IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 60/2020

HELD AT MBABANE
In the matter between:

MBONGENI NDLELA 1st Appellant

THE AFRICAN ECHO t/a

TIMES OF SWAZILAND2nd Appellant

and

PHILA BUTHELEZI 1st Respondent

CEBSILE NGWENYA2nd Respondent

Neutral Citation:*Mbongeni Ndlela and Another vs Phila Buthelezi and Another* (60/2020) [2021] *SZSC* 04 (31/05/2021)

Coram:S.P. DLAMINI JA, R.J. CLOETE JA AND N.J. HLOPHE JA

Heard:17th May, 2021.

Delivered: 31st May, 2021.

SUMMARY: *Claim for damages for defamatory article in newspaper – Interpretation of words "caught" and "busted" – Whether articles were in the public interest – Whether the articles were reasonable as espoused in the BOGOSHI Judgment – Whether quantum awarded was reasonable – When the Supreme Court will intervene in the quantum of awards – Disparity of awards for male and female discussed – Award of costs discussed – Held that the Respondents were defamed – Held that the quantum awarded was disproportionate to the outcome and reduced.*

JUDGMENT

R. J. CLOETE – JA

[1]The Appellants are Mbongeni Ndlela (the Reporter) and African Echo (Pty)Ltd (the Publisher).

[2]The Respondents are Phila Buthelezi (Buthelezi) and Ceb'sile Ngwenya (Ngwenya).

[3]The first housekeeping matter relates to a letter written to the Registrar of this Court relating to the objection to the inclusion of certain Judges in the panel to hear this matter. All parties met in Chambers and the objection was withdrawn and it was agreed that the matter will proceed before the appointed panel.

[4]The Appellant filed a corrected transcript of the evidence heard in the Court *a quo.* The Appellant had filed the record timeously and it was certified as such by the Registrar. However upon scrutiny it was found that the transcript was incomplete and as such had to be reconstructed, even to the extent of using the Judge in the Court *a quo's* notes. Mr. Jele on behalf of the Respondent had filed a Notice to oppose the late filing but no supporting Affidavit was filed. In my view, not only in the interest of justice and moving forward with the matter, there had been substantial compliance with Rule 30 and under the circumstances the amended transcript was admitted into the record.

[5]This matter emanates from some extraordinary activity in the dead of night at the home of Ngwenya at or near Siteki. That does not seem to be any

serious disagreement between the parties that as a fact the following occurred:

1. Zweli Martin Dlamini and four (4) of his staff members of an organisation apparently known as Zwemart Investigators, invaded the home of Ngwenya at or near Siteki on Monday 19 October 2014.

2. Upon doing so they found the Respondents together in the house and proceeded to take videos and photographs of the couple together and individually and by all accounts harassed the couple claiming that they had been hired by a certain Cabinet Minister to investigate the relationship between them for reasons which will become apparent below.

3. Ngwenya reported the matter to the Siteki Police but for some unknown reason the matter was transferred to the Mbabane Police Station. Whatever the reason was, it is apparent that Ngwenya had laid criminal charges against the Zwemart group but there is nothing before us to suggest that any form of prosecution followed nor that any conviction was recorded. In one of the sub-articles referred to

below, Zwemart confirmed having been detained and that he was eager for the matter to get to Court as he still had a lot to say.

4. Enter the Appellants. The Reporter allegedly obtained the "story" and photographs and videos from Zwemart. (Regrettably the Appellants chose not to lead any evidence before the Court *a quo* and so the mystery as to how the Reporter obtained the information will forever remain a secret.)

5. Some ten (10) days after the unlawful invasion referred to above, the Publisher, in its edition of the Times of Swaziland Newspaper (Times) on Thursday 23 October 2014, on the front page in bold printing which takes up approximately one half of the said page the following appeared:

"MP, JUDICIAL OFFICER CAUGHT IN BED".

Underneath that in markedly smaller print the following appears:

- Private Investigators break into Assistant Master's house at night
- Say they were hired by a Minister to track the two
- They are charged with invasion of privacy

6. On the following two pages of the said edition various sub-stories appear and it is necessary to set out at least brief details of each of those:

1. The main article penned by Ndlela, again under a very prominent banner heading reading "**MP, MASTER'S EMPLOYEE CAUGHT IN BED"**, in the first paragraph thereof states as follows:

   "Assistant Master of the High Court Cebile Ngwenya has been found in bed with Matsanjeni North Member of Parliament Phila Buthelezi. The married MP was busted by a team from Zwemart Private Investigators last Monday".

2. The other sub-stories are headed;

   - Who is this woman
   - Cabinet Minister hired us
   - We are prepared for Court proceedings
   - About MP Phila Buthelezi

3. Various photographs were also published, all relating to the Respondents including a shocking picture of a woman (Ngwenya) cowering under a blanket.

7. Comment was sought from Ngwenya and she, quite correctly, refused to divulge any information and referred the person seeking comment (again no direct evidence on part of the Appellants as to who sought the comment) to the Police.

8. Comment was apparently sought from Buthelezi while he was out of the country and he indicated that he will deal with the matter on his return. Despite that the article was published anyway.

9. The Minister concerned was not named.

[6]On the following day the Publisher, at page two (2) of that edition ran further sub-stories under the following headings:

1. **"CABINET DIDN'T HIRE PRIVATE INVESTIGATORS – PERCY"**

2.**"**Relationship would not influence MP's duties – Parly Chief Whip"

3.“NGIYABUKELA, SAYS CABINET MINISTER”. It is important to note that the Cabinet Minister is still not named.

4.“Nothing wrong with MP’s dating unmarried women”.

5.“I will comment when I return says MP Phila”

6.“EXPOSE’ POLITICALLY MOTIVATED”. In this article the Appellants claim to have interviewed a close source who advised them that Buthelezi was married according to Swazi Law and Custom and that Ngwenya is not married.

[7]After allegedly sending a letter of demand to the Appellants (which was not before us) the Respondents on or about 16 November 2015 instituted proceedings against the Appellants jointly and severally for the following:

1. Damages in total sum of E4 million Emalangeni
2. Interest thereon
3. Costs of suit
4. Further and or alternative relief.

[8]The Appellants duly defended the suit and filed their plea to which a replication was filed and all other documentation required in terms of the Rules was filed.

[9]It is important to point out that on 13 June 2017, the parties, duly represented by their Attorneys held the required pre-trial conference and the Minutes of that pre-trial conference reflect *inter alia* the following:

1. The citation of the parties, the jurisdiction of the Court, that an article accompanied by photographs was published by 2nd Appellant on 23 October 2014 concerning the Plaintiffs and that is a claim for defamation as a result of unlawful intrusion upon privacy and publication of the article were facts which were agreed.

2. The facts in dispute were that the 2nd Defendant denies that the gist of the article had something to do which sexual proclivity and that the article was made wrongly or with intention to injure the reputation of the Respondents.

3. The issues for determination were **if the Respondents were defamed as a result of the invasion and publication and whether they suffered any damages and the amount claimed and if Appellants were liable, the quantum of such liability.**

[10]The matter was finally heard by the Court *a quo* and the Judgment of Mlangeni J reflects that it was last heard on 11 June 2020 and the written Judgment was delivered on 16 September 2020. After a fully reasoned judgment the Court *a quo* made the following order:

1. The plaintiffs' claim succeeds.

2. The Defendants be and are hereby ordered jointly and severally to pay the plaintiffs the following respective amounts:-

First plaintiff=E350,000.00

Second plaintiff=E175,000.00

3. Plaintiffs' costs to be recovered up to sixty (60) per cent
4. Interest on the said amounts from date of judgment to date of final payment.

[11]The Appellant filed a lengthy Notice of Appeal (not in concise form) and for the purposes of this judgement I am going to take the liberty of summarising

the grounds of appeal and will deal with the actual arguments raised by Counsel for the Appellants. Accordingly the summarised grounds are:

1. That article was not defamatory and was not capable of conveying a meaning defamatory of the Respondents.

2. That the weight of the evidence relating to the context in which the article was published was overlooked.

3. That the words “caught” and “busted” conveyed a defamatory meaning.

4. The Respondents failed to prove the innuendo pleaded.

5. That the Court erred in finding against the Appellants in all their defences.

6. That the Appellants’ allegations in the articles were in the public interest.

7. The Court erred in finding that the tone of the article was scurrilous and that the Appellants acted with *animus injuriandi* and allowed themselves to be used. The Court *a quo* erred in dismissing the alternative defence.

8. That the damages granted were excessive.

9. That Appellants should not have been forced to pay any of the Respondents costs.

[12]Both parties filed extensive Heads of Argument and Bundles of Authority and this is the matter which is now before us.

[13]As regards the merits of the matter, Advocate Flynn presented numerous arguments and issues which were contained in his Heads and in response to various questions from the Bench and these are best summarised as follows:

1. That the Court had to understand the background to the matter being a dispute between the Minister (unnamed in any of the articles on either the 23rd or 24th October 2014 but subsequently confirmed to be the Minister of Justice at the time, one Sibusiso Shongwe), the Master of the High Court to whom Ngwenya reported, the Parliament of the Kingdom of Swaziland (as it was then) and in which Buthelezi was a vocal opponent

of the said Minister and seemingly the dispute stretched as far as the Cabinet of the day.

2. As such the main thrust of the articles was to expose the reprehensible behaviour of the Zwemart contingent, allegedly on the instructions of the said Minister.

3. That the particulars of claim of the Respondents did not mention the actual words published which were defamatory and since this was an absolute requirement, the matter should have been dismissed on that ground alone.

4. That the test for defamation was an objective one and words concerned should not have been interpreted subjectively and should have been interpreted in the wider sense of the whole article.

5. The main defence pleaded was that the article which essentially is in the form of a report which informs the reader of the conduct of Zwemart and the invasion of the privacy of the Respondents.

6. The alternative defence pleaded was that the Roman Dutch Law, which is the Eswatini Common Law as per the Constitution, had progressed and

developed relating to the publication of material which is defamatory provided that the publication thereof was a reasonable action on the part of the Publisher and is now considered to constitute a defence in defamation matters.

7. That the photographs used by the Appellants showed the readers the disgraceful conduct of Zwemart and the Cabinet Minister.

8. That the arrest of Zwemart and his employees who sought to "bust" the couple and to expose their relationship were clearly as a result of Buthelezi being a vocal opponent of the said Minister in Parliament.

9. That the article is therefore objectively reasonable and the reasonable reader would have found the article reasonable and not sensational and would have understood that the articles were all about the behaviour of Zwemart *et al*.

10. We were referred to the matter of **NATIONAL MEDIA LIMITED VS BOGOSHI 1998(4) SA** as being the classic case which should be followed those neighbours who still apply the Roman Dutch Law.

[14]For his part Mr. Jele on behalf of the Respondents argued that:

1. The Appellants kept on insisting that the whole rationale of the offending article was to highlight the controversial Estates Policy and the resulting dispute between all the parties referred to in Advocate Flynn's argument. However the Appellants failed to lead any evidence in support of any of the defences and simply closed their case at the end of the evidence of the Respondents.

2.The Respondents in their evidence told the Court *a quo* of the inhuman, traumatic and degrading treatment that they endured at the hands of the intruders who broke into the house and took pictures of them against their will and that Ngwenya was assaulted when they tried to take a picture of her naked. Accordingly the Appellants at all times knew that the so called evidence which they obtained from Zwemart was unlawfully obtained.

3.That the publication clearly implied that the Respondents were "caught" and "busted" in bed that this was some form of unlawful activity.

4. That the Times has a wide circulation and was subsequently widely distributed on social media and is still available on the internet at present.

5. The test of defamation is twofold. What is the ordinary meaning of the words and are they defamatory. The test is objective. The meaning of the words may not necessarily be a dictionary meaning but through the lens of the ordinary reasonable reader. See **Dr. Johannes Futhi Dlamini vs The Swazi Observer and Others High Court Case No. 1319/2016 and the Editor Times of Swaziland and Another vs Albert Shabangu Supreme Court Case No. 30/2016**.

6.In **Independent Newspapers Holdings Ltd and Others vs Suliman 2004 3 All SA** the Judges stated that they should discard their "*judicial robes and the professional habit of analysing and interpreting statutes and contracts in accordance with long established principles* and adopt the mind-set of the reasonable lay citizen".

7.In this matter the ordinary lay reader would firstly be drawn by the headline itself which tells the reader that they have been “caught” in bed and were “busted” and that both of the words clearly meant they were doing something wrong and that as such the words were clearly defamatory of the Respondents.

8.In the subsequent publication and in the plea the Appellants concede that Buthelezi was married under Swazi Law and Custom and Ngwenya unmarried but that the article would clearly be understood by the lay reader that the Respondents are of loose moral integrity.

9.As regards BOGOSHI, the decision has been criticized in this Court in the matter of **African Echo (Pty) Ltd and two Others vs Inkhosatana Gelane Zwane Supreme Court Case No.77/2013**. The defence of reasonableness cannot be sustained in this matter.

10.The defence of the Appellants that the articles were in the public interest cannot be sustained. In **Prinsloo vs RCP Media Ltd t/a RAPPORT**

2003 (4) SA. The Court held that there was no public interest in revealing graphic insights into the bedroom of advocates. There was accordingly no public interest in publishing pictures of the Respondents in their own home nor of the picture of Ngwenya trying to cover herself.

11. The Code of Ethics for Journalists in Swaziland defines public interest as "*all matters that have to be brought to the public attention especially relating to public safety, security, health and general well-being of society.*" The articles clearly did not comply with this definition.

12. The Code further states at article 5(1) in clear and unambiguous terms that "*Journalists shall respect the right to individual privacy and human dignity*".

13. The Appellants contravened the rights of privacy contained in Section 14(1) (c) of the Constitution.

[15]Whilst agreeing with most of the submissions of Mr. Jele and disagreeing with most of the submissions of Mr. Flynn, I set out under my findings on the issue of the merits of the matter.

[16]The headings of the offending article are shocking and unambiguous and have no doubt in my mind that the reasonable lay reader would understand and believe that the front page heading and the subsequent article was all about Buthelezi and Ngwenya.

[17]If the whole object of the Publisher was to show the readers the reprehensible conduct of Zwemart *et al,* then the heading for a start should surely have been along the lines that Zwemart *et al* unlawfully broke into the home of a couple who were an item and were not committing any common law or statutory offence and were not being untrue to either of their marital status.

[18]The words “caught” and “busted” are, in my view, both in their ordinary meaning and in the eyes of reasonable lay reader and by the Judge in the Court *a quo*, can only mean that they were engaged in some form of wrongdoing on their part and that they were caught in the act of such

wrongdoing. We know that there was in fact no wrongdoing of any nature on the part of either of the Respondents. In their pleadings and obliquely in the articles on 24 October, the Appellants conceded that the Respondents were an item and clearly the Reporter had not done his homework and clearly the Publisher should have waited until all comment had been obtained, including from Buthelezi (which he asked for), upon his return.

[19]The submission that the articles concerned had as its sole object and indeed obligation to bring to the attention of the average lay reader the conduct of Zwemart cannot be sustained given the heading and the fact that the Minister concerned was not named, that there was publication of a woman cowering under a blanket. No lay reader would possibly interpret the articles to mean anything other than that the Respondents were involved in some form of unlawful and or salacious activity.

[20]In my view the Appellants were in clear contravention of the provisions of the Code of Ethics for Journalists on two grounds. Firstly that the publication of the articles cannot remotely be said to have been in the public interest and that they did not respect the rights of the Respondents to individual privacy

and human dignity. On top of that in my view they knowingly published information and pictures which were obtained through unlawful means. We were advised that criminal charges had been laid against both of the Respondents and Zwemart but as indicated there is nothing before us in that regard.

[21]As regards the BOGOSHI defence of reasonableness, can it be said that the Appellants acted reasonably in the face of the following facts:

1. The information was obtained unlawfully and the Appellants were fully aware of that fact.

2. The headings and the gist of the main article centered on the Respondents and not the actions of Zwemart.

3. The published pictures were of the Respondents only and there were no pictures of Zwemart or his cohorts.

4. The Reporter clearly did not verify the information about the perfectly normal relationship between the Respondents and the Publisher published the offensive articles before obtaining a statement from Buthelezi which

was imminent and the information related to an incident which was already ten (10) days old at the time.

5. The Appellants did not lead any evidence and relied on establishing the defences they had raised.

6. The words used clearly implied that the Respondents were engaged in something wrongful or unlawful.

[22]In my view, even if BOGOSHI had been adopted or agreed with by the Courts in the Kingdom, I do not believe that it could be remotely said that the publication was reasonable and would have been understood to be so by the average lay reader.

[23] Can it be said that the contents of the article are in the public interest and as suggested by the Appellants that it was their duty to bring to the attention of the reader important issues of policy affecting the nation? How can it be said that two people who are lawfully occupying a home can have it be invaded unlawfully and that this constitutes public interest due to the fact that Buthelezi as an MP was opposed to the policy of the Minister and

Ngwenya, as a relatively middle management employee in the Master's office were peacefully and lawfully in their own home minding their own business. With respect that cannot be sustained. See **PRINSLOO** *supra*.

[24]It would be remiss of me not to deal with the issue of the pleadings. In my view neither set of pleadings were of high standard and I agree with the comments of the Judge in the Court *a quo* that the pleadings were inelegant. Mr. Flynn submitted that because the actual words "caught" and "busted" were not specifically set out in the particulars of claim, that the claim should have been dismissed on that basis alone. I do not agree with that given the circumstances of the matter.

[25]The pleadings specifically referred to the attached article to which the Respondents took umbrage. This Court is here to see that fair justice is dispensed and cannot merely dismiss a matter because of the ineptitude of the person drawing the particulars of claim. The fact is that the Appellants knew all along that the allegation was that the article itself was defamatory and this was confirmed to be a case in the pre-trial minutes referred to above.

[26] In my view the presiding Judge in the Court *a quo* dealt with all of the relevant issues and I agree with his reasoning as regards the merits of the action. The words were defamatory and the Respondents were defamed and the publication was clearly not reasonable nor in the public interest and accordingly the appeal on the merits stands to be dismissed.

[27]I now move on to the issue of the quantum of damages. I gained the impression that this was the main thrust of the appeal by the Appellants relating to the quantum of the award by the Court *a quo.*

[28]The first issue which I must deal with right at the outset as advised by Mr. Flynn and as set out in his Heads, is that this Court is not in a position to revisit the GELANE Judgment which was upheld both on appeal and on review by a full Bench of this Court. Suffice it to say that we are dealing with the Buthelezi matter and not the GELANE matter. Each matter has its own facts and merits and this matter will be dealt with on that basis.

[29]The arguments of Mr. Flynn relating to quantum can be summarised as follows:

1. The original claim was E4 million Emalangeni and although disputed exactly when, it is common cause that this was reduced to E2 million Emalangeni either during or before the trial in the Court *a quo.*

2. It has become common practice to claim excessive damages in defamation cases and recent awards in Eswatini have alarmingly high.

3. In **Van den Berg vs Coopers and Lybrand Trust (Pty) Ltd 2001 (2) SA** the following was said:

   "…care should be taken not to award large sums of damages too readily lest doing so inhibits freedom of expression or encourages intolerance to it and thereby fosters litigation."

4. This notion has been applied in Eswatini in various matters including **The Times of Swaziland vs Martin Akker Appeal Case No. 44/2009**.

5. The action for an *injuria* under Roman Dutch Law and such the awards made in jurisdictions in the region under the same Roman Dutch Law.

We were referred to a Namibian Judgment of **Trustco Group Internation vs Mathews Kristof Shikongo, Supreme Court of Namibia, Case No. 32/2015** where the Mayor of Windhoek was awarded an equivalent of E1 00.000.00 (One Hundred Thousand) Emalangeni for a serious defamation. The Court as per **O'Regan AJA** stated that an Appellate Court would interfere with the award of damages if persuaded that the award is *"so unreasonable as to be out of proportion to the injury inflicted."*

6. Similarly the Court of Appeal in Botswana in **Tsodilo Services (Pty) Ltd vs Tibone 2011 2 BLR** a Minister who was defamed for being involved in corruption had the award substantially reduced in respect of a serious defamation.

7. In **EFF and Others vs Trevor Andrew Manuel SCA Case No. 711/2019** the South African Court of Appeal referred an award of the equivalent of E500.000.00 (Five Hundred Thousand) Emalangeni back to the High Court for reconsideration as it found it to be extraordinary high.

8. The purpose of damages in defamation cases was formulated by the South African Court of Appeal via **Harms JA in Mogale and Others vs**

Siema 2008(5) SA and it is apposite to quote as follows from that Judgment:

1. *"Damages are not intended to teach the perpetrator a lesson".*

2. *"……in line with the common law places a great value on human dignity including reputation. It also emphasises the right to freedom of expression. These two rights have to be balanced, a somewhat difficult exercise".*

3. Harms also refers to the basis of interference with the award of the trial Court and that a Court of Appeal would interfere if there is a palpable or manifest discrepancy between the amount of Court of Appeal considers it would have awarded and that awarded by the trial Court.

4. In this Court in the **Dr. Johannes Futhi Dlamini vs Swaziland Observer and Others 2017 SZHC** the Judge in that matter stated that "*As each matters turns on its own special circumstances it would be very difficult to say such a claim is inappropriate".*

9. The Court *a quo* refers to *"the remarkable sting of publication"*. This was not pleaded nor does there appear to be a legal basis for invoking the "sting" concept.

10. This Court, in terms of the *dicta* of O'Regan and Harms, has the right to interfere with an award which it deems to be unreasonably high and out of proportion to the *injuria*.

11. Mr. Flynn, quite properly, stated that there was no suggestion that there is some upper limit or that a Court may not exercise a discretion beyond that limit.

[30] Mr. Jele on behalf of the Respondents submitted that

1. This Court should be guided by the GELANE matter and quoted extensively from that matter.

2. Referred the Court to **Lindifa Mamba and Another vs Vusi Ginindza Civil Case No. 1354/2000** in which the factors to be used in assessment of damages would include the character and status of a plaintiff, the nature and extent of publication, the nature of the

imputation, the probably of consequences of the imputation, partial justification, retraction or apology and comparable awards.

3.That the articles were an unwarranted attack on the wrong party.

4.There was no apology or tender offered. That in the MOGALE matter there had been a tender of an apology as soon as the defendants could not establish the truth of the allegation which tender was not accepted.

5.That the articles were prominent and that the Appellants had raised spurious defences.

[31]As regards damages my considered view is that each matter must be judged on its own peculiar circumstances and having found that the articles concerned were defamatory and as such I must now deal with the issue of quantum.

[32]I agree that the object of damages is a fine balancing act to protect the integrity, privacy and dignity of the party who has been wronged with the right of freedom of expression and I fully agree that this should not be a punitive exercise.

[33]Having said that I propose to look at the issue from two points of view. The first being the rights of the Respondents and the mitigating factors relating to what I consider to be a fair amount of damages to be awarded.

[34]Looking at the first point of view;

1. It is common cause that the publication has wide readership.

2. The information it obtained and published was unlawfully obtained and as such it was their duty not to publish such information and specially the extremely distressing photographs.

3. There does not appear to have been any attempt to apologise to the Respondents.

4. The publication was not reasonable at all and could not have been understood to mean that it was in fact to show the reprehensible actions of Zwemart *et al*.

5. The Respondents were in breach of their own Code of Ethics.

6. They failed to fully investigate the status of the parties as regards their relationship.

7. They did not name the Minister or show any photographs of him or the Zwemart group.

8. The articles were not in the public interest.

9. Ngwenya was subjected to a horrific experience and the photograph of her cowering would have had a lasting effect on her.

[35]As regards what I consider to be "mitigation" relating to the award of damages:

1.The Appellants made some amends in the publication of 24 October clearing up the status of the parties.

2.Buthelezi remains an influential Member of Parliament.

3.Ngwenya is currently an Acting Magistrate.

4.As such their careers do not appear to have suffered although the mental anguish would certainly remain.

[36]I do not agree with the purported "sting" theory raised by the Court *a quo* in arriving at the quantum of damages which he did. As I indicated above there was a measure of setting the record straight in the next publication.

[37]I do not believe that there was any justification for the publication of the article relating to a political spat. The politics involved relating to the estates controversy could never justify the publication and as such I do not intend dealing with that issue in any detail.

[38]I fail to understand why Buthelezi was given double the award of Ngwenya. Surely there has to be equity and equality in matters of this nature. In fact, from a psychological point of view, Ngwenya would have suffered a greater anguish given that she is unmarried, has a right to full privacy in her own home and would have been traumatised by the photograph of her cowering under a blanket. I intend to rectify that misconception in the award below.

[39]In his judgment in the Court *a quo*, the Judge indicated that had it not been for the "sting" effect, the award would probably have been E200.000.00 (Two Hundred Thousand) Emalangeni for Buthelezi and E100.000.00 (One Hundred Thousand) Emalangeni for Ngwenya.

[40]As indicated by **O'Regan and Harms** above, a Supreme Court will only interfere with the discretion exercised by the Court *a quo* if in its view there has been material injustice. With the greatest of respect, I believe that this is such a matter and that given the circumstances and the mitigating factors which I set out above and taking into consideration the *dicta* and findings and awards in the Courts of our neighbours who also practice under Roman

Dutch Common Law, I am compelled to interfere so as to implement the fine balance referred to above. I consider a reasonable sum of damages for each of the Respondents to be in the sum of E150.000.00 (One Hundred and Fifty Thousand) Emalangeni.

[41]It needs to be also set out that the damages claimed in a global sum on behalf of both of the Respondents is to be discouraged. A separate sum should be claimed in respect of each of the parties, certainly in the case of two individuals. To merely claim E4 million Emalangeni or as reduced to E2 million Emalangeni on behalf of two individuals complicates the discretion of the Courts.

[42]The last issue is that relating to costs. Mr. Flynn argued that because of the astronomical amount claimed by the Respondents (even the reduced amounts) his clients were forced to continue with the litigation and the fact is that even in the Court *a quo* the Respondents were awarded substantially less than they claimed and as such they should not have been any order of costs against the Appellants. He has referred to the matter of **Nedfin Bank Ltd vs Muller and Others 1981 (4)** where it was found that the successful

party was deprived of any order for costs because the claim for damages was vastly exaggerated (to be fair that was not the only reason as the successful party had also failed to mitigate its damages). I entirely agree with Mr. Flynn that outrageous and unachievable claims must face censure. Also in MOGALE it was held that where a litigant makes an inflated claim a Court may make a punitive order relating to costs.

[43]Having said that, I do believe that the Court *a quo* did take that into consideration by awarding the Respondents only 60% of the costs and I do not intend interfering with that order.

[44]However in this appeal, the Appellants having partially succeeded, there will be no order as to costs and each party will pay their own costs.

I accordingly make the following Order:

1. The appeal on the merits is dismissed.

2. The order of the Court *a quo* is amended to read as follows:

2.1 The Plaintiffs' claim succeeds.

2.2 The Defendants are hereby ordered jointly and severally, the one to pay the other to be absolved, to each of the Plaintiffs the sum of E150.000.00 (One Hundred and Fifty Thousand) Emalangeni.

2.3 The Plaintiffs' costs to be recovered up to 60%.

2.4 Interest at the rate of 9% per annum on the said amounts *a temporae*

morae from date of judgment to date of payment.

3. Each party will bear their own costs of this appeal.

-

R. J. CLOETE
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

N.J. HLOPHE
JUSTICE OF APPEAL

For the Appellants:MUSA M. SIBANDZE ATTORNEYS

For the Respondent:ROBINSON BERTRAM ATTORNEYS