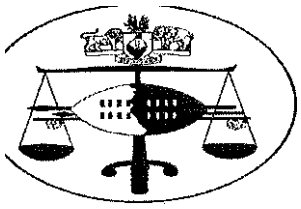

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 7/2018**

In the matter between:

Alpheous Nxumalo Appellant

And

The Swazi Observer t/a The Obse1ver on Saturday 1st Respondent

The Editor of The Observer on Saturday (Thulani Thwala) 2nd Respondent

Bodwa Mbingo 3rd Respondent

Neutral Citation: Alpheaus 7 (7/2018) [2022] SZSC ...50..(J?fh February, 2022).

Coram MCB Maphalala CJ, MJ Dlamini JA and MJ Manzini AJA

Heard 7 October, 2021

Delivered 17 February, 2022

SUMMARY : Defamation - liability of the media - false statements - wrong interpretation of words spoken by the appellant in a video clip- respondents liable - assessment of damages - N0 retraction - no consent to publication by appellcmt - damages to appease victim and not to punish or teach the respondents - court a quo awarded minimal damages of E2,000-00, set aside a11d replaced with El 80,000-00.

JUDGMENT

MJ Dlamini JA

Introduction

[I] This is an appeal on the matter of quantum arising out of a defamation of the appellant by the respondent. The court *a quo* (per Her Ladyship M. Dlamini J) had fixed the quantum of damages at E2,000-00 (Two Thousand Emalangeni). Appellant argues that this amount is unreasonably small and that an amount between E300,000-E500,000 would be more reasonable in the circumstances.

[2] This case started at the High Court in October 2016 under Case No. 1654/2015. It was then dismissed (per Nkosi **J)** in June 2016 (or February 2018). The Appellant successfully appealed to this Court under Case No. 7/2018. The matter was referred to the High Court for determination of the quantum of damages. In the court *a quo,* as already stated above, the quantum was assessed at E2000-00 (per M. Dlamini J). It is that assessment which has given rise to this appeal. The somewhat concerning issue here is the numbering of the cases here and below. Both judgments *a quo* bear the number 1654/15; and both judgments here bear case no.7/2018. Something is wrong with the numbering. This is not the first time I have had to point out at wrong case numbering. The Registrar and her assistants are again urged to do something about this misnomer.

Background

[3] The summons and particulars was issued and served on 30 October 2015. The appellant (as plaintiff) sued the respondent (as defendant) for the amount ofE500,000-00 by way of damages for defamation of character arising from an article published by the respondent in its **Observer on Saturday** newspaper of24 October 2015. Apparently, a letter of demand had been written to the Respondent two days after the publication, on 26 October 2015 in which the payment of E500,000-00 was demanded by not later than close of business on 28 October 2015. The Respondent did not pay as it denied the claim.

[4] **The article published by the Respondent reflected** as follows -

> ***"Ex-MD Alplteo11s Nx11m11/o decillres:*** *I* ***11m HIV positive"*** *By Bodwa Mbingo.*
>
> *Former Swazi Observer Managing Director (MD) reverend Alpheaus Nxumalo is HIV positive. He has been living with the condition for the past 14 years. He made this touching but educative confession to a South Afi-ican Miracle Pastor that later took time to pray for him during a church service in that counlly recently.*
>
> *This confession was then broadcast on one of South Aji-ico's most followed gospel channels, The Last Hour Miracle TV, where Nxumalo explained his situation to the pastor and his congregation on why he had decided to pour his heart out on his HIV status.*
>
> *The strength by the Observer on Saturday of publishing this revelation is obtained Ji-om the reverend's own confession in the church that they discussed with his wife a long time ago and agreed lo share it with other people so that they can get strength from it.*
>
> *Speaking during the service, Nxumalo revealed that he has lived with his wife and that they have been married for the past 24 years. He then broke the news of his status by stating that he was alive to the fact that some people feel that he should not be disclosing such news in a live broadcast.*
>
> *"But what if I keep quiet when somebody is going through the same experience? 1 have lived with my wife with an HIV positive status 14 years of the 24 years that we have been married. We agreed with her a long time ago that I'd share it so that others can get strength Ji-om it. I didn't believe that God would reveal that to you" he said before screaming Oh! My God, upon where the pastor then started praying for him.*
>
> *"Let me send an angel to you. You will be free, be healed and be saved, thus says the Lard", prayed the pastor. Within a moment, the pastor then stated that, "It's done", before Nxumalo was heard shouting "/* ***receive it", before he then gave a moving sermon of his own as the congregants listened allentively. He drew*** *his words Ji-om the Books of Matthew and John. He said Jesus performed a few miracles to His family . . .*

Nxumalo, when later reached by this publication, said he had no comment on the matter as one's sickness *and prophecy by a pastor before a congregation are private. He clarified that the matter came as a prophecy from the pastor and that all he did was confirm the prophecy before the congregation.*

in a nutshell, Nxumalo was saying the pastor prophesied that he was living with HJV and all he had to do was corifirm the prophecy.

Nxumalo is a well-known political analyst who has authored articles for both mainstream newspapers in *Swaziland He* is *not only a former MD of this newspaper but also private secretary to former minister of* ***foreign affairs Mathende/e Dlamini and Princess Tsandz;/e while she served as natural resources minister, Currently, the princess is home affairs minister/>.***

[5] The above article was supposedly based on a video clip which was acquired by the Respondents purportedly capturing a live television prayer service in South Africa which the Appellant had attended and was prayed for. Since the video clip was part of a TV broadcast, it fell in the public domain and was accessible where the TV station played. The **video clip version** proceeds:

Mr. Nxumalo: *I have lived with my wife, we have been married/or 24 years. I know that some people will say this should not be said in a live broadcast. But what if I keep quiet and somebody is going through the same experience? I have lived with my wife with an HIV status and we agreed with her, a long time ago that I will share it so other people can get strength off, of it.*

So, 14 years of that 24 years 1 have lived with her in that condition and I didn't believe that God will reveal that to you

Priest *Imagine God revealed to me about her blood ...*

Mr. Nxumalo: *Oh, Jesus*

Priest : *J imagine God revealed to me about her blood* (INAUDIBLE) *about her blood . . .*

Mr. Nxumalo: *Oh, My God . . .*

Priest *Let me send an angel ...*

Mr. Nxumalo: *Thank you Jesus ...*

(Priest Proceeds To Do What Seems Like Casting Spells ...)

Priest : *Your **(inaudible),** be free, be healed and be saved. Thou says the Lord of Hosts*

Mr. Nxumalo: *Thank you Jesus, I receive*

Priest : *It* is *done. Clap hands for Jesus ...*

[End of Recording]

[6] On the basis of the article as published, the Appellant framed his claim *inter alia* as follows:

> "6. On the 24th October 2015, the pt Defendant caused to be published in its ***Observer On Saturday,*** a newspaper circulating in the Kingdom of Swaziland and in the whole world and also published in the internet daily, a highly defamatory and grossly malicious article at page three (3) thereof captioned ***"EX MD ALPHEOUS NXUMALO DECLARES; I AM HIV POSITIVE",*** copy of the extract is hereto annexed and marked 'A'.
>
> 6.2 Published directly juxtaposed the headline to the offending article, and on the front page of such publication, was as well another headline captioned "REPORT:

SWAZI MEN JUST LOVE PROSTITUTES", which plaintiff pleads, based on its extreme proximity to the offending headline, would and did cause a reasonable reader to attach meaning and or significance to the article referring to the plaintiff. A copy of the headline (s) is hereto attached as well and marked 'B"'.

[7] Appellant further claimed -

"7. The said article stated *inter alia* of the plaintiff that:

7.1. He had been inflicted with a sexually contagious and/venereal decease;

7.2. He was HIV positive.

7.3. He had admitted to being HIV positive;

7.4. He had been HIV positive for the past 14 (fourteen) years;

7.5. He had made such admission and/or confession to a South African Healing Pastor on live Television.

7.6. He had agreed to 'share' his 'confession' with other people.

"6. The said words and /or statements contained in the said article were published of and expressly concerned the Plaintiff and as such were *per se* false, wrongful and defamatory to the Plaintiff in that -

6.1 They were more than reasonably capable of conveying to the reasonable reader and/ or alternatively they expressly conveyed to the reader that the defamatory and malicious article referred to the plaintiff;

6.1.1. The words used were in their very nature meant to convey malicious and injurious falsehood and convey a defamatory meaning to the readers of the said publication by imputing upon the plaintiff infliction with a highly

sexually contagious and/or venereal virus by extension an imputation of low moral character by plaintiff;

6.1.2 The article and words were used to convey the message that plaintiff could morally not be trusted though being a Christian Evangelist and was inflicted with sexually transmitted viruses;

6.1.3 The words used were in their very nature meant to convey a malicious and injurious falsehood and to convey a defamatory meaning to the readers of the publication, viz. that plaintiff was HIV positive and had been in such condition for the past 14 years;

6.1.4 The said article was published with the intention to defame plaintiff, to injure his reputation as a Christian Evangelist and Man of God, businessman, professional writer and political analyst.

"7 Pursuant to the defamatory article the plaintiff has suffered damages in that -

7.1 The resultant public reaction caused members of the public to believe that plaintiff was HIV positive and / or afflicted with a highly sexually transmitted and / or sexually contagious virus;

7.7 The article further caused plaintiff not only to suffer damage to his reputation, but also suffer damage to any prospects he may have had in the professional world in general."

[8] The Appellant further averred that as a result of the defamatory article, he suffered damages in a variety of ways from members of the public who then viewed him as being HIV positive; that this lowered the plaintiff in the estimation of the public as a person who was *"chronically ill and inflicted with a chronic illness that has [unfortunately] been*

socially stigmatized and associated with sexual promiscuity, infidelity and a failure to practice safe sex and the victims to which are associated with shame and stigma and are marginalized by society"; that as a Christian Evangelist and Preacher the article "aroused ridicule, obloquy, (and) contempt", causing plaintiff to be "shunned, pitied and avoided" in his social circles as an Evangelist and Preacher, businessman, political analyst and writer. That others have been reluctant to associate with him and has been exposed to "hatred, undue ridicule, contempt and pity", causing trauma to his family and children who have endured "ridicule, stress and pain as a result".

[9] Appellant consequently claimed an amount of E200, 000 (Two hundred thousand Emalangeni) for damages suffered "as a Christian Evangelist, businessmen, professional writer and political analyst; an amount ofE300, 000 (Three hundred thousand Emalangeni) for damages suffered "as a result of the wrongful and defamatory article "totaling E500,000 (Five hundred thousand Emalangeni) in all. Interest at 9% per annum from date of judgment to final payment and costs of suit". In his letter of demand dated 26th October 2015 the plaintiff demanded payment of the amount of E500,000 - 00 within two days and the immediate retraction of the defamatory article and a formal apology. None of the three things happened. Appellant followed up with combined summons on 30th October 2015.

[10] In their plea in opposition the Respondents (Defendants) admitted having written the headlines to the article as alleged by the Appellant, but denied that the article (as headlined) was "highly defamatory and grossly malicious". Respondents also denied that the location of the other headline viz. 'REPORT: SWAZI MEN JUST LOVE PROSTITUTES' was in any way intended to bear on and underscore the impugned headline expressly referring to the Appellant. Nor that the reasonable reader would read or understand the article on the 'Swazi men' as necessarily related to the first article captioned **"Ex-MD Alpheous Nxumalo Declares ... "** The Respondents denied everything alleged and admitted only what was expressly stated in the article such as that Appellant "was HIV Positive; had been HIV Positive for the past 14 years; had made such admission and or

confession to a South African Healing Pastor on live Television; and had agreed to 'share' his 'confession' with other people. The defamatory meaning and other sinister imputations ascribed to some of the words or statements in the article were also denied and disputed.

[11] The Respondents also pleaded that the article complained of was "not unlawful by reason of the protection afforded to the Defendants by Section 24 (1) and (2) of the Constitution of eSwatini No.001 of 2005 (the Constitution)". That the article was "a substantially accurate report of the Plaintiff's testimony in a leading public television channel, The Last Hour Miracle TV; that they (Defendants) were unaware of the falsity of any averment in the article"; that they published the article "in discharge of their duty to inform the public about newsworthy events and matters of public interest. ..". Respondents denied that they were negligent or reckless or had intention to injure the appellant in publishing the article.

[12] The Defendants argued that the article was not defamatory of plaintiff nor did Plaintiff suffer any damages as a result of the publication. If the article were to be held defamatory by the Court under any law, then that law would be in contravention of section 24 of the Constitution and as such be a law *"not reasonably justifiable in a democratic society".* Defendants finally pleaded that the publication of the article did not invade any privacy of the Plaintiff as what was published was actually in the public domain *"via the medium of a leading Christian broadcast by the Plaintiff himself, who indicated that he was disclosing his status publicly to help others".*

[13] As noted above, the High Court initially dismissed the action but the Appellant successfully appealed that holding: *"The Court found that the televised broadcast was to the effect that it was plaintiff's wife who was positive and not the plaintiff. The publication was therefore defamatory of plaintiff as it expressed that plaintiff was HIV positive. The matter was referred back to the [High Court] for determination of the quantum (of damages). It found its way into my roll",* says M Dlamini J at paragraph [4] of her judgment.

This then means that the question of liability had been resolved. But, for the assessment of the quantum of the damages due it is necessary that the basis of the liability be sufficiently appreciated. It does not appear that the parties, in particular the Respondents, filed any additional pleadings other than heads of argument after the appeal had succeeded and the matter was returned to the High Court for determination of damages.

General

[14] In this appeal, it seems to me that the judgment of the court *a quo* [per Dlamini J.] which gave rise to this appeal and the judgment of this Court which found the article to be defamatory must be considered for a balanced assessment of the quantum. As it is, the assessment is uniquely difficult where the assessor of the damages is not the determiner of the fault. The later court may not see the defamation and then, 'the centre cannot hold'. In a case like this, there is a real danger of the later court of appeal rejecting the decision of the first appeal. In my view, the court determining the damages must be convinced of the defamation.

[15] Compliance by the High Court with the order of this Court was bound to be tricky and challenging. The problem is that the defamation and the damages therefrom are closely intertwined. The action was dismissed at first instance. The High Court found the impugned article not defamatory and awarded no damages. This Court found the article to be defamatory and ordered for the award of damages by the court of first instance. The difficulty here may be likened to a case where one Judge convicts and another Judge is required to pass sentence. The second Judge must understand the considerations that led to the conviction. A similar process had to happen in this case. The ideal, however, is that all issues should be resolved in one set of proceedings, by one Judge or one court, instead of the truncated proceedings that happened here.

[16] It is not stated why this Court did not itself determine the award. In **Van der Berg v Coopers and Lybrand Trust** [1] case, after the trial at first instance, some issues remained undetermined. One of those issues was the quantum of the appellant's damages. In the result, Smalberger JA said the following:

> *"[44] As a general rule the determination of damages is a function peculiarly within the province of the trial court. There are, however, circumstances in which it would be appropriate, and the interests of justice and convenience served, were an appellate tribunal to determine the damages* **(Neethling v Du Preez and Others** *1995 (1) SA 292 (A) at 301B-302D). As all parties were agreed that, in the event of the appeal being successful, we should fulfil that function and as there are circumstances present, upon which I need not elaborate, which make it convenient and in the interests of justice for us to do so, I proceed to a consideration of the appellant's damages".*

[17] At the outset of his judgment, Smalberger JA had stated: *"[4] In order to determine the issues on appeal before us it is necessary to place the defamatory statement in its proper perspective. This in turn involves an appreciation of the relevant events which preceded its making. These are set out accurately, succinctly and lucidly in the heads of argument filed on behalf of Lane and Republic Trustees. In recounting the history of the matter. I propose to borrow extensively from them".* In my opinion, the High Court having dismissed the action and therefore having not considered the issue of damages, the Supreme Court which found the Respondents liable should itself have determined the damages, unless, of course, justice and convenience could not be best served. I say this because award is usually linked to the fabric of the liability, that is, the facts constituting the injury.

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[1] **Van der Berg v Coopers** & **Lybrand Trust (Pty) Ltd and Others** Case No. 466/99 (SCA) (29 November 2000)

[18] The publication of the impugned article was on 24th October 2015 and the letter of demand was dated on 26th October and the combined summons served on 30th October 2015. It all seemed so well planned, if not anticipated. This rather short period of gestation of the damage allegedly suffered raises the questioned whether Appellant actually experienced the suffering he alleges in his particulars of claim. Indeed most of the alleged deleterious imputations are presupposed rather than actually experienced. The Appellant does not tell us whether his close friends and acquaintances who knew him well also believed the article to be true and consequently shunned him. On pages 110 and **111** of the Record the Appellant says that he did not approach any company or prospective employer for employment as MD or CEO "for two reasons", not necessary to state here. In other words, Appellant's endeavours to be employed were not frustrated, if at all, because of any stigma associated with the impugned article. The Court takes notice that it is not universally true that once a person is affected with HIV/AIDS he becomes implicated and stigmatized with the host of evils that Appellant alleges in his particulars. Other than the mere false allegation that Appellant was HIV positive, the article said nothing else directly condemnatory or judgmental of the Appellant. The presumption of damage to reputation should not be unduly exaggerated. The Plaintiff did not call any witness in his support except himself. How the matter broke out at the prayer service in South Africa is not told by the Plaintiff; nor is the TV clip helpful in this regard. In instances of this kind the court should be on its guard lest it be duped and used as an instrument for the perpetration of injustice.

[19] The offensive article is set out in paragraph [4] above: it may be contrasted with the video-clip version reviewed by the court *a quo* and is set out under paragraph [5] above. For the purposes of the complaint herein it is important to note the differences between the article and the video-clip version of the event at the prayer meeting in South Africa. The anchor of the article and the gist of the complaint by the Appellant is around the statement: **"1** have lived with my wife with an HIV positive status... " The Appellant avers that the statement does not refer to him, the Appellant, while the Respondents have built and developed the article on the assumption (to them a certainty) that the statement refers to

the Appellant. It is of course proper to read both versions as a whole for a correct understanding of the statement. Be it noted however that it is not the statement per se that is the issue: the statement is, however, more of the genesis of the thinking and belief by the Respondents that the video clip from which was developed the article was a confession by the Appellant that he was HIV positive and had been so for 14 years but continued to live with his wife of 24 years.

[20] Taken alone, the statement is perfectly ambiguous. It reflects the kind of language which should not be used in serious public discourse. The statement could refer as much to the Appellant as it could to his wife. It is for that reason, in my view, that the Respondents should not have concluded that the statement referred to the Appellant without further investigation. There are indicators in the (original) video-clip version which point in the opposite direction to that assumed by the Respondents. After Appellant said that he did not believe God would reveal the HIV positive status issue, the Priest responded: **"Imagine God revealed to me about <u>her</u> blood... , Let me <u>send</u> an angel ... ; <u>Your</u>** *(inaudible)* **be free, be healed and be saved".** (My underlining). Surely, '<u>her</u> blood' pointed to Appellant's wife; the angel could only be <u>sent</u> to someone who was not present at the prayer meeting. At any rate the video clip did not say to whom the angel was to be sent: the article wrongly assumes the angel was to be sent to the Appellant. The video clip does not say: "You" will be free, be healed, etc. The clip says: "Your"(.....) be free, etc which could not be a reference to Appellant. Instead the sentence makes better sense when read: <u>"Your</u> (wife will) be free, be healed and be saved". The newspaper article changed the whole excerpt to read: *"Let me send an angel <u>to you. You</u> will be free, be healed and be saved . . . .*" Unfortunately, the hearing did not properly examine this discrepancy. To that extent the video clip was not properly reproduced in the article. The Respondents were negligent at least and dishonest at worse.

[21] The Appellant and the Priest may not have expressed themselves clearly in the video clip - to which must be added the incomplete sentences and inaudible parts but nowhere

did Appellant express himself as HIV positive. The Respondents made incorrect inferences. Appellant attacked the whole article as defamatory of him. The final understanding of the article is that it was wrong, that is, false. In its judgment of October 2018, this Court was of the view that *"the Court* a quo *erred in not specifically addressing the question whether the statements published by the Respondents were defamatory of the Appellant. Had the court* a quo *done so, it would have come to the finding that the statements published by the Respondents were defamatory* per se *of the Appellant, as they tended to lower the reputation of the Appellant in the opinion of right - minded people and were also untrue".* In para [18] of its judgment, the court *a quo* (per Nkosi J) wrote: " *...When any reasonable person hears the Plaintiff's words in the live broadcast I cannot see any negation of the inference that can be adduced,* i.e. *that, in fact, the Plaintiff was saying that his wife and him are HIV positive ...* "

[22] Under para [29] of its 2018 judgment this Court stated (per Dr. Odoki JA):

> *"I have already stated in this judgment that a careful reading of the live broadcast or video clip as a whole does not support the Respondents' claim that the Appellant was referring to himself and not to his wife. The Pastor who was present in the congregation readily understood the Appellant to be referring to his wife, and any reasonable person would have understood the statement to mean so...* "

[23] I am not quite certain to what extent the Pastor may be dealt with and referred to as a 'reasonable person' in the legal sense as it would appear that the Pastor was not relying on his normal, human, reasonableness but on his spiritual power. On page 104 of the Record, (transcript section), it is written:

> **"APPL** *As the Prophet was done praying for me and I was about to take my seat he said I see a close family member who is sick. I said to him yes Prophet, I have left a family member hospitalized in Moneni. And then he said the family member admitted is HIV positive; I responded in the affirmative before the Prophet that*

indeed the family member had been in that condition for 14 years. And the Prophet said I am sending an Angel to the sick family member, as a result you will find her discharged and at home".

[24] At the first court hearing, Appellant was asked by his counsel: [2]

"AC : It is alleged by the Defendant that you made a confession in church that you are HIV positive.
What did you exactly say to the Prophet?

"APPL : As the Prophet was done praying for me and I was about to take my seat, he said I see your close family member who is sick. I said to him yes Prophet. I have left a family member hospitalized in Moneni. And then he said the family member admitted is HIV positive; I responded in the affirmative before the Prophet that indeed the family member has been in that condition for 14 years. And the Prophet said, I am sending an angel to the sick family member, as a result you will find her discharged and at home. And then the Prophet was puzzled.

JUDGE Are you telling us what he said?

APPL : Yes.

(AC) **APPL:** The Prophet said this is a new experience as it is not familiar that one can stay with a family member who is in this condition for 14 years. He then asked me to go to the microphone to share with the viewers as to how one can cope with the similar situation. I then said that it is not necessary for married couples to divorce because one of them is HIV positive. I then further said it is

[2] Record of Appeal p104 ff (From Transcript)

possible to live with your spouse who is HIV positive for 14 years, supporting each other.

AC : For the purposes of the Record, describe your nature of relationship with the close family member.

APPL : She is my wife.

AC Do you have a copy of the video clip.

APPL: Yes I do".

What is uncertain, however, is whether the video clip that the Appellant had was from start to end the same as the one that the Respondents had.

[25] Elsewhere Appellant was asked by defence counsel whether he had *"approached any company that has refused to hire him because of the alleged HIV status"*. The Appellant stated that he had not approached any company for two reasons: *"First, because I knew that ...for a position of MD or CEO you do not just write an application and throw it. Somebody must approach you to convey their interest in you or somebody must approach you ....* " (p110 of the **Record).** *"Secondly, my Lord, I did not apply to any company because this is not just only the matter that is in court between me and Swazi Observer; there is another industrial case that is pending at the Industrial Court where I was issued with a court order to go to my office at Swazi Observer, and Swazi Observer in the contest of that court order closed my office. It is three years now and my office is closed. I am seated at home without a salary and the matter is pending in the Industrial Court ...* " (p111 of the Record). Is there a hidden, unexplored lesson from this excerpt?

[26] Other than the general allegation that HIV carriers in Swati society are still stigmatized and shunned the Appellant agreed that he has not been turned down by any potential employer because of the alleged HIV status. Appellant insisted that Government efforts to de-stigmatize the HIV decease have not been successful. But no specific instance of him being a victim of the stigma associated with the alleged HIV status was shown or alleged by the Appellant. Part of the cross-examination proceeded as follows:

> **"DC:** Mr. Nxumalo, I put it to you that it is you who are stigmatizing HIV/AIDS and not the general reader of a newspaper or the average reader of the newspaper.
>
> **APPL:** My Lord, in fact my experience and truth of what Mr. Shabangu is saying is contrary to what he has just said. I could not have lived for 16 years with somebody that is infected and I am affected by that situation ifI stigmatized people that are HIV positive. In fact, my Lord, ifl were to add, I believe with all my heart that part of the reason I am here before the court today is because I want to protect people that are HIV positive. I want to deal with stigmatization because the malicious and defamatory manner in which the Swazi Observer reported this case, other than the fact that it was false that I am HIV positive, there was no doubt that this was all about stigmatization and making it a taboo that you are HIV positive; so I believe the contrary of what Mr. Shabangu is saying".

[27] Appellant was questioned at length by Respondents' counsel pointing out that it was the Appellant who thought that other people (the public or general readers of the newspaper) thought of him as a person of"low moral character". Appellant went on: " ... I would be of low immoral (sic) estimation, my Lord, ifl have successfully hidden my HIV positive status from my family, from my relatives, from my church for 16 years. So, yes, I believe people would believe I am a man of low moral estimation as a result". And, " ... ***The whole claim is about me my experience and my underst{llu/ing of what the article conveyed as a result of publishing (it) in tltis manner and fashion",*** says the Appellant.

And that he never consented to the article being published at all or about his or anybody else's sickness. In my reading, the alleged stigmatization of the Appellant does not come out in the manner and fashion the article was published. This is particularly so because the article was presented as a confession by the Appellant himself before a congregation.

[28] The Appellant also agreed in the cross-examination that the article was malicious "because the headline had below it another headline stating that 'Swazi men just love prostitutes'. Even though the 'below' headline did not expressly refer to the Appellant, the Appellant explained its supposed association with the main headline: " ....any reasonable reader, especially with the type of stigmatization and taboo that people of HIV/AIDS are being viewed by society. It could have been reasonably concluded by any reader that I am probably one of the clients that are very much in love with the subjects of that article, my Lord". The Appellant further conceded that the article he was complaining about was the one headed "Ex MD Alpheaus Nxumalo declares 'I am HIV positive" and that the complaint was based on the "article as a whole". The reason for his complaint is that the article was wrong as Appellant never'said he had lived with an HIV possible status for 14 years.

[29] On the day before publication of the article by Respondents, 3rd Respondent had phoned the Appellant at about 4pm. The Appellant tells what transpired: *"**Appl:** He said that they are doing a story that happened last week about a sick close family relative and I said it was not last week it was in May. I told him that illnesses are of privileged nature. I will quote him: 'Siyabonga babe Nxumalo, loudly'; he uttered those words sarcastically sending a message that my response will not be considered, any way".* (My emphasis)

[30] The reference to a 'sick close family member' is rather puzzling in the circumstances. Surely, the reference could not be to the Appellant who was being spoken to at the time. Ifin fact those words, the reference, were used, they could only have referred to someone else other than the Appellant. In that case the sick family member was not the

Appellant to the knowledge of the 3rd Respondent. Unless, of course, Appellant has embellished the narrative. Unfortunately, the thrust of Appellant's response was not appreciated to solicit further clarification or confirmation by 3rd Respondent (DWI). Appellant does not say that 3rd Respondent knew that it was not the Appellant who was said to be HIV positive in the video clip. The question arises whether Appellant's account is correct. If this is correct, why is it not openly stated by the Appellant, that is, that 3rd Respondent knew that the sick family member was not the Appellant. The point was overlooked during the cross-examination of the Appellant and of 3rd Respondent. Also, why was the interview directed to the Appellant and not the family member who was seemingly !mown to be sick? Asked by counsel for the defence why Appellant did not state earlier that he was "affected not infected with HIV"? Appellant responded: **"Appl:** *My Lord I could have done that if I wanted to make the comment in the first place. My response was that I am not at liberty to comment on anybody's HIV status including mine. Secondly ...we did not have a long conversation with him and in our conversation he never mentioned specifically what type of sickness he was talking about, he only said that 'we hear that there is a sickness to somebody', that is when I responded that I was not at liberty to comment about my sickness or somebody else's sickness and then he hung up the phone".* (My emphases)

[31] It seems that the approach made to Appellant to comment on the matter before publication was purely perfunctory; 3rd Respondent was not serious about it and if he sounded sarcastic it was evidently because 3rd Respondent !mew the video clip to be already in the public domain as it was circulating on T.V. That was in October 2015. And as the Appellant himself corrected 3rd Respondent the prayer meeting in South Africa had been in May. So there had been time for the clip to circulate widely. At p146 of the Record, in response to a question asked, 3rd Respondent (as DWI) says: *"And after he did not want to discuss it with me we felt that it was already in (the) public domain because the clip was obviously circulating as it was broadcast on TV ...* "

[32] Before moving on to consider the matter of damages, two other paragraphs from this Court's 2018 judgment are worth recalling:

> *"[30] It was also submitted by the Respondents that the publication was reasonable because they took steps to verify the correctness of the statement in the video clip from the Appellant who did not deny the statement that he was HIV positive. In my view the response given by the Appellant that matters relating to sickness are private and not for public consumption was reasonable. The Respondent should have taken more caution in publishing the statement since it was highly sensitive and private.*
>
> *"[33] In considering the test of reasonableness or unreasonableness of the publication, it is also necessary to take into account the professional ethics governing the publication of such statements as there is a need to balance the media's rights to inform the public on matters of public interest and the need to protect the individual's right to dignity and privacy. In this case the Respondents failed to strike the right balance by publishing the article".*

[33] As stated above, the appeal was allowed and the matter referred back to court *a quo* for assessment of damages, this Court expressing that *"As the court* a quo *did not assess the quantum of damages, this Court is not in a position to consider the issue which the Appellant could not address in his heads of argument".* The matter fell for consideration by her Ladyship Dlamini J who, after addressing several of the subheadings relevant to quantum in cases of defamation, came to the conclusion that an amount ofE2000-00 was in the circumstances of the case adequate compensation. The upshot was a notice of appeal on seven grounds. I note that the Judge *a quo* wrote in the Summary to her judgment as follows: " ... *The defendant submits that any award should be minimal owing to the common cause that the statement complained of did not originate from the defendant, but plaintiff himself".* The court *a quo* seems to have been tolerant of that version. And Appellant's attorney may well be justified in submitting that *"the court a quo in its factual*

findings and award, effectively rendered the findings or judgment of the Supreme Court on the Respondents' liability totally nugatory".

General analysis

[34] In my opinion, m this matter, other than the headlines earlier referred to hereinabove, the central issue is that Respondents published in an article, words or statements to the effect that 'Appellant is HIV positive and has been so for 14 years' and that Appellant himself had confessed to that health status at a church meeting. The Respondents attribute these words to Appellant but Appellant denies ever uttering those words. In the result the words or statements are false and consequently defamatory of the Appellant. This Court in an earlier hearing so found. Appellant complained about the whole article, but beyond the words flagged above, the rest of the article is but excess baggage that adds nothing valuable to the supposed sting of the actually defamatory words. In the result, considering the express words of the article as to what Appellant says the words say of him, I have no doubt in my mind that the words (or article) do not say as much as what Appellant says the words say of him. In general, there seems to be a tendency to enlarge and generously extend the meaning or effect or impact of the defamatory words or act in defamation actions. Courts, be they trial or appellant, should guard against being unduly swayed by plaintiffs supposed meaning or understanding of the impugned words or action.

[35] Ifwe consider that the fault of the Respondents was to publish the false article that Appellant was HIV positive, the damage or injury in all the circumstances of the publication to the Appellant cannot be as extensive as implied by the Appellant. Even though not verified, the substance of the article in terms of the video clip was already in the public domain in October 2015 at the instance or participation of the Appellant as the source of the video clip. This, save for the aspect that the Appellant said he was HIV positive, which thing he had not said, the rest of the article is largely innocent information generated by Appellant himself and his Pastor. Other than what might possibly he implied,

the article itself did not say anything else negative about the Appellant. In fact, but for the false imputation, the article on the whole was positive of the Appellant. The Article did not allege that Appellant had been hiding the alleged affliction.

[36] The article may be defamatory and malicious, but I see nothing "highly defamatory and grossly malicious" in it. That the Appellant said he was HIV positive and had been so for fourteen years may very well be untrue, but that allegation did not drop out of the blue; there was a background to it - the prayer event in South Africa and the conversation between the Appellant and the Pastor. Given the origin and context of the defamatory statement, we have not been told in what specific way or ways the statement was 'highly defamatory' or 'grossly malicious'. The fact by his own admission Appellant had lived with his wife (who was HIV positive) for 14 years and had wanted to share that experience with others (in the same sort of situation) Appellant was no stranger to an HIV positive related situation to suffer seriously from a false allegation that he was himself HIV positive.

[37] The Appellant says that these impugned words were "per se false" and consequently "wrongful and defamatory". The words are indeed 'per se false' in the absolute sense that the Appellant never spoke them. But what is intriguing in this action is how the Respondents could have had the intention and malice to defame the Appellant by publishing words supposedly, albeit mistakenly, spoken by the Appellant in public. In my view the Respondents' belief that the words were spoken by the Appellant and of the Appellant must have a mitigating effect on the sting of the defamation. By the same argument, it is unlikely that the Respondents could have intended the vice alleged by the Appellant, such as 'sexual promiscuity, infidelity and failure to practice safe sex' or the intention to "injure his reputation as a businessman, professional writer and political analyst". None of these moral shortcomings appear in the article. In other words, having regard to the context in which the defamatory words were allegedly spoken by the Appellant, the host ofimplied consequential injurious effects should not necessarily follow.

[38] It is to be noted that there are two versions in connection with this matter. There is the article version, which is the basis for the suit, and there is the video-clip version. As to the article version the Appellant is mainly troubled by the headline "Ex-MD Alpheous Nxumalo declares: I am HIV positive". The Appellant complained about the headlines and the article as a whole. Appellant also drew support for his complaint from another seemingly related article on the same newspaper headlined "Swazi men just love prostitutes". To Appellant this other article, also prominently headlined, added salt to the injury. Appellant, however, conceded that the second (latter) article "never made any reference to (him)". It would seem that the sting, if any, of the second article was in its mere presence and proximity to the other headline on the same day as the first article about him being HIV positive. It seems to me that Appellant had somehow become unduly sensitive on the matter of sexual morality and HIV status. Connecting it to the Appellant's story by mere association on the paper seems to me would be going too far. I do not see the connection. Any connection must be remote. Otherwise newspapers would not operate if they could be punished for the manner they arrange the stories in their publications.

[39] Considering the article as a whole and its origins and what the Appellant says it says of him, I am of the view that Appellant has unduly extended whatever may be said to be defamatory from the article. The defamatory character of the 'confessional' aspects of the article must be seen from the point of view of their being untrue or false in that Appellant never expressly spoke them. That is, Appellant never said: "I am HIV positive" or words to that effect. What Appellant said at the prayer service was erroneously understood by Respondents to refer to the Appellant when Appellant says it was his wife he was referring to - the subject of the conversation or prophecy. In the earlier appeal, this Court found that the Respondents were negligent in publishing the article in the way they did. This negligence is supported by the fact that there was no express consent by the Appellant to have the prophecy or confession published on account that it involved the privacy of

persons.

[40] In my view, the publication manifests no intent to harm the reputation or in any way ridicule the Appellant in whatever aspect of his character or profession. It is not correct in my opinion in matters of this kind to simply say that because the words are defamatory they may be freely and willy-nilly extended to harm every aspect of the victim's personality. I do not believe that just by saying that a person is HIV positive then all the evils - some far-fetched, foreseeable or unforeseeable - must be piled upon that person. This is particularly so where the defamatory statement is the result of the misinterpretation of a statement made by the same person alleging to be defamed. What happens here is that the defamation is more by accident than design.

[41] Subject to what I have said or will say in this connection, the Appellant who was not unknown to the Respondents does not say that the Respondents knew that he was not HIV positive so that the wrong understanding of the words "I have lived with my wife with an HIV positive status" cannot be forgiven. There must be a reason for alleging that the misinterpretation was deliberate and the defamation was intentional. I do not think that the sting of the defamation would be the same whether it results from sheer negligence or unmitigated intention, that is, malice. That the Respondents failed to check on the veracity of their interpretation or understanding of what the Appellant had said to the Pastor at the prayer service cannot be gainsaid. With respect, some aspects of the Appellant's conversation with his Pastor were not free from ambiguity, which called for extra caution by the newspaper. In the prevailing conditions and bearing in mind the source of the (impugned) words, failure to doubly check does not mean the Respondents necessarily wanted to defame the Appellant and that they knew that their understanding of the video clip was wrong. The Respondents were negligent in taking things for granted. The newspaper article was not all so negative; it goes on to tell how Appellant "gave a moving sermon of his own as the congregants listened attentively".

[42] The Appellant did not agree to the publication of the article when approached by 3rd Respondent. Appellant clearly demonstrated a negative reaction to the idea of a 'story' in

the newspaper. There was no point in flying the public interest when Appellant, the supposed author of that interest did not support the effort. Evidently, the Respondents were on their own in the publication. Any face-saving public interest in the publication of the defamatory article pales into insignificance as a result of the falsity of the statement associated with the central character. It is not certain how Appellant wanted to help others in similar situation to live with their HIV positive partners without resorting to divorce. It would seem that the article did not assist in that regard. Any purported fight against the stigma associated with **HIV** positive status also fails for lack of a willing champion. In considering the issue of the quantum of damages the article and its meaning as such or what was said about it need be carefully studied.

[43] As it is in the nature of general damages, the defendant is somehow punished for the defamatory statement. *In casu*, the Respondents, it may be fairly said, stand to be punished for publishing a false and defamatory statement about the appellant. The context, however, in which the defamation occurs must always be borne in mind. The context has a definite bearing on the quantum. However, in **Media 24 Ltd,** [3] in para [33], Petse JA stated: *" ...It is as well to bear in mind that the purpose of damages for defamation* is *not to punish the defendant but to offer solace to the plaintiff by payment of compensation for*
the harm caused and to vindicate the plaintiff's dignity". See **Charles Mogale** [4] paras [1OJ and [11]. In that case, the learned Judge, Harms JA, also criticized the approach frequently adopted by some trial and appellate Judges who grant an award *"which would teach newspapers to limit themselves to inform and entertain the public without ciffecting anyone"* and that the *"teach them a lesson"* approach to defamation awards is wrong. As was stated by Hattingh J. in **Esselen v Argus Printing & Publishing**[5]: *"In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in*

[3] Media 24 Ltd t/a Daily Sun v Bekker Duplessis [2017] ZASCA 33 (29 March 2017)
[4] Charles Mogale & Others V Ephraim Seima Civ. Case No 575/04
[5] Esselen v Argus Printing and Publishing Co Ltd and Others 1992 (3) SA 264 (T) at 771 F-T

two ways - a vindication of the plaintiff in the eyes of the public, and a conciliation to him for the wrong done to him. Factors aggravating the defendant's conduct may of course serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a solatium. *In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalize or to deter the defendant for his wrong doing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict* ".

[44] On some of the factors affecting awards, Harms JA (Ibid) stated that *"The main factor determining quantum is the seriousness of the defamation".* Other factors are the extent of the publication based on the circulation and readership of the newspaper; the reputation, character and conduct of the plaintiff: *"However, not unlike politicians, persons who move in or close to the limelight have to expect that their lives will be to some extent in the public domain and they must be prepared to endure somewhat more than the ordinary citizen has to endure",* says Harms JA (in para [15]. *In casu,* Appellant has described himself in various capacities as a person who is frequently in the limelight and public glare. In **van der Berg v Coopers** & **Lybrand** [6] Smalberger JA remarked: *"[23] In **National Media Ltd and Others** v **Bogoslti** 1998 (4) SA 1196 (SCA) at 12071 Hefer JA stated: 'It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other'. He went on to observe (at 1207£) that '(i)t would be wrong to regard either of the rival interests with which we are concerned as more important than the other', a matter on which he then proceeded to elaborate. This is particularly so where the Constitution in terms seeks to protect both the dignity of the individual and freedom of speech(.....)'".*

[45] The 'protection of freedom of expression' provided under section 24 of the Constitution of eSwatini was referred to by the Respondents. Section 24(2) in terms

[6] Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others Case No. 466/99 (29/11/2000)

includes "the freedom of the press and other media". Under section 24 (3) (b) the freedom is limited in situations where 'any law' (which would include the common law) provides for the reasonable protection of the 'reputations' of other persons. Without much elaboration it may fairly be said that the section cited does not provide full protection to the Respondents.

Assessment of damages

[46] In the assessment of damages for defamation the appeal court bears the same discretion as the court of first instance save to exercise it subject to specified considerations peculiar to the impugned judgment and the facts of the particular case. Counsel for Appellant referred in this regard to the statements of Dr. BJ Odoki JA in **African Echo**[7] where the learned Judge stated that this Court *"can interfere with the award given by a trial court if 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",* in which case this Court *"has the power to award a figure which it should have awarded had it tried the case"* and in so doing this Court " *may be guided by the previous award of damages made in comparable cases".* Further support was drawn from **Media 24 Ltd** [8] where Petse JA touched on the court's 'wide discretion', pointing out that an appellate court *"will interfere with the exercise of that discretion only where it is shown that the lower court had not exercised its discretion judicially or that it had been influenced by wrong principles or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, or where its assessment differs so markedly from that of the trial court as to warrant interference".* In **Media 24 Ltd** the appellants conceded to the defamatory nature of the article and pleaded substantial truth and public interest. In the result the award by the lower court was reduced from R80,000-00 to R40,000-00. In that case the court stated the following:

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[7] African.Echo (Pty) Ltd t/a Times of Swaziland.v lnkhosatana Gelane [2016]SZSC 20 (30/6/2016) para 89

[8] Media 24 Ltd t/a Daily Sun v Bekker Duplessis [2017] ZASCA 33 (29.3.17)

"[15] .... The gist or sting of the article is determined with reference to the legal construct of a reasonable reader. It is the meaning that the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. The test is an objective one. And as Corbett CJ explained in ***Argus Printing an,l Publishing Co. Ltd & others v Esselen's Estate*** *1994 (2) SAJ (A) at 20E-G, the ordinary and natural meaning of the words takes account of not only the words expressly said, but also of what they imply".*

[47] In the foregoing case, the learned Petse JA in para [16] referred to an 'instructive' statement by Colman Jin **Channing v South African Financial Gazette Ltd** 1966 (3) SA 470 (W) at 474 A - C, in these terms:

"From these and other authorities it emerges that the ordinary reader is a 'reasonable', 'right thinking' person, of average education and normal intetligence; he is not a man of 'morbid or suspicious mind', nor is he 'super critical' or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read. For that assumption authority is to be found is to be found in ***Basner v Trigger*** *1945 AD 22 at 35-36. It is no doubt fair to impute to the ordinary reader of the* South African Financial Gazette *a somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this inquiry, the training or the habits of mind of a lawyer".*

[48] As stated above, before this Court the Respondents have not challenged the defamatory character of the article as found in the earlier appeal. To that end, Respondents' opening statement in their heads of argument reads: *"I.I .... It is the Respondents' respectful submission that determination of quantum is an issue that falls entirely within the discretion of the trial court which is the true trier of facts. It is an entrenched principle of our law that such discretion is not to be readily interfered with by the appeal court ..."*

As might be expected, the Respondents were arguing for non-interference by this Court with the award granted by the court *a quo*. Cautious not to unduly interfere with the discretion of the Judge *a quo,* it is, however, the duty of this Court on appeal to consider and determine whether the court *a quo* properly exercised its discretion in granting the award. In this regard, on appeal, the lower court's discretion is by no means sacrosanct. According to the Respondents *"a perusal of the judgment [a quo] indicates no misdirection"* to justify this Court's intervention. The Respondents submit: *"The court a quo exercised its discretion lawfully and or judiciously, clearly stating the special circumstances leading to the award of damages in the amount which is the subject of the appeal"*. That any purported interference would be "unwarranted" since "the court *a quo* did not misdirect itself on facts or the law".

[49] Petse JA in **Media 24 Ltd,** at para [32], says that "... *an appellate court will not decide the question afresh. It will interfere with the exercise of that discretion only where it is shown that the lower court had not exercised its discretion judiciously, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, or where its assessment differs so markedly from that of the trial court as to warrant interference. (...) In* ***Sadler v Wholesale Supplier Ltd*** *1941 AD 194 at 200 this Court held that should the appellate court find that the trial court had misdirected itself with regard to material facts or its approach to assessment or the trial court's assessment of damages is markedly different to that of the appellate court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court".*

[50] Harms JA in **Charles Mogale** [9] states:

[99] Charles Mogale and Others v Ephraem Selma 2008 (5) SA 637 (SCA)

"[8] . . . The determination of quantum in respect of sentimental damages is inherently difficult and requ/res the exercise of a discretion, more properly called a value judgment, by the judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is and it is therefore the rule that a court of appeal has a limited power of intervention. The court of appeal usually considers what it would have awarded and if there is a palpable or manifest discrepancy between that amount and that awarded by the trial court, it will interfere (e.g. Salzmann v Holmes 1941 AD 471 at 480 and Sutter v Brown 1926 AD 155 at 171). A court of appeal may also interfere if the court of first instance materially misdirected itself and in this regard it is important for a court of second instance to know what factors a trial court took into account in determining the award, ...

[9] The Constitution, in line with the common law, places a great value on human dignity (including reputation). It also, more than the common law, emphasises the right to freedom of expression. These two rights have to be balanced, a somewhat delicate and difficult exercise. But it is not only in regard to justification of a defamation that the freedom of expression impacts on the right of dignity. It also impacts on questions such as the interpretation of an allegedly defamatory statement: life is robust and over-sensitivity does not require legal protection; and of quantum: too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right".

[51] In his heads of argument, the Appellant submits that *"the court* a quo *misdirected itself on the facts"* in that it *"made afresh opposed factual findings upon which the Supreme Court had already made judgment ...."* In the circumstances of the case, so long as the court *a quo* did not contradict the Supreme Court, that approach was not wrong. Indeed a glance at the judgment appealed against supports the Appellant to some extent. Under para [7] of the judgment *a quo,* it is reflected: "The publication was made after plaintiffs own

publication", and "There was absence of malice or intention to injure plaintiffs reputation following that the defendant is not the originator of the statement"; and: "The statement was first made by him before the congregation and a live televised broadcast. .." (My underlining). Now, if the impugned statement is untrue it could not possibly have been made by the Appellant and as such the Appellant could not be the originator of the statement. As I understand the appellate judgment, the finding that the Respondents are liable was based on the said statement being false and negligently published.

[52] Whilst the above is presented as "Defendants submissions", nowhere in the judgment *a quo* are those submissions rejected as untrue in light of the finding of the Supreme Court. In para [8] of the judgment Justice Dlamini M continues: *"They were encouraged to publish the article following plaintiff's own statement that he intended to help others who were in similar positions ..."* But under para [10] the learned Judge states: *"Defendants pointed out that they merely interpreted the words spoken by plaintiff These words were spoken to the whole world. The defendants are therefore liable for the wrong interpretation as the Supreme Court found that the plaintiff was not referring to himself but to his wife ...* " Paragraph [10] of the judgment is followed by "Determination" and the Judge proceeds to consider the quantum of damages. Under para [12] (c), the learner Judge wrote: *"It is common cause that the plaintiff, in a live television broadcast in South Africa, ... announced that he has been living with the condition for fourteen years .....* "This is all so confusing. In this regard, the Respondents were not supposed to submit as they did, after the judgment of this Court, that the Appellant was the author of his own defamation.

[53] It is only in paragraph [12] (d) that the Judge *a quo* comes out clearly and states: *"The Supreme Court looked at the utterances of the plaintiff before the congregation and the live broadcast and concluded that the plaintiff stated that it was his wife that was HIV positive. I agree with the findings of the Supreme Court. It takes a close reading of the transcribed clip to come to such a conclusion ....* " The Respondents, following the

judgment of this Court, should have premised their defences on the basis that they had misconstrued the words of the Appellant contained in the video clip and tried as best they could to explain and justify their misinterpretation. This approach would have given the Respondents the opportunity to retract and apologise, which thing might not have been justified before the judgment of this Court determining liability. In my view this would also have necessitated Respondents to seek leave to file supplementary affidavit in light of the changed playfield. None of that happened.

[54] In favour of the Respondents, the learned Judge *a quo* continued in the said paragraph 12(d) to observe that once the clip was downloaded it was easy to scrutinize the statement and read it over and over: *"It became easy for the Court to read over the words and analyse them. This was not so when the defendants and the congregation, together with the viewers, heard the utterances from the plaintiff. Plaintiff's words were said once and not repeated. The listeners had no benefit of reading or hearing the words over and again for purposes of analyzing them. In brief, any misinterpretation was justified* Petse JA in **Media 24 Ltd,** para [29], says "....*it will not be regarded as unlawful when the media publishes false defamatory allegations of fact, if upon a consideration of all the circumstances of the case, it was reasonable to have published the facts in the particular manner in which they were published at that particular time. The pertinent considerations that come to the fore are the nature of the information upon which the allegations had been based, the reliability of the source and the reasonable steps taken to verify the accuracy of the information supplied to them ... before publishing the article ...Proof of reasonableness was the substantive duty of the appellants. They accordingly had to prove the reasonable steps they took to verify the accuracy of the information before the publication of the article".* The video clip had as it were sign points pointing to the opposite of what the Respondents believed. There is no reason to believe that the Respondents possessed a different video clip from that reproduced above.

[55) What the Respondents did not realise is that the video clip was not self-explanatory; instead someone had to interpret it. That is where things fell apart. In the hearing and interpretation or understanding an error was always possible. That needed double checking the correctness of the interpretation. The Respondents did not sufficiently check and verify the correctness of the information in their video clip. After publication, there was not much that Respondents could do by way of mitigation as they believed to have been right in the information they published. This attitude is also borne out by the Respondents' persistent allegation that they were not the source or author of the defamatory statement. This line of defence is of course patently erroneous in light of the earlier decision of this Court. The truth is that the Respondents were the source of the false statement which defamed the Appellant.

[56) On the issue of retraction by the Respondents, the learned Judge *a quo* says whilst there was none "*... it is common cause that the defendants solicited for plaintiff's comments before publishing the statement.... (Plaintiff) decided to use his right not to discuss the issue. This does not however detract from the fact that it was already in the public domain at his (plaintiff's) instance".* The clip may well have been in the public domain, but the Respondents did not know what version or understanding of the video clip was in the public domain. The clip was in the public domain but not necessarily the version published by the Respondents. The public might not have understood the clip in the way the Respondents did. The only written version of the video clip before court is that of the Respondents; and that version has been adjudged as erroneous and defamatory of the Appellant. There is no evidence before court that the public held the same version as that published by the Respondents and adjudged as false and defamatory of the Appellant. It was the business of the Respondents to produce such supportive evidence, if any.

[57] Even though the **Ngomane** [10] case was not against a newspaper or for a publication of some defamatory matter, the principles it set out are worth recalling. In that case to a suit ofE350, 000-00 for damages, the trial court awarded ES0,000-00 which was reduced to E30,000-00 on appeal. Ota JA made the following statement:

> *"[80] The award of damages is a discretion vested in the trial court. The appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial court. However, a discretion is not a power to be exercised arbitrarily or capriciously. In certain circumstances an appellate court may reverse a discretiona,y decision if it is not judicial and judicious in the sense that it exhibits a material misdirection. These circumstances have been identified by case law to include but 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) acted in disregard of principles, (iii) acted under a misapprehension of the facts, or took into account irrelevant considerations. See* ***Saffeidine v Commissioner 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 (l) SA 530 (AD) at 534 - 535A; (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".*

[10] **The Swaziland Government v Aaron Ngomane** [2013] SZSC 73 (29 November 2013)

Conclusion

[58] It is in order to conclude with reference to the statements of some leading authorities in this field. Corbett CJ in **Argus Printing and Publishing** (supra):

> *"I agree and I firmly believe that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. 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. I emphasise the word 'unlawfully' for, striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, ... The resultant balance gives due recognition and protection, in my view, to freedom of expression".*

[59] In para [48] of the **Van der Berg case** (supra) Smalberger JA stated:

> *"We were referred to a number of cases reported over a period of years which were claimed to be comparable or roughly comparable to the present ..... Comparisons of the kind suggested serves a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately, a court must, as best it can make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess. Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation. Having said that does not detract from the fact that*

a person whose dignity had unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings".

(60] In **Media 24 Ltd** (supra) Petse JA wrote:

*"[33] In **Dikoko v Mokhatla** 2006 (6) SA 235 (CC), paras 75 and 76, the Constitutional Court held that equity in determining a damages award in defamation remains an important consideration .... It is as well to bear in mind that the purpose of damages for defamation is not to punish the defendant but to offer solace to the plaintiff by payment of compensation for the harm caused and to vindicate the plaintiff's dignity.*

*"[34] In **Tsedu and Others v Lekota and Another** [2009] ZASCA 11; 2009 (4) SA 372 (SCA), para 25, this Court said that 'monetary compensation for [defamation] is not capable of being determined by any empirical measure'. It went on to say that awards made in other cases are of limited value as they only provide a generalized form of guidance in assessing damages..(... ....)* "

(61] In my opinion, the trial court exercised its discretion wrongly and failed to give sufficient weight to the relevant factors and consequently acted on a misapprehension of the facts. On all the relevant facts of the case, I find that there is a striking disparity between the amount awarded by the trial court and the amount that ought to have been awarded or would be awarded by this Court, resulting in this Court's interference with the trial court's award. The trial court did not give sufficient weight to the fact that the defamatory words were untrue and the Respondents offered no apology even after it was determined that the words in question were untrue and defamatory.

(62] Accordingly, in all the circumstances of the case, bearing in mind the relative seriousness of the harm caused; that on the 7th November 2015 2nd Respondent, a senior staffer of the 1st Respondent published an article to the effect that the Respondents stood by their story of 24th October 2015; the public standing of the Appellant; the role of

newspapers in our society; that the award is not to punish the Respondents but to offer solace to the Appellant; that the award must be balanced and equitable and not to have a chilling effect; the need for an award that seeks to realistically fit the particular case, the following order is made -

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and substituted as follows:
   (a) Plaintiffs claim succeeds
   (b) Damages ofE180,000-00 awarded
   (c) Costs to follow the result.

M.J. Dlamini JA

I Agree

M.C.B. Maphalala CJ

I Agree

M.J. Manzini AJA

M.T.M. Ndlovu for the Appellant.

Z.Shabangu for the Respondents