IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 1001/2017**

In the matter between:

THE WEEKEND OBSERVER (PTY) LTD **1ST APPELLANT**

MUSA NDLANGAMANDLA **2ND APPELLANT**

PHINDA ZWANE **3RD APPELLANT**

AND

SIPHO MAKHABANE **RESPONDENT**

Neutral Citation: *The Weekend Observer (PTY) Ltd and Two Others vs. Sipho Makhabane (100/2017) [2018] SZSC 41 [23 October 2018]*

Coram: **DR. B.J. ODOKI, JA**
S.P. DLAMINI, JA
M.J. DLAMINI, JA

Date heard: **15 AUGUST 2018**

Date delivered: **24 OCTOBER 2018**

Summary: *Civil Law – Defamation* **-** *Appellants published an article alleging that Respondent never paid bail for an accused as he claimed – Respondent provided evidence that he paid for bail – whether publication defamatory of the Respondent – whether Appellants were negligent in publishing the article – whether defences of fair comment on matter of public interest, and reasonableness available to the Appellants – whether publication protected by Section 24 (2) (a) of the Constitution relating to freedom of the press and other media – whether the Court* a quo *erred in finding in favour of the Respondent and awarding him punitive damages of E300 000.00 – On appeal, decision of the Court* a quo *upheld – Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] This is an appeal from the judgment of the High Court where the Respondent's claim for damages succeeded and he was awarded E300, 000.00 as compensation, with costs of the suit.

[2] The background to this appeal is that the Respondent brought an action against the Appellants claiming that an article published in the 1st Appellant (*the Weekend Observer*) of 20 January 2007, contained defamatory statements against him. The impugned the article read;

“Leave God alone please!

Enough of football for now. This year God will show every Swazi that these so-called modern Christians are far from being what they want us to believe.

Firstly, it was Ncandweni Christ Ambassadors. They fed us with a lot of drivel instead of telling us the truth that there was a lot wrong on inside the group.

Thimothy Myeni had said he had received a message from God and blaah…blaah…blaah.

We knew that he was pulling some stunts. Then this latest Frans Dlamini scandal. This is hogwash!

Why are we taken for a ride? For example, one Sipho ‘Big Fish’ Makhabane claims to have paid Dlamini’s bail. There is a lot fishy there.

When did he send the money to Swaziland because by the time he arrived here Dlamini was already out of prison?

Then we have Dlamini calling a press conference saying he was apologizing. I think the apology was too early. What if he loses the case and goes to jail?

Then he claims to have had a vision while at Sidwashini prison and that he composed a song through that vision from God! Rubbish! Get God out of this madness please! God is nowhere near this charade pregnant with sin!
“Aseniyekele Somandla nente lemikhuba yenu baketfu!!”

[3] The Respondent who is a well known business man and gospel singer, pleaded that the publication was to the effect that he had lied when he claimed that he had paid bail for Frans Dlamini because by the time he arrived in Eswatini, the said Dlamini had been released from custody, as his bail had been paid. However, the Respondent testified that on 16 January 2007, he received a call from Nhlanhla Mbingo informing him that France Dlamini had been arrested and that a sum of about E15, 300.00 thousand was required to bail him out of custody. The Respondent then transferred the sum of E15, 300.00 to a friend's account in First National Bank. The sum transferred was then used to pay for Dlamini's bail, who was released the following day.

[4] The Respondent travelled from South Africa to Swaziland on the following day and held a press conference together with Frans Dlamini, attended by various media houses including the 1st Appellant, were Frans Dlamini tendered apology to the Nation and thanked the Respondent for paying his bail amount. It was after this press conference that the impugned article was published.

[5] The Respondent pleaded that the publication conveyed to the ordinary reader of the newspaper that he:

1. *is not a Christian;*
2. *is a liar and / or cheat and / or dishonest person using the name of God;*
3. *lied that the paid for Frans Dlamini yet he did not; and*
4. *is engaged in dishonest, disreputable and dishonest activities, which are not associated with God.*

[6] The Respondent claimed the sum of E1 000 000.00 as compensation for the injury he suffered against his reputation.

[7] The Appellants pleaded that the article was not malicious, defamatory, or unlawful or intended to injure the Respondent's good name. They contended that the article was within the scope of Section 24 (2) (a), (b) and (c) of the Constitution. They also pleaded that,

1. *the article was a fair comment on the matter of public interest;*
2. *they were not negligent in publishing the article;*
3. *the article was published without animus injuriandi;*
4. *they did not publish the article recklessly;*
5. *the publication was objectively reasonable;*
6. *the facts commented concerned matters of burning public concern, and*
7. *there was no innuendo attributed to the Respondent.*

[8] The Court *a quo* found that the article was defamatory *per se* and that none of the defences raised by the Appellants were available to them. The Court *a quo* then held that the Respondent had established his claim and awarded him compensation of E300,000.00.

[9] It is against the above decision that the Appellants have appealed to this Court, on five grounds of appeal, summarised as follows:

1. *The Court* a quo *misdirected itself on what meaning an ordinary reasonable reader of the newspaper would attribute to the statement in the article.*

2. *The Court* a quo *erred in its application of the defence of fair comment on a matter of public interest.*

3. *The Court* a quo *erred in applying strict liability test of animus injuriandi which was inconsistent with Section 24 of the Constitution as opposed to the criteria of negligence.*

4. *The Court* a quo *erred in failing to apply the reasonableness defence.*

5. *The Court* a quo *erred in awarding punitive damages which are inconsistent with the values of the Constitution.*

[10] The Respondent lodged a notice of cross appeal against the judgment of the Court *a quo* on the following grounds;

> *" 1. The Court* a quo *erred in law and in fact in holding that there was no duty on the appellants to call and verify what the respondent, Sipho Makhabane, meant when he said in the Press Conference that the has to "run as fast as he could,"*
>
> *2. The Court a quo erred in law in holding that the following statement "...one Big Fish" Makhabane claims to have paid Dlamini's bail When did he send the money because by the time he arrived here, Dlamini was already out of prison" was*

protected under Section 24 of the Constitution and a fair comment.

If the author was not sure of what the respondent, Sipho Makhabane, meant in the figure of speech he used at the press conference, he ought to have verified with him prior to publication.;

3. *The Court* a quo *erred in law in holding that the words quoted above amounted to fair comment because to a reasonable reader it meant the respondent did not pay bail for Mr. Frans Dlamini and that was false and cannot amount to a fair comment;*

4. *The Court* a quo *erred in law in awarding the respondent nominal*

damages when the circumstances of this case points out that the author had malice by failure to get a comment from the respondent of what he meant at the press conference. The malicious conduct of the appellant warranted substantial damages,"

[11] On the first ground of appeal, the Appellants submitted that the Court *a quo* misdirected itself by holding that an ordinary reasonable reader would have understood the statements in the article to mean that the Respondent is "one of the so-called modern Christians who are faking as a Christian" and further that the statements in the article were *per se* defamatory. They contended that an ordinary reasonable reader of the newspaper would have understood the article as a comment based on facts which were in the public domain. It was their submission that the learned judge in the Court *a quo* failed to interpret the statements in the

context of the article as a whole, and instead erroneously separated portions of the article and read them separately from each other. The Appellants also argued that the learned judge did not apply the objective test of what a reasonable person would give to the statement complained of and instead adopted and applied a more subjective test, confining herself to the question of Christianity and totally ignoring the

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context in which the statements were made in the article. The Appellants submitted, that they were critical of the involvement of God by Thimothy Myeni and Frans Dlamini in issues that otherwise had nothing to do with God, and the Respondent was criticized for saying things that did not add up.

[12] The Respondent submitted that the most logical departure point in any defamation action is to first determine what the words complained of mean, more particularly, whether they convey the meaning which a plaintiff seeks to place on them. In determining the alleged defamatory content of the words of the article, the common law postulates a two-faced test. First, what is the ordinary meaning to the words? Second, whether that meaning is defamatory. Reference was made to the case of **Demmers v Wyllie and Others** 1980 (1) SA 835 (A) at 842 A, and Jonathan Burchell, **The Law of Defamation in South Africa** page 83.

[13] In establishing the ordinary meaning of the words complained of, the Respondent contended, the Court is not concerned with the meaning the journalist intended to convey or the meaning given to it by the person to whom it is published (i.e the readers of the **Weekend Observer**), whether or not they believed it to be true, or whether or not they then thought less of the Respondent upon reading the article, but the test is

objective and one that enquires into what meaning the reasonable reader of ordinary intelligence would attribute to the statement.

[14] It was also submitted by the Respondent that the Court should bear in mind that the ordinary reasonable reader has no legal training or other special discipline and is more likely to skim through the article casually and not give it detailed attention or a second reading. The Respondent argued that the reasonable reader is not a man of "morbid and suspicious mind" nor is he "supper critical" or abnormally sensitive, and must be assumed to have read the articles in daily newspapers as usually read. Reliance was placed on the cases of **Basner v. Trigger** 1945 AD 22 and **Channing V South African Financial Gazette Ltd**, 1966 (3) SA 470 (W). The Respondent maintained that the Court is obliged to avoid the danger of considering itself to be the ordinary reader of the article, for that would result in the substitution of the reasonable reader.

[15] It was the submission of the Respondent that the article complained of conveyed a central message that despite the Respondent's status as a self-proclaimed Christian, he had lied when he claimed that he had paid the bail of Dlamini. The Respondent maintained that the words read as a whole implied that he was not a Christian, he is a liar, a cheat, and involved in sinful acts and wayward ways not associated with Christianity.

[16] Regarding the question whether the article was defamatory of the Respondent, it was argued that the article tended or was calculated to undermine the status and good name of the Respondent because the article affected the Respondent's moral character, and imputed dishonesty, unethical conduct and unprincipled behavior.

[17] After analyzing the statements in the impugned article, the Court *a quo* stated;

" [67] Summing up the article with regard to Makhabane, it is my considered view that an ordinary reader reading the title of the article, together with the first paragraph and the entire article with reference to paragraph 6 and the last three paragraphs would understand that Makhabane is one of those so called modern Christians who are faking as Christians.

[68] This perception about Makhabane would be fortified by the photograph of Makhabane depicted by the author immediately under the last paragraph of the article. Below the photograph there is inscription, 'Sipho Makhabane." He is depicted as carrying a mark with his left hand, with his right hand pointing to heaven and with his mouth opened.

[69] *In the analysis, the publication is* prima facie *defamatory of Makhabane in its simpliciter reading and without any imputation of an innuendo. It remains for one to determine if it is unlawful. In this exercise, I am guided by the defences raised."*

[18] I am unable to fault the conclusion arrived at by the Court *a quo* that the article contained statements that they were defamatory *per se.* The

learned judge did give the words used in the statements their ordinary and natural meaning which a reasonable reader of average intelligence would give them. There is no doubt that the article depicted the Respondent as not a Christian, a liar, a cheat and a dishonest person using the name of God to carry out dishonest and disreputable activities. Therefore, the Respondent's integrity and moral standing were questionable. Consequently the article was defamatory of the Respondent as it injured his reputation and standing in the public. The first ground of appeal therefore has not merit.

[19] On the second ground of appeal regarding the defence of fair comment on a matter of public interest, the Appellants submitted that the article which is the subject of the defamation action was a comment written by the 3rd Appellant in a column of the *Weekend Observer* under the title:

"At Sixes and Sevens," a column in which the 3rd Appellant would reflect on events of that particular week, and give his view and analyses of those events.

[20] It was submitted by the Appellants that the evidence of the Editor of the Weekend Observer was that the way he would present those issues, was that he would take hard news and try to make them funny and break the ice in terms of the presentation, but at the same time not deviating from the content of what the story was all about, but didn't necessarily need to be sports thing, but it was the events of the week and would then write them in a manner that would suit his particular audience.

[21] The Appellants maintained that the article was clearly a comment and stands to be dealt with as a commentary as opposed to an assertion of fact. It was the Appellants submission that the Court *a quo* dealt with the comment as if it was an ordinary article and failed to apply the requirements of the defence of fair comment.

[22] The Appellants argued that the requirements of the defence of fair comment were enunciated in the case of **Crantford v Al bu 1917 AD 102** and approved by Jansen J. in **Marais v Richard** 1981 (1) SA 115 y (A) at 1167, and by Harms AJA in **Johnson v. Becket and Another** 1992 (1) SA 762 at pages 778 – 779. The requirements are as follows;

(i) The statement must be one of comment and not of fact;
(ii) It must be fair;
(iii) The facts upon which it is based must be true; and
(iv) The comment must relate to matters of public interest.

[23] The Appellants referred to Section 24 of the Constitution which protects the freedom of expression and opinion and to hold opinions without interference, and to receive ideas and information without interference. It was submitted that the 3rd Appellant was criticizing the association of God with some events he was commenting about and that the comment was an honest, genuine expression of opinion relevant and not disclosing malice.

[24] The Appellants maintained that the expression of opinion was relevant to the facts it was based on, and the article was unmistakanly a comment as opposed to being a statement of facts. It was the submission of the Appellants that had the Court *a quo* applied the

requirements of the defence of fair comment, it would have upheld the defence because the article satisfied all the requirements of the defence.

[25] The Respondent submitted that the defence of fair comment was not established at the trial because the Appellant's could not prove that the facts on which the comments were made were true. The Respondent maintained that the falsity of the comments stems from the fact that the Appellants were unable to refute the Response's evidence at the trial that he paid Dlamini's bail. Secondly, the Appellants failed to seek clarification from the Respondent at the press conference or thereafter before publication, and went ahead to publish the article recklessly, which imputed that the Respondent lied when he claimed to have paid Dlamini's bail.

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According to the Respondent, the Appellant's reporter was content in savaging the reputation of the Respondent, and the article cannot amount to fair comment.

[26] The learned judge in the Court *a quo* dealt with the defence of fair comment in some detail, and came to the conclusion that it had not been established. In her judgment she stated;

"[85] Much time was spent on behalf of Makhabane on proving that he did pay bail for France Dlamini. This was unnecessary because it is not one of the elements of defamation to establish untruthfulness of the publication. It would have been sufficient for Makhabane on the witness stand to assert that he did pay bail for Frans Dlamini by means of electronic transfers. The number of documents handed to court as exhibit A were unnecessary. On

the contrary, a defendant who raises the defence of fair comment in the public interest is burdened with the onus of proving that the publication was true.

[87] The rationale behind this position of the law is that there can be no public interest on falsehood. Where however, the defendant cannot establish truth of the statement by reason that it is difficult to do so or disproportionately expensive, the law permits a defendant to publish a false statement but must establish on a balance of probabilities that its was reasonable to do so under the circumstances of the case.

[88] In the case at hand, the defendant has pleaded both fair comment in the public interest and reasonable circumstance warranting publication. Turning again to the article by the Observer, the poser at paragraph 6 would have been a fair comment in the public interest by

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reason that Makhabane having assembled the press decided to make an incomplete statement. What is of course incorrect is that Makhabane is not a true Christian. The defence on fair comment in the public interest stands to fail."

[27] It is well settled that the requirements for the defence of fair comment on a matter of public interest are as follows:

(1) The statement must be one of comment and not of fact.
(2) It must be fair,
(3) The facts upon which it is based must be true, and
(4) The comment must relate to matters of public interest.

[28] In the present case, the Appellants have dwelt at length to justify the publication of the article as a fair comment on a matter of interest. But the Appellants failed to establish that the facts upon which the publication was based were true. They were unable to contradict the evidence of the Respondent that he paid bail for Frans Dlamini. The Appellants had opportunity to seek clarification or comments from the Respondent during the press conference or thereafter before publishing the article. The manner in which the article was published exhibited recklessness as well as a measure of spite and malice. It was not fair to the Respondent . Therefore the Court *a quo* was justified in rejecting the defence of fair comment on a matter of public interest.

[29] The complaint in the third ground of appeal is that the Court *a quo* erred in applying the strict liability test of *animus injuriandi,* which was inconsistent with Section 24 of the Constitution as opposed to the criterion of negligence.

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The Appellant submitted that the freedom of expression and opinion is guaranteed in terms of Section 24 (1) of the Constitution which provides in subsection (2) that the press and media shall not be hindered from enjoying the freedom of expression, including the freedom to communicate ideas and information without interference.

[30] It was the argument of the Appellants that the press has an important constitutionally protected right and freedom to hold opinions without interference and has a duty to communicate ideas, opinions and information to the public without interference, and the public has a corresponding right to receive ideas and information without interference.

However, the Appellants submitted that the right to freedom of expression is not absolute but is limited by *inter alia,* an individual's right to reputation which is protected in terms of Section 24 (3) (b) (i) of the Constitution.

[31] The Appellants maintained that in a defamation case, the Court must balance the right to free speech with the competing right to individual reputation. It was the submission of the Appellants that the Court *a quo* failed to strike the right balance between these competing rights, and instead applied elements of the law of defamation which had been discarded elsewhere.

[32] In reply, the Respondent submitted that there is no constitutional right which allows one to tarnish the reputations of others, and Section 24 cannot be read to afford such right. It was the argument of the Respondent that taken to its logical conclusion the consequence would be to elevate the right to free speech above other rights enshrined in the Constitution, including the right to

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human dignity provided in terms of Section 18 of the Constitution. Reference was made to the case of **Khumalo v Holomisa** 2002 (5) 2002 (5) SA 401 page 28.

[33] The Respondent maintained that the right guaranteed in Section 24 should be balanced with other rights which are equally guaranteed as such. It was therefore contended that Section 24 does not provide the press with free license to publish false, unjustified, unreasonable and

patently false information about the Respondent especially where it violates the right to human dignity, and that all freedoms must be enjoyed subject to corresponding responsibilities, duties and obligations as held in the case of **African Echo (Pty) Ltd and two Others v Inkhosatane Gelane Simelane** Supreme Court Case (77) 2013) [2013] SZCS 83.

[34] The Respondent conceded that the principle of strict liability of the press has long been abandoned in South Africa, citing the **Bogoshi** decision (Supra) and the decision in **Dlamini v African Echo (Pty) Ltd and Others** (2020/09) [2010] SZSC 77 (07 May 2010.) It was the submission of the Respondent that the judgment of the Court *a quo* was therefore, unassailable in far as it struck the right balance between freedom of expression and the right to dignity which incorporates reputation as an important component.

[35] In her judgment the learned judge in the Court *a quo* addressed herself to the provisions of Section 24 of the Constitution and their interpretation. She quoted Section 24 (2) (a) (b) and (c) of the Constitution which provided as follows:

" *A person shall not except, with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say:*

(a) freedom to hold opinions without interference;
(b) freedom to receive ideas and information without interference;

(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons).”

[36] The learned judge then referred to the decision of the Constitutional Court of South Africa in **Khumalo and Others** v **Holomisa** (Supra) where O’Regan J. emphasized the importance of the media in a democratic society in these words;

“[24] *In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their broader society, principally through the provisions of S. 16.”*

[37] With regard to the need to strike the right balance between freedom of the press and other media and the right to human dignity and individual reputation, the learned judge emphasized that the law does not allow

the unjustified savaging of an individual's reputation and therefore the right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed.

[38] The learned judge referred again in to the conclusion made by O' Regan J in the Holomisa case (Supra) where she observed:

> *"The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore , we need to ask whether an appropriate balance is struck between the protection of freedom of expression of the one hand, and the value of human dignity on the other ."*

[39] It is clear, therefore, that the learned judge was alive to the need to balance the right to freedom of the press and the right to individual reputation. In her judgment she stated that the approach to the striking of balance is to determine the circumstance of each case holistically. She then considered the contention of the Appellant that they based the publication on a previous article published during the week of the 18th January 2007.

[40] The learned judge analysed the words in the article in detail and came to the conclusion that the comments made in the article could have been fair if they had ended by pointing out the doubting circumstances as demonstrated in the question by the author "when did Makhabane

run to save the day when in actual fact by the time he reached Swaziland Frans Dlamini was already released on bail."

[41] I agree with the learned judge when she concluded:

> *"[82] The author went overboard and made assertive position on Makhabane. In other words, the Observer's woes emanate from a cursory reading of the article. The title* "Leave God alone, please!" *together with Makhabane's photograph prompts one to read the article to find out why Makhabane is commanded*[35] *to leave God alone. The answer lies in para 5 of the article, viz. he* "claims to have paid bail" *for France Dlamini. Whereas Frans was released on bail before he came to Swaziland. In these words the author fails to leave the matter to its audience to judge for itself. He indirectly informs them that Makhabane falls in the category of "these so called modern Christians" who "are far from being what they want us to believe."*
>
> *[83] The statement* "This is hogwash" *does not only refer to Ncandweni and Timoty Myeni but Makhabane as well. The closing paragraphs; "Rubbish! Get God out of this madness please! God is nowhere near this charade pregnant with sin! Aseniyekele Somandla nenta lemikhuba yenu baketfu" cannot be read at the exclusion of Makhabane.*

[84] In the above, the defence under section 24 cannot avail the Observer. Makhabane's dignity is to be "inviolable" *as per section 18 (1) of our Constitution."*

[42] The Court *a quo* was, therefore, justified in finding that after balancing the right to freedom of the press and other media and the equally guaranteed right to individual reputation, Section 24 of the Constitution did not offer protection to the Appellants for the defamatory article published against the Respondent. The criticism that the Court *a quo* applied the test of strict liability of *animus injuriandi* has no merit.

[43] With regard to the defence of reasonableness, the Appellant submitted that the comment in question was objectively reasonable and constituted a reasonable inference from the facts. It was contended that the comment was written in a reasonable but robust and critical tone. The comment was based on facts which were in the public domain based on interviews by the Respondent and his fellow Gospel Artist, Frans Dlamini. Reference was made to the cases of **National Media Ltd v Bogoshi** 1998 (4) SA 1195 and **Khumalo and Others v Holomisa** (Supra).

[44] The Respondent submitted that it is now settled law in South Africa that the publication of false defamatory allegations of fact are not unlawful if upon a consideration of the facts of the case, it was found to have been reasonable to publish the facts at the particular time. It was the Respondent's contention that since the decision in **National Media Ltd v Bogoshi** (Supra) the media may escape liability for publishing false defamatory statement if they acted reasonably in so doing thus

affording the media a degree of protection, when reporting matters of public interest.

[45] The Respondent argued that criteria for assessing the reasonableness of a publication are set out in the **Bogoshi judgment and Mthembu Mahanyele v Mail Guardian and Another Ltd** [2004] All S.A 511 **Mthembu Mahanyele v Mail Guardian and Another** Ltd [2004] All S.A. 511 Ltd and are, *inter alia,* the interest of the public in being informed; the nature of the information on which the article was based; the reliability of the source the steps taken to verify the information; the opportunity given to respond the need to publish before establishing the truth; the manner of the publication, and the tone of the article which can provide an unnecessary or additional sling.

[46] However, the Respondent pointed out that this Court has criticized the **Bogoshi decision** and the authoritatively stated that it does not apply in Swaziland in the well known case of **African Echo (Pty) Ltd and Two Others v Inkhosatana Gelane Zwane** (Supra) where this Court stated;

"[34] It is imperative that I point out at this juncture that the ***Bogoshi decision*** *just like all other decisions of South African courts, are merely of persuasive authority in the Kingdom. They are not bending on our courts. It needs to be emphasized that the* ***Bogoshi decision*** *was based on the uniquely liberal Constitution of South Africa, which exhibits some marked differences with our Constitution and should be approached with trepidation. The foregoing not withstanding, since the reasonableness concept of the Bogoshi phenomenon which commends itself to me, was*

relied upon by the Court a quo*, I am compelled to consider it in that regard.*

[35] What then is the test for reasonableness within the context of this case?

[36] In the case of ***Lange v TB Alkinson and Another*** *(New Zealand) (1990) UKPC 46 Bremen CJ articulated the guiding principles as follows: -*

"Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took steps so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Further more, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respondent."

[47] It was the Respondent's contention that the defence of reasonable publication should, therefore, be approached with great circumspection in this country as not be automatically applied. The Respondent also maintained that even if the defence of reasonable publication was available, the Appellants failed to prove it, as the journalist responsible for writing the story did not testify as he had died, and no effort was

made to verify the allegations in the article with the Respondent, nor was he given an opportunity to respond.

[48] In her judgment, the learned judge in the Court *a quo* rejected the defence of reasonable publication in these words;

> *"[89] Similarly the defence on reasonable circumstances permitting the publication must fail for the same reason that Makhabane is in the same category of "so called modern Christians who are far from being what they want us to believe," his claims of paying bail to be classified as a "lot fishy there." he should also "Get God out of his madness" as God is nowhere near this charade pregnant with sin." He should leave God and continue with his charade (absurd pretence) pregnant with sin. To crown the defamatory publication, Makhabane's photograph with his names below is pitched on the article below with a heading, "Leave God alone, please!' The evidence before me does not support the Observer's defences. I must find for Makhabane."*

[49] Although the learned judge in the Court *a quo* did not analyse in detail the defence of reasonable publication, I agree with her conclusion that the defence failed in the circumstance's of this case. There was no evidence that the Appellants had reasonable grounds for publishing the article, nor did they take steps to verify with the Respondent the allegation they made, nor did they give the Respondent an opportunity to respond to the statements they published. In my view, the Appellants were negligent in publishing such statements whose publication became unlawful.

[50] On the last ground of appeal, the Appellants submitted that the award of punitive damages by the Court *a quo* will have the effect of inhibiting the exercise of the right to freedom of expression as enshrined in Section 24 of the Constitution. It was the Appellant's contention that the learned judge in the Court *a quo* misdirected herself by holding that the failure by the Applicants to publish an apology in circumstances where the Appellants believed that they were within their rights to do so was justified to award unitive damages. The appellants maintained that in the circumstances of this case, the Court *a quo* should have awarded only normal damages.

[51] The Respondent submitted that the Court should be guided by the judgment in the case of *Inkhosatana Gelane Zwane* (Supra) where this Court held that since the award of damages is in the discretion of the trial Court, an appellate Court will be hesitant to interfere with the damages awarded except in face of material misdirections resulting in a miscarriage of justice. However, in certain circumstances, an appellate Court may reverse the award of damages if it is not judicial or exhibits material misdirections.

[52] In the present case, the Respondent submitted that he was a well known and prominent figure just like *Inkhosatane Gelane Zwane* where an award of E550.000.00 (Five Hundred and Fifty Thousand Emalangeni) was awarded to the Plaintiff. The Respondent stated that he is a Christian and music producer and that children look up to him as their role model.

[53] The Respondent maintained that the publication was a serious attack against his character and reputation. According to the Respondent, the situation was made worse in that after the publication, a letter of

demand was sent to the Appellants who did not publish any apology. This matter therefore called for punitive damages. The Respondent conceded that while it had not been shown that the Court *a quo* improperly exercised it discretion, the Court was too lenient in the award which should be increased to at least E450.000.00 (Four Hundred and Fifty Thousand Emalangeni).

[54] It is well settled that when assessing damages for defamation the Courts have considered a range of factors which includes the nature and gravity of the defamatory words, falseness of the statement, malice on the part of the defendant, rank and social status of the parties, the absence or nature of

/cont....

an apology, the nature and extent of the publication, the general conduct

conduct of the defendant and the comparable awards in the similar cases See **African Echo (Pty) Ltd and two Others v Inkosatana Gelane Simelane** (Supra) **Khumalo v Holomisa (Supra) National Media Ltd v Bogoshi** (Supra) **Lindifa Mamba and Another v Vusi Ginindza** High Court Civil Case No. 1354/2000 and **Kelsy Staurts Newspaper's Guide to the Law** 5th edition. Page 67.

[55] In her judgment, the learned judge in the Court *a quo* referred to the above principles and took into account the following factors in as assessing the quontum of damages:

1. *that the Respondent was a public figure known in the country and else where;*
2. *that he was a well known Christian Musician;*
3. *that the publication was in the Sports Section which is widely read;*

4. *that the language used in the article was not only obnoxious but aggressive;*
5. *that no apology or retraction was made by the Appellants.*

[56] It is trite law that an appellate Court will hesitate to interfere with an award of damages unless the trial Court has committed a misdirection which has caused a miscarriage of justice. In other words, an appellate Court will not interfere with such award except upon existence of special circumstances.

[57] In the **Inkosatana Gelane Zwane** case (Supra) this Court gave detailed guidelines on how an appellate Court should deal with an award of damages made by trial Court. The Court stated,

" [62] It is trite law that since the award of damages is a discretionary measure of the court of trial, an appellate court will be hesitant to interfere with damages awarded, except in the face of material misdirection resulting in 37 the miscarriage of justice. ***In Swaziland Government v Aaron Ngomane*** *(Supra) paragraph [80], I recounted this principles as follows:-*

"In certain circumstances an appellate Court may reverse a discretionary decision if it is not judicial and judicious in the sense that it exhibit a material misdirection. These circumstances have been identified by case law to include but are not limited to the following:- (a) Where the trial Court exercised its discretion wrongly in that no weight or sufficient weight was given to relevant factors. (b) Where the decision is wrong in law or will result in injustice being done. (c) Where the trial Court :- (i) acted under a mistake of law; (ii) in disregard of principles; (iii) under a misapprehension of facts; or (iv) took into account irrelevant

considerations. See ***Saffeidine v Commision of Police*** *(1965) 1 All NLR 54,* ***Solanke v Ajibola*** *1969) 1 NMLR 25.3 (d) where there is a striking disparity between the amount that the trial court awarded and what the appellate court considers ought to have been awarded. See* ***Protea Assurance Company Ltd v Lambs*** *1971 (1) SA 530 AD at 534 – 535 A. (e) The reason or reasons given by the Judge for exercising a discretion in a particular way often provide the basis for challenging such exercise. They show what he considered and the general ground for his decision."*

[63] It is to ensure a judicial exercise of this discretion that the law has evolved certain parameters as guides to the trial court in the process.

[58] In my view, the learned judge look into account all the factors she considered relevant to in the circumstance of the case, and therefore there was no misdirection in her assessment of the damages awarded to the Respondent. The learned judge awarded substantial amount/damages which were justified given the serious attack on the reputation of the Respondent. The sum of E300.000.00 awarded to the Respondent was less than the E550.000.00 awarded to Inkhosatana Gelane Zwane, who was a Presiding Officer of the Senate and where the defamation against her was more serious. Therefore the amount of compensation awarded to the Respondent in the present case was appropriate.

[59] It now remains to consider the cross appeal. I have already dealt with the complaints regarding the amount of damages by both parties and came to the conclusion that their complaints have no merit, as the

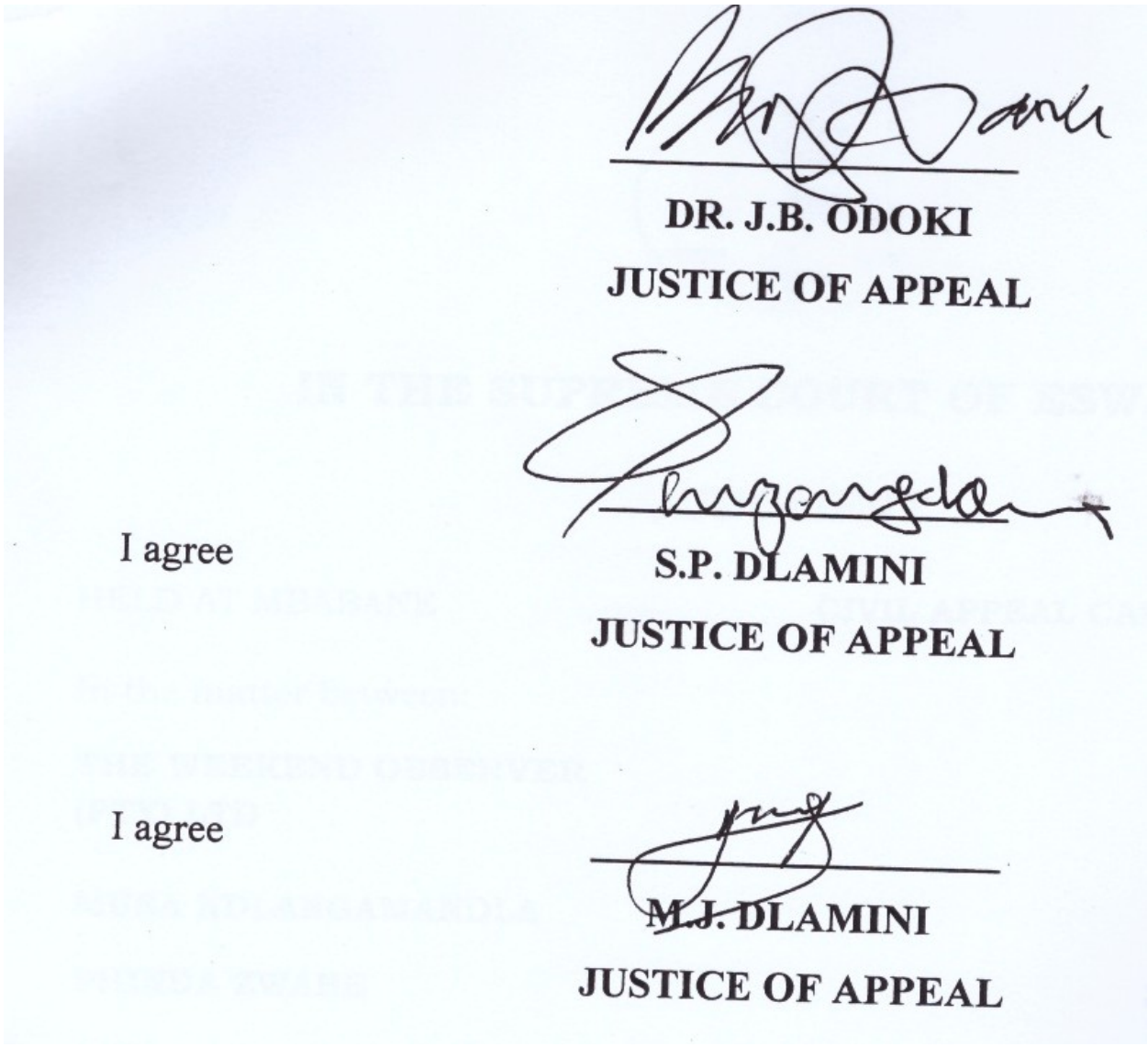
award made was appropriate and there is no reason given to justify interfering with it.

[60] The remaining grounds of cross appeal were not pursued, and in view of my analysis and conclusions on the Appellant's grounds of appeal, I find no merit in those grounds of cross appeal.

[61] In the result, I find no merit in the appeal and cross appeal.

[62] Accordingly, I make the following order:

1. The appeal is dismissed with costs to the Respondent
2. The Cross-appeal is dismissed with costs to the Appellants.
3. The judgment of the Court *a quo* is confirmed.



DR. J.B. ODOKI

JUSTICE OF APPEAL

I agree

S.P. DLAMINI

JUSTICE OF APPEAL

I agree

M.J. DLAMINI

JUSTICE OF APPEAL

FOR THE APPELLANT : MR.M.B. MAGAGULA

FOR THE RESPONDENT : MR. N.D. JELE