferred from (any) unequivocal act inconsistent with the intention to appeal. It is not necessary to show an agreement not to appeal, or conduct which would estop the Appellant from denying acquiescence, or an abandonment of the appeal, but there must be conduct leading to the clear conclusion of intention not to assail the judgment. The onus of proof, of course, rests on the person alleging acquiescence and in doubtful cases it must be held not proven. A voluntary and unconditional payment or acceptance of payment under a judgment therefore preempts the right of appeal at common law."*** (**<u>HLATSHWAYO vs. MARE AND DEAS 1912 AD 232</u>**)

[49] However under the Section 85 of the Magistrates Act No. 32 of 1944 (SA) it is provided that,

> ***"A party shall lose the right of appeal through satisfying or offering to satisfy the judgment in respect of which he appeals or any part thereof on by accepting any benefit from such judgment decree or order."***

[50] To that extent the common law has been repealed, but it is accepted that acquiescence manifested in some other way than by satisfying or accepting a benefit from the judgment will still preempt the right of appeal. See **DE WET vs. VAN ZYL 1928 CPD 116, ZOCK vs. BRAUDE 1936 TPD 256**.

It is a difficult question which has still to be decided by the courts on the facts that of each case. It is clear that where submission to a court's order is not dictated by acquiescence it does not preempt an appeal.

[51] In the present case given the unreasonable delay in the institution of these review proceedings without sound reasons, and the prompt satisfaction of the amount awarded, it seems inescapable for me to conclude that the Applicants had acquiesced in the judgment of the

Supreme Court and given the Respondent the impression that they would not pursue further proceedings against her.

[52] The third point *in limine* concerns the absence of the transcript of the arguments of the Appellants in the Supreme Court. If there is no record of transcript of the proceedings in the Supreme Court, then it is the Applicants who will be unable to establish their claim of unfair interventions during the oral submissions by the Applicants' Counsel. The Respondent will suffer no prejudice and therefore this should not stop the review to be heard. It remains to be seen how the Applicants will establish their ground of review based on bias.

[53] The fourth point *in limine* is that the application is not permissible in the absence of an Act or Rules of Court was not pursued as it is common ground that the Supreme Court has held that it can exercise its review powers even in the absence of law or rules prescribing the conditions or grounds for review.

[54] The fifth point *in limine* is that it is impermissible for the Applicants to appeal the judgment of the Supreme Court under the guise of a review. While it is trite law that an Applicant cannot disguise a second appeal to the Supreme Court as a review, it falls to be decided in this

application whether the grounds advanced for review are grounds of appeal to enable the Applicants to have a second bite at the cherry. I must now turn to consider the grounds raised for review.

CONSIDERATION OF THE GROUNDS OF REVIEW

[55] The gist of the complaint in this ground is that the court erred in finding that Respondent has proved that the words in the article were defamatory *per se* when the Applicants had denied the allegation. Secondly, having decided that the article was defamatory *per se*, the court erred in proceeding, in contradiction to that finding, to attribute implied meanings to the article whereas such meanings were not pleaded. It was the contention of the Applicants that to conclude that the article conveyed the meaning that the Respondent had falsely conceded her identity and deceived the whole Kingdom in furtherance of her ambition and political gains was not pleaded and proved as required. It was the submission of the Applicants that the Supreme Court findings show that it failed to apply the relevant case law which was cited to it and consequently made grossly unreasonable findings on the pleadings.

[56] The Respondent argued that the findings in relation to the pleadings and in particular the contention that the Appellants had failed to deny the defamatory innuendo or that the words were defamatory *per se*

was made by the trial judge in the High Court, and in the appeal before the Supreme Court where the Applicants argued extensively on this issue and the Supreme Court merely confirmed the findings of the High Court on appeal. It was the contention of the Respondent that it was impermissible for a party to seek to reargue the same issue of pleadings that it raised in the High Court, on appeal and now on review.

[57] The Respondent further submitted that it is not every decision that can be impugned because it is wrong and it is a misdirection or error of law which can be a ground of review. It was the contention of the Respondent that only exceptional circumstances justify the application of Section 148 (2) including fraud, patent error, bias, new facts significant injustice or absence of alternative remedy and the ground advanced does not satisfy those requirements.

[58] I entirely agree with the Respondent's submissions. The interpretation of pleadings and findings of the High Court were dealt with adequately by the Supreme Court in paragraphs 19, 22, 23, 28 where the court stated,

"[19]It is patently obvious to me that while the Appellants denied that the context of the article are wrongful and defamatory of the Respondent, "they however failed to deny the allegation that the words in the context of the article" were intended and were understood by the readers of the newspaper to mean that the Plaintiff was an imposter who had usurped the chieftaincy of Kontshingila when she is not entitled to act by virtue of the fact that she is not a Simelane.

[20] The legal position in these circumstances is that the Appellant's are bound by their plea and must be taken to have admitted this portion of the Respondent's pleading. This derogates the necessity of leading any further evidence in proof of it.

[22] Having admitted that the words in the context of the article were intended and were understood by the readers of the newspaper to mean that the Respondent was an imposter who had usurped the chieftaincy of Kontshingila where she is not entitled to act by virtue of the fact that she is not a

Simelane, the Appellants cannot turn around, as they sought to do both in the court a quo and this court, to say that the words used are an innuendo and not defamatory per se. This is because by their admission they agreed that the meaning is apparent from the words used and is so understood by the ordinary reader of the newspaper, which reader, according to the authorities is the ordinary intelligent and reasonable man on the streets of Swaziland. This takes the words in the context of the article out of the realm of an innuendo. This is the applicable test – See ARGUS PRINTING AND PUBLISHING CO. LTD. vs. ESSELEN'S ESTATE 1942 (2) SA 1 (A) DANKIE MTHEMBU – RUHANYELE MAIL AND GUARDIAN AND ANOTHER [2004] A11 SA 511 (SCA) paragraph [26].

[23] Inspite of this established fact, Learned Counsel for the Appellants, Adv. Flynn, tenaciously contended that the words in the context used are an innuendo and not defamatory per se, I find myself unable to subscribe to this proposition for reasons that appear under."

[59] The Supreme Court went on to conclude on this matter:

"***[28] It is beyond contradiction that the foregoing article was intended to impress in the mind of the ordinary reasonable and intelligent man on the streets of Swaziland that the Respondent fully knowing that she is not a Simelane but a Mahlangu, falsely conceded her true identity, and deceived the whole Kingdom that she is a Simelane, in furtherance of her ambition of becoming an retaining the position of Acting Chief of Kontshingila which is a fact nor her birthright. This is so when judged against the background fact that,***

1) ***Respondents' position as Acting Chief stems from her birthright as a Simelane (a fact which is well known in Swaziland,***
2) ***Yet the foregoing article proclaimed that the Respondent is in fact not a Simelane, but a Mahlangu,***
3) ***That the Respondent knows that her real father is out there but distancing herself from***

him because he has nothing to offer unlike the Simelane's,

4) Coupled with the further statement that Gelane could be acting illegally, and,

5) That the Ludzidzini Council has been told about it and that the late Governor of Ludzidzini Jim Gama, said that the area should be under the guidance of a person originally born a Simelane. Indeed, implicit from the article is that the Respondent is a fraudster, an imposer who usurped the position of chief of Kontshingila. The words "imposer" and "usurp" are language elaborately used to convey an ordinary meaning of the defamatory words. The context of the words is not an innuendo. It is defamatory per se."

[60] I am unable to fault the reasoning and conclusion reached by the Supreme Court that the article contained words which were defamatory *per se*. I find no gross misdirection or error warranting this court to review the judgment of the Supreme Court based on this ground.

[61] The second ground for review concerns the High Court reliance on culture in the absence of evidence. In its judgment the Supreme Court considered the issue of Swazi Law and Custom as follows:

> ***"[30]It is arguable, as concluded by Adv. Flynn, that the court a quo misdirected itself by placing reliance on Swazi Law and Custom as it did in paragraph [36] above, in arriving at its decision when such custom has not been proved by evidence. This is arguable. However, speaking for myself, this does not detract from the finding of the court a quo that the publication is defamatory per se, as the court also placed reliance on other facts evidence in the record in reaching that conclusion. The pronouncement of the court on Swazi Custom, therefore, translates to mere surplasage and is of no moment."***

[62] Once again, it is clear that the Supreme Court addressed the point relating to reference to custom by the trial court and came to the conclusion, rightly in my view that it was of no consequence to the decision of the court. I find no reviewable error committed by the Supreme Court on this ground.

[63] The third ground advanced for review is that the Supreme Court misdirected itself in law on the Bogoshi judgment when it held that ***"the Bogoshi decision was based on the uniquely liberal constitution of South Africa which exhibits marked difference to our Constitution and should be approached with trepidation".*** It was submitted that the Supreme Court's assessment of the evidence of reasonableness of the publication was grossly unreasonable by rejecting the evidence of the Mahlangu without proper analysis. It was contended that the court ought not to have referred to the evidence of Mahlangu as of a ***"shabby old"*** man and an ***"assassin"***, and dismissed it as pathetic, inconsistent and unreliable ramblings, and thereby failed to display a dispassionate approach to the evidence.

[64] The responsibility of assessing the demeanor of a witness lies mainly with the trial court which has advantage of seeing the witness. An appellate court may make its own inferences from the record regarding the credibility of a witness. In the instant case, there was evidence that the witness's credibility and reliability was doubtful. I am unable to fault the assessment of the witness by the Supreme Court. More importantly this cannot form a ground for review.

[65] The Supreme Court dealt in detail with the ***"Bogoshi defence"*** expounded in **NATIONAL MEDIA LTD. vs. BOGOSHI 1998 (4) SA 119 (SCA)** The court said,

> ***"The raison d' etre of this defence is best summarized as follows: in an action for defamation against the media the defendant is entitled to raise reasonable publication as a defence; the publication of defamatory statements will not be unlawful if upon a consideration of all the circumstances of the case it is found to have been reasonable to publish the particular facts in a particular way and at a particular time; protection is only afforded to publication of material in which the public has an interest (i.e. which it is in the public interest to make) as distinct from material which is interesting to the public; the form of fault in defamation actions against the media is thus negligence rather than intentional harm; fault however need not be an issue in particular circumstances anterior injury shows that the jurisdiction is lawful because it is reasonable; in appropriate cases where the publisher reasonably believes that the information published is true, then the publication is not unlawful;***

political speech might depending upon the context be lawful, even where false, provided that its publication is reasonable."

[66] Having set out the principles applicable to the Bogoshi defence, the Supreme Court pointed out that while the Bogoshi decision was not binding but persuasive authority in Swaziland. The court stated:-

"[34]It is imperative that I point out at this juncture that the Bogoshi decision, like all other decisions of South Africa, South African courts are merely persuasive authority in the Kingdom. They are not binding on our courts. It needs also to be emphasized that the Bogoshi decision was based on the uniquely liberal constitution of South Africa, which exhibits some marked difference with our Constitution and should be approached with trepidation. The foregoing notwithstanding, since the reasonableness concept of the Bogoshi phenomenon which comments itself to me, was relied upon by the court a quo, I am compelled to consider it in that regard."

[67] It is therefore clear that the Supreme Court accepted to consider the Bogoshi defence in the present case. The Supreme Court referred to the **Bogoshi** decision where the court held that the defendant bears the onus of proving reasonableness. The inquiry as to the reasonableness of the publication must take into account the following factors:-

a) Whether there was not unnecessary string attached.
b) The nature of the information published.
c) The reliability of the source.
d) The steps taken to verify the information.

[68] The Supreme Court asked the question whether the publication in the present case was reasonable in the circumstances of this case. The court found that the court *a quo* had carely canvassed the law and the facts and circumstances and came to the conclusion that the article was not reasonable. The court concluded:-

> ***"[41]Having tested the facts and circumstances of this case against the vigours of the question of unreasonableness I find myself unable to fault the court a quo in its assessment of the evidence, the law and the circumstances of this case. I***

wholistically adopt the foregoing analogy of the court a quo."

[69] Having considered the evidence produced and submissions of the parties, I am unable to fault the conclusions arrived at by the Supreme Court on this ground. I find no material error or gross misdirection committed by the Supreme Court justifying review of its decision.

[70] The fourth ground for review is that the Supreme Court misdirected itself in law in the interpretation of the Appellants' argument in respect of defamation of politicians when it stated that it was necessary "***to dispel the notion that the Respondent being a politician and indeed a public servant in general is deprived by virtue of her status in government, of the normal protection afforded to individuals by the law of defamation"*** when the Appellants did not propound such notion.

[71] In their Founding Affidavit, and in the Heads of Argument, the Appellants referred this court to their submissions in the Supreme Court, without indicating what the submissions were. This practice of referring to submissions in the previous proceedings without indicating what those submissions are, is not helpful to the parties or the court

and should be avoided. This court is entitled to be addressed on the relevant point without parties having to hide under cover of ***"previous submissions on record"***.

[72] Be that as it may, the misdirection complained of appears in paragraph [55] of the judgment of the Supreme Court as follows:

> ***"[55]Let me first dispel the notion cast by the Appellants that the Respondent being a politician, and indeed a public servant in general is deprived by virtue of her status or role in government of the normal protection afforded to individuals by the law of defamation. What the Appellants' proposition loses sight of is, that though several law authorities proved this theory, they however throw a qualifier into the mix. I say this because was in the public interest, because while the law is agreed that as a matter of public policy, politicians and public officials should be more resilient to attacks on their performation as such, however, there would be justification to such publication if only the defamatory statement is reasonable in the peculiar circumstances and therefore lawful. Furthermore if the defamation relates to purely personal matters, it is actionable whether the Plaintiff is a politician or a public officer"***

[74] The Supreme Court was considering whether the publication was in the public interest and therefore reasonable. It concluded that although the publication was in the public interest, because it concerned he Respondent's paternity which was directly tied to her eligibility for appointment as Acting Chief of Kontshingila, the public had no right to know the information which was untruthful and published recklessly and negligently, without caring whether it was false. The court held that the publication was unreasonable in all the circumstances of the case.

[75] I am unable to find any serious misdirection by the Supreme Court as alleged by the Applicants. The issue of whether the publication was reasonable was extensively canvassed on appeal and therefore the Applicants are merely attempting to reargue the appeal through this ground. Therefore the ground must fail.

[76] The fifth ground of review is that the Supreme Court misdirected itself in law and made unreasonable findings in respect of quantum of the award of damages when it failed to exercise its discretion to reduce the amount of E550, 000-00 which was grossly excessive and

inconsistent with the quantum of damages awarded in comparable cases.

[77] In addressing the submissions of Counsel for the Appellants on the issue of whether the damages awarded to the Respondent were grossly excessive, the Supreme Court stated,

> ***"[68]Adv. Flynn has raised before us some arguments, principal of which is that the amount awarded is too excessive and will have a chilling effect on the media; the matter was already in the public domain before the publication; the highest amount awarded in Swaziland in relation to such damages was the sum of E100, 000-00 in the Akker case; the publication did not have much effect on the Respondent and she has retained her position as Senate President and Acting Chief of Kontshingila; the Appellants made every effort to get the Respondent's side of the story but to no avail, therefore, they could not be said to have erred on the side of the opposing Simelane faction as the court a quo held; the Appellants did not act with malice; the Appellants subsequently published a***

rejoinder from the Respondent's Aunt Jane Dube. In light of the factors Adv. Flynn prayed the court to set aside the award of E550, 000-00 and substitute it with a lesser award.

[69] The contention that damages awarded is disproportionate to the prejudice suffered by the Respondent and it should accordingly be reduced and to what extent, cannot lie. This is so because it is patently obvious to me that the court a quo considered the issues urged by Adv. Flynn, within the context of the guiding principles, in its process of the award of damages. If the court a quo did not give reasons for the award or the award is not supported by the evidence, then this court will have power to interfere with the award. This is however not such a case. The trial court gave copious reasons for he award, which reasons are supported by the evidence on record. The court therefore lacks the power to interfere."

[77] The Supreme Court went on to consider the argument relating to the highest award of damages made in Swaziland and whether the court has discretion to exceed it, the Court stated,

> ***"[70]There is however a thorny part of this case which I find I need to comment on for the purpose of emphasis. This is the contention that the award is excessive on the basis that it is the highest award granted in Swaziland for this sort of damages is the sum of E100, 000-00 in the Akker case.***
>
> ***[71] If this argument is well understood by me, it means that since the alleged highest award was E100, 000-00 the court was not at liberty to exceed this amount, therefore, the exercise of its discretion in awarding the sum of E550, 000-00 to the Respondent was erroneous. Put it differently, it means that the sum of E100, 000-00 is forever a benchmark for the award of damages and the court can only exercise its discretion to award damages of E100, 000-00 and below in all cases.***
>
> ***[72] It seems to me that the fallacy of this argument lies on different fronts which I detail hereunder.***

[73] Firstly, I know no rule or principle of our law under which the discretionary power of the court to award damages can be so fettered. The suggestion that the discretion of the court a quo must be approximated to the amount of E100, 000-00 diverts such a discretionary power of its judicial and judicious efficacy, based on all the peculiar facts and circumstances. Such a process, with respect, will amount to an arbitrary and capricious exercise of discretion without any rational basis. It will be wrong in principle See: GOVERNMENT OF SWAZILAND vs. AARON NGOMANE (supra) paragraph [88].

[74] Secondly the proposition loses sight of the fact that Mr. Akker was a Deputy Sherriff. His status in Society as such was of far less prominence than the Respondent, the Senate President and Acting Chief of Kontshingila. She is not just a local figure but an international personality. The egregiousness of the degradation is incomparable regard being had to the fact that the newspaper circulates around the globe in the cyberspace. On the surface it extends beyond the borders of Swaziland to other nations.

Not losing sight also of the fact that the defamation in Akker was less acrimonious and the decision was given in 2009, about five (5) years ago. The court a quo correctly considered these factors in its judgment.

[75] Then there is the fact that the proposition also loses sight of the case of SIKELELA DLAMINI vs. THE EDITOR OF THE NATION AND ANOTHER (supra) where the High Court awarded the sum of E120, 000-00 to the plaintiff (who was an under Secretary in the Ministry of Health and Social Welfare) as damages"

[78] The Applicants' submissions are that an appeal court would interfere with an award if it was glaringly disproportionate either because it was too modest or because it was grossly excessive. Secondly it was argued that a court of appeal may also interfere if the court of first instance materially misdirected itself with regard to the factors it took into account. In the present case it was submitted that the court *a quo* erred in its award in that it both misdirected itself and awarded damages in a grossly excessive amount.

[79] The Applicants maintained that the power to intervene on the basis of misdirection by a court *a quo* is not restricted to a case where the court *a quo* does not give reasons for the award or the award in not supported by the evidence.

[80] It was submitted that it was not argued in the Supreme Court that there was an upper limit of a specific amount of damages which a court could not exceed or that the discretion was fettered in this way or that only ***"normal"*** damages should be awarded.

[81] The Applicants maintained that what was argued was that care should be taken not to award large sums of damages too readily which may inhibit freedom of expression and that there is a discernible range in the quantum of damages awarded in comparative recent cases.

[82] Finally the Appellants submitted that damages for defamation are not a penalty imposed on a defendant but rather compensation to a plaintiff and not deterrent. In this connection both the High Court and the Supreme Court misdirected themselves in law in this regard and awarded an amount of E550, 000-00 which was grossly excessive and inconsistent with the quantum awarded in comparable cases.

[83] The Respondent submitted that the fact that the Applicants are unhappy with the quantum does not found a ground for review. The Applicants having already advanced the argument that the award was excessive, and the Supreme Court having concluded that the award was appropriate, does not entitle the Applicants to a review of its decision.

[84] It was further contended that the High Court was empowered to determine the appropriate award to be made in circumstances. It exercised its powers and discretion judiciously, and came to the conclusion that the sum of E550, 000-00 was appropriate. The Respondent submitted that the Applicants had their opportunity on appeal to have this amount reduced, and indeed it was a matter for appeal only, and having failed there they came seek to once more again to have another attempt to have the quantum reduced simply because they are disappointed.

[85] The power of an Appeal court to interfere with the award of damages made by a trial court has been well recognised in several decisions, and stated in various principles.

[86] In the old case of **FLINT vs. LOVELL 50 TLR 127**, the Court of Appeal held that since an appeal is a rehearing by court with regard to all questions involved in the action, including the question of what damages ought to be awarded, the court of appeal would be disinclined to reverse the finding of the trial judge with regard to the amount of damages merely because the court thought that if they had tried the case in the first instance, they would have given a lesser sum. The court would only interfere if satisfied that in assessing damages complained of the judge acted upon some wrong principle of law or that the amount was so extremely high or so very small as to make it an entirely an erroneous estimate to which the plaintiff is entitled.

[87] In **OBONGO AND ANOTHER vs. MUNICIPAL COUNCIL OF KISUMU**, [1971] EA 91, the East African Court of Appeal held that an Appeal Court will not interfere with the quantum of damages awarded by the trial court unless it is satisfied that the award of the trial judge was based on some wrong principle or is so manifestly excessive or inadequate or otherwise incorrect that a wrong principle is inferred. The Appellant has a duty to show that the trial court erred to justify the reassessment of damages.

[88] **HERBSTEIN AND VAN WINSEN** in their book, **THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA, 3RD EDN. 1979**, page 741 state,

> ***"In earlier cases there are a number of dicta suggesting that an appellate court will show great reluctance to interfere with an award of general damages by a trial court in cases where the estimate of damages must necessarily be somewhat rough and ready, such as general damages for defamation, damages for pain and suffering and the like See: SALZMANN vs. HOLMES 1914 AD 471, SUTTER vs. BROWN 1926 AD 155, BLACK vs. JOSEPH 1931 AD 132. It has now been laid down, however, that it is the duty of the court of appeal to decide upon the figure which it thinks should have been awarded and if such figure, considered from all aspects, differs substantially from the figure awarded, the court of appeal must not defer to the judgment of the trial court but must give effect to its own estimate."*** See: **SANDER vs. WHOLESALE COAL SUPPLIES LTD 1941 AD 194** at page 200.

[89] It is therefore clear from the above authorities that the Supreme can interfere with the award given by a trial court if it satisfied that the award was based on a wrong principle of law or that the award was so grossly high or extremely low as to make it an entirely erroneous estimate of the appropriate award. It seems clear also that the Supreme Court has the power to award a figure which it should have awarded had it tried the case. In so doing the Supreme Court may be guided by the previous award of damages made in comparable cases.

[90] In the present case although the Supreme Court did not address itself expressly to its power to award a different figure from the one awarded by the trial judge, the court after considering all he circumstances of the case including the factors the trial judge took into account in assessing damages, and the awards in previous cases of defamation came to the conclusion that the award of E550, 000-00 was not grossly excessive. I am unable to fault the Supreme Court in refusing to reduce the damages awarded to the Respondent. This ground of review has no merit.

[90] The sixth ground of review is that the Supreme Court took into account irrelevant considerations which in the course of an argument on the quantum of damages the court commented that the article was an

attack on Swaziland institutions which was irrelevant to an action for defamation. It was submitted that the purpose of award of damages was to compensate a plaintiff for damage to her reputation and not to serve as deterrent.

[91] This ground is covered in the above ground discussing the quantum of damages awarded to the Respondent and it is not necessary to deal with it here. It is a ground of appeal disguised as a ground of review. It must fail.

[92] The last ground claims that the Applicants were denied the right of a fair hearing due to the interventions of the court and its reluctance to permit Counsel to develop their arguments that the award was grossly excessive, and that this created the impression that the court had prejudged the issue.

[93] In the absence of the transcript of the record of proceedings in the Supreme Court during the hearing of the appeal, it is difficult for this court to consider this ground and find substance in it. Apart from the affidavit of Counsel for the Applicants, there was no corroborative evidence to support the claim. I have examined the judgment of the

Supreme Court and I find it balanced and does not give the impression that the court had prejudged the matter.

[94] In conclusion, for the foregoing reasons I find that there is not merit in this Application. There are no exceptional circumstances established which have caused manifest injustice, warranting this court to grant this review.

ORDER

[95] In the result, I make the following order:-

(a) The Application for review is dismissed.

(b) The Respondent will have the costs of the Application.

_____

DR. B. J. ODOKI

JUSTICE OF APPEAL

I agree

_____

S. P. DLAMINI

JUSTICE OF APPEAL

I agree

_____

C. MAPHANGA

ACTING JUSTICE OF APPEAL

I agree

_____

M. LANGWENYA

ACTING JUSTICE OF APPEAL

I agree

_____

M.J. MANZINI

ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: **ADV. P.E. FLYNN**

FOR THE RESPONDENT: **Z.D. JELE**