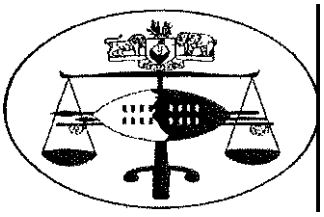

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Held in Mbabane Case No. 13/2018

In the matter between:

The Swazi Observer Newspaper t/a The Observer on Saturday 1st Appellant

Alec Lushaba 2nd Appellant

Bodwa Mbingo 3rd Appellant

And

Dr. Johannes Futhi Dlamini Respondent

Neutral citation: The Swazi Observer Newspaper t/a The Observer on Saturday Alec Lushaba, Bodwa Mbingo vs Doctor Johannes Futhi Dlamini (13/2018) [2018] SZSC *51(07 March 2022)*

Coram: **MJ Dlamini JA, SJK Matsebula JA and MJ Manzini AJA**

Heard: **10 November 2021**

Delivered: 07 **March 2022**

Summary: *Defamation - Statements contained in a newspaper - Whether statements defamatory - Test is objective - Ordinary reasonable reader - Strict liability renounced - Defences and justification - Reasonableness of conduct - Proof of absence of negligence or unlawfulness - Role of the press in democratic society - Public interest - Freedom of expression must yield to the individual's right - Award not to punish the media but to compensate the victim.*

JUDGMENT

Dlamini JA

Introduction

[1] The appellants have appealed against the judgment of the High Court the judgment of the High Court (per NJ. Hlophe J, as he then was) awarding the Respondent an amount ofE200,000-00 damages suffered by the said Respondent following an allegedly wrongful and defamatory article (or articles) published by the Appellants on 23rd July 2016. The Respondent (as Plaintiff) had alleged that "the article was published wrongfully, recklessly and intentionally, with no steps taken by the [Appellants] to test its veracity, or even obtain comment from the [Respondent] prior to publication. The articles were published with the sole intention of injuring the [Respondent's] reputation in the estimation of the right thinking readers of the first [Appellant's] publication. The article was untruthful and did not represent fair comment".

The Case

[2] The article complained of was published under the headline: *"Sarah, her children ran away fi·om Phakama 's meetings"*. The learned trial Judge then reproduced the article as follows:

> ***"Sarah, her children ran away from Phakama's meetings.***

1. Before his death in December 2013, the late businessman, Themba Richard Dlamini, popularly !mown as Phakama tried to convene two meetings where he wanted to discuss the issue of his businesses.

2. The meetings were held at his first wife, Sarah's home, at Mahlanya. However, LaKunene (Sarah) and her children Dr. Futhi, Siphephiso, Muzi and Makhosazana did not show up.

3. It is said that only Principal Secretary Emmanuel Dlamini, the eldest son of LaKunene showed up and instructed that they opened up the homestead's main house (indlu yaka Gogo).

4. Loziga confirmed knowledge of his brother's attempts to resolve the issue of his estate before he died, but alleges that LaKunene and her other children who are central to the family business made sure that such a meeting did not happen.

5. It is said that when Muzi took interest in running the family business, he suggested to his father that the public transport was in decline and recommended that they venture into the trucking business.

6. It is said that before his death Phakama was worried by the state of his business where his buses were running out of routes, while the Phakama Logistics business was gaining strength. *Allegations are to the effect that he gathered his children with the view to ascertain the state of the family business because he had heard that despite owning 50 per cent of Phakama*

Investment, Phakama Logistics was no longer registered in his name, but Muzi, whom he had appointed as Trustee to look into the family business.

7. *On the other hand, Dr. Futhi who operates a private surgery also ventured into big business, by buying the Nandos franchise in the country and opened some outlets even in South Africa.*

8. · *The late businessman is said to have been bothered by the sudden success of his sons, suspecting that they may have used the family finances to open their private interest.*

9. Loziga even kept copies of a newspaper cutting where another meeting convened by Jiva Dlamini for Emalangeni in December 2014 was abandoned after they were locked out at LaKunene's home in Mahlanya. (Underlining added)."

[3] The foregoing is the publication which Respondent complained of as being defamatory of him, contending that the highlighted statements were *"intended and understood by the readers of the newspaper that the plaintiff (was) dishonest and untrustworthy"* in several specified respects, *inter alia*, that,

"9.1 The plaintiff abused his late father's trust and confidence in that he swindled and /or misappropriated his late father's business money in order to operate his own business;

9.2 The plaintiff's Nanda 'sfi'anchise business was acquired and /or established using funds which were misappropriated from his late father's business or estate;

9.3 The plaintiff was a person of base moral standards or had abused his late father's business or estate for his own personal benefit to the prejudice of his late father's estate, his siblings and other family members;

9.4 The plaintiff was a person disposed to manipulating situations including his father for his own personal gain and success;

9.5 The article was not attributed to any person and constituted a baseless opinion by the reporter;

9.6 The plaintiff was untrustworthy in that he avoided confrontation with his father over his 'dealings'.

10. The article was published wrongfully, recklessly and intentionally with no steps taken by the Defendants to test its veracity, or even obtain comment from the plaintiff prior to the publication. The articles were published with the sole intention of injuring the plaintiff's reputation in the estimation of the right thinking readers of the first defendant's publication. The article as untruthful and did not represent fair comment".

[4] As a result, the Respondent claimed an amount of E2,000,000-00 by way of damages, alleging that by the said wrongful article,

Respondent was injured in his standing as a reputable medical practitioner in eSwatini;

Respondent's status and position as an upright citizen m the Kingdom of eSwatini was damaged;

Respondent's standing as a businessman of great repute was injured;

Respondent's business as a franchise with Nandos fast foods was damaged as he was depicted as a dishonest person.

Respondent was embarrassed, humiliated and degraded as a person.

[5] In his particulars of claim Respondent stated -

"7. One of the sub-articles had a heading entitled 'Sarah, her children ran away from Phakama's meetings. Under this sub-article, the defendants caused certain defamatory allegations concerning the plaintiff to be published. The statements read -

'On the other hand, Dr. Futhi who operates a private surgery also ventured into big business, by buying the Nandos franchise in the country and opened some outlets even in South Africa.

'The late businessman is said to have been bothered by the sudden success of his sons, suspecting that they may have used the family finances to open their private interests'".

(The reference to Dr. Futhi was a reference to the plaintiff).

The defences

[6] The Appellants admitted the publication but denied that the article was defamatory of the Respondent. In the result the Appellants denied *"each and every allegation herein as if specifically traversed and put the Respondent to strict proof thereof"*. In particular, the Appellants denied that the article was 'wrongful and defamatory of the [Respondent]',

or that *"it was understood by ordinary reasonable readers of the newspaper to mean that the [Respondent] is dishonest and untrustworthy in any of the respects alleged in paragraphs 9.1 to 9.6* ". Appellants denied being negligent or reckless in publishing the statements in the article, and stated that they were not aware of the falsity of any averment contained in the article.

[7] The Appellants averred that the ordinary reasonable reader of the articles in question would have understood the statements in the article to be an account by the Appellants' sources of what the late Themba Richard Dlamini related to them about *the Respondent, his mother and his brother Muzi.*

[8] The Appellants denied that the publication of the article was wrongful, reckless and intentional or that it was published with the sole intention of injuring the Respondent's reputation or that *"the article did iryure the [Respondent's] reputation as a medical doctor,*
businessman and his franchise business. "

[9] The Appellants also took refuge under the Constitution asserting that the statements in the article were not unlawful by reason of the protection afforded to the Appellants by section 24 (1) and (2) and the article was published by Appellants *"in discharge of their duty to iriform the public about newsworthy events and matters of public interest",* with *"the public having a corresponding right to receive the information.* "In other words, the Appellants contended that they were justified in making the publication complained of as the material was obtained from 'reliable sources'. Further, the Appellants contended that if the statements are found to be defamatory under any law, that other law would not be reasonably justifiable in a democratic society and as such invalid as it would unjustifiably impinge on Appellants' constitutionally protected right to freedom of expression under section 24.

[10] The Respondent replicated *inter alia* pointing out that "section 24 of the Constitution does not entitle the press to publish false, unjustifiable, unreasonable and patently defamatory interest (sic) that are not in the interest of the public".

The grounds of appeal

[11] In this Court, Appellants appealed as follows-

1. The court *a quo* erred by finding that the article was defamatory of the Respondent.

2. The learned Judge *a quo* erred by not finding that the Appellants were not liable for defamation because in the circumstances of the case they were not negligent.

3. The learned Judge *a quo* erred by applying the test of intention/ recklessness to determine the liability of the Appellants when [the Judge] ought to have applied the test of negligence and or reasonableness which is applied in cases of defamation involving media defendants.

4. The learned Judge *a quo* erred by not finding that the article was published by the Appellants in discharge of their duty to inform the public about newsworthy events and matters of public interest and that the public had a corresponding right to receive the information.

[12] The Respondent filed a cross-appeal contending that;

"1. The court *a quo* erred in law and in fact in awarding the respondent nominal damages when the facts of the matter warranted substantial damages.

2. The court *a quo* erred in law and in fact in awarding the respondent nominal damages when the author of the article in question had malice by failure to get

a comment from the respondent before he wrote the defamatory article. The malicious conduct of the appellants warranted substantial damages.

3. The court *a quo* erred in law in not following the current trend in the award of damages in our jurisdiction".

General principles

[13] Prof. Burchell tells that *"(t)he law of defamation seeks to protect a person's right to an unimpaired reputation"* and that *"(p)roof of publication of defamatory matter referring to the plaintiff gives rise to two inferences (sometimes referred to as presumptions): (a) an inference of unlawfulness or wrongfulness, and (b) an inference of animus injuriandi (subjective intention on the part of the defendant to impair the plaintiff's reputation with knowledge of unlawfulness). The defendant bears an evidential burden of adducing evidence of a defence excluding unlawfulness (for instance, truth for the public benefit, fair comment, privileged occasion, consent, self-defence, necessity) or defence excluding animus injuriandi (for instance, mistake, intoxication or insanity)".* Burchell continues to state that *"(!)iability of the mass media under the civil law is strict. In other words, animus injuriandi (or even negligence) is not a prerequisite for their liability. The mass media may, however, escape responsibility by leading evidence to support a defence rebutting the inference of unlawfulness".* [1] The strictness of the liability referred to by Burchell must be understood in light of developments in this law since 1985.

[14] According to Prof. Burchell: ".... *An impairment of reputation leads to a lowering of the individual's standing in the estimation of others. Reputation is therefore distinct from dignity (or self-esteem) although both personality interests are protected under the broad framework of the actio injuriarum. . . . The distinction between reputation and dignity has not always been clearly drawn"* (page 18). The learned author further says: *"Defamation is seen as an 'unlawful, intentional publication of words or conduct concerning a specific*

[1] Jonathan M Burchell, **The Law of Defamation In South Africa** (1985) page 1

person whereby his good name, reputation or estimation in the community is impaired'. Both unlawfulness and intention are stressed as essential elements of the delict and a clear distinction is *drawn between the two concepts".* (p. 35)

[15] Geoffrey Robertson Q.C. writes: [2]

> *"In English law, a libel is simply a statement, either of fact or opinion, which lowers plaintiffs in the estimation of right-thinking people or exposes them to hatred, ridicule or contempt. Any statement which attributes blameworthy conduct, or any criticism which casts a shadow over a person's fitness for a job or profession is on the face of it defamatory. Judges and juries place themselves (without very much difficulty) in the position of 'right-thinking members of society', and ask themselves whether they think the statement would injure the plaintiff's reputation. The court must bear contemporary social standards in mind in making what will in some cases necessarily be a value judgment. . . . The question, always, is whether the words, in their published context, would be likely to lower the plaintiff in the minds of ordinary, decent readers. That depends, of course, on how the ordinary, decent reader interprets the words, 'reading between the lines in the light of his general knowledge and experience of worldly affairs* '".(3) (p. 318)

Robertson also remarks that: *"An assertion is not defamatory simply because it is untrue - it must lower its victim in the eyes of right-thinking citizens",* (p. 319).

[16] Robertson continues:

> *"A libel is, in effect, a criticism of a person or corporation. The facts stated may well be true, but the newspaper carries, in law, the burden of proving they are true, by testimony which satisfies strict rules of evidence law. Where the source for a story dies, or is out of the country, or has been promised confidentiality, it will be difficult for the newspaper to satisfy that legal burden",* (p. 320).

---

[2] **Freedom, The Individual and The Law** (1993)

[3] See **Lewis v. Daily Telegraph** [1964] AC 234 at 258, per Lord Reid

[17] Robertson also tells us that:

> *"It was in fact the Star Chamber which paved the way for civil libel when it tried to provide an alternative to dueling, which was the traditional method of redressing damage to reputation. The courts became inundated with libel actions and the King's judges tried to discourage them by severely limiting the circumstances in which damages could be recovered. But these early restrictions on defamation were forgotten in the Victorian era, when libel actions became a fashionable and indeed necessary method of answering insults. The idea that large sums of money must be awarded to compensate people for words which 'tend to lower them in the estimation of right-thinking members of society' directly derives from this age, when social and political life was lived in gentlemen's clubs in Pall Mall, an age when escutcheons could be unblotted and society scandals resolved by writs for slander. Libel damages came in this period to call for a metaphysical evaluation of dignity, the notion being that they should show the world a gentleman's real value, rather than be used to punish the publisher for error. Libel was a method for deciding whether the plaintiff really was a gentleman* ... " (at 316 - 317).

[18] In **Silkin *V.* Beaverbrook Newspapers**\ summing up to the jury, Diplock J. (as he then was), stated the following:

> *"This is an important case, for we are here concerned with one of the fundamental freedoms - freedom of speech, the right to discuss and criticize the utterances and the actions of public men. Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between the right of the individual, like the plaintiff, whether he is in public life or not, to his unsullied reputation if he deserves it. That is on the one hand. On the other hand, but equally important, is the right of the public, which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on*

[4] **Silkin v. Beaverbrook Newspapers Ltd and Another** [1958) 2 All ER 516 (QBD), at 517,518

the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though that involves strong criticism of conduct of public people.....

Let us look a little more closely at how the law balances the rights of the public man, on the one hand, and the rights of the public on the other in matters of freedom of speech. In the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men.

. . . You have, of course, first to decide whether the words are defamatory at all, that is to say whether they tend to lower the plaintiff's reputation in the estimation of right thinking people ... "

[19] Corbett CJ (for the Court) in **Argus Printing and Publishing** [5] stated the following: *"I agree, and I firmly believe, that freedom of expression and 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, in 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 law has devised a number of defences, such as fair comment, justification (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory. (.. .) the resultant balance gives due recognition and protection, in my view, to freedom of expression".*

[5] Argus Printing and Publishing Co Ltd and Others v. Esselen's Estate 1994 (2) SA 1 (A) at 25B-E

[20] In **Demmers v. Wyllie and Others** [6] the Appellate Division accepted the statement of the trial Judge regarding the words 'reasonable person' or 'reasonable man' in connection with whether the so-called 'reasonable reader' would understand an article to have a particular meaning, where the trial Judge had said: *"The standard is that of the ordinary reader instead, who has no legal training or other special discipline. He is taken to be a reasonable person of average intelligence and education.* " As to who is the 'reasonable person' or 'reasonable man', Muller JA observed: *"From the above it is clear, I think, that the words 'reasonable person' or 'reasonable man' referred to in the decisions cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.* " In the present case, for whatever it may be worth, I do not believe that the Respondent's business auditor would qualify for the description of 'reasonable person' or 'reasonable man' or ordinary reader who has no special discipline. In my view the auditor is not a good example if that was the purpose.

[21] Regarding the place and role of the mass media in modern democratic society, O'Regan J. of the Constitutional Court of South Africa has stated:[7]

> *"[24} In a democratic society, then, the mass media play a role of undeniable importance, They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of iriformation and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society, If the media are scrupulous and reliable in the performance of their constitutional obligations, they*

[5] 1980 (1) SA 835 (AD) at 842

[7] **Khumalo and Others v, Holomisa** 2002 (5) SA 491(CC)

will invigorate and strengthen our fledgling democracy. ff they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16. " (Instead of s 16, its s 24 in our case).

[22] In **Reynolds** [8] case, Lord Hobhouse observed:

"The law of civil defamation is directly concerned with the private right not to be unjustly deprived of one's reputation and recognizes the defence of privilege. The justification for this defence is at least in part based upon the needs of society. It can easily be asked why society or the law of defamation should tolerate any level of factual inaccuracy. The answer to this question is that any other approach would simply be impractical. Complete factual accuracy may not always be practically achievable nor may it always be possible to establish what is true and what is not. Truth is *not in practice an absolute criterion. Nor are the distinctions between what is fact and innuendo and comment always capable of a delineation which leaves no room for disagreement or honest mistake. The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications. Some degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege."*

The meaning of the article: Was the article defamatory?

[23] It is generally agreed that in defamation proceedings the starting point is ascertaining what the words or conduct complained of mean. Do the words mean what the plaintiff says they mean? This is matter of law for the decision of the court. As Corbett_ CJ noted in **Argus Printing & Publishing Co.** (at p. 20E): *"From this it appears that Hattingh J adopted, ... the test as to whether a reasonable person of ordinary intelligence* might

[8] Reynolds v Times Newspapers Ltd and Others [1999] 4 All ER 609 (HL)

reasonably understand the words to convey a meaning defamatory of the plaintiff (see at 767E-F). This is *unquestionably the correct approach and, as this formulation indicates, the test is an objective one.* The court does not merely accept what the plaintiff says about the impugned words or conduct; this being largely subjective. In their approach to understanding the words alleged to be defamatory, the Judges must endeavor to free themselves of the courtroom milieu and judicial hubris and assume the posture and mindset of the ordinary reasonable person or reader who is not supercritical or meticulous to detail whilst appreciating the impact of the context in which the words were spoken or published. In the quest for the meaning of the words complained of the court searches for the understanding of the reasonable person of ordinary intelligence also called the "hypothetical reader". This is so because *"the reasonable person of ordinary intelligence* is *taken to understand the words alleged to be defamatory in their natural and ordinary meaning, ... In determining this natural and ordinary meaning the Court must take into account not only what the words expressly say, but also what they imply"*, says Corbett CJ in **Argus Printing and Publishing Co.** at 20F-G

[24] Marais JA in **Independent Newspapers Holdings** [9] states:

> *"In any defamation suit the logical starting point* is *what the words complained of mean, more particularly, whether they convey the defamatory meaning which the plaintiff seeks to place upon them. In answering that question a court discards its judicial robes and the professional habit of analyzing and interpreting statutes and contracts in accordance with long established principles. Instead it dons the garb and adopts the mindset of the reasonable lay citizen and interprets the words and draws the inferences which they suggest, as such a person would do. It follows that meticulous attention to detail . . . cannot be expected. The law reports are replete*

'Independent Newspapers Holdings Ltd and Others v.Walleed Suliman [2004] 3 All SA 137)SCA) para [19]

with reminders of the looseness of thought and low concentration with which even an eminently reasonable member of society may read newspaper reports, "

[25] A plaintiffs understanding of the article said to be defamatory is ordinarily bound to be subjective and in some instances exaggerated and even far-fetched. This is so because for the plaintiff there is a prize at the end if he can convince the court that he has indeed been injured by the defamatory article. The court has to guard against the commercialization of the proceedings. That is why it is the court's duty to determine the meaning of the words or statements published and whether they are defamatory of the plaintiff as alleged. In **Shongwe v Dlamini and Another** [1982 - 1986 SLR 291 (HC)] at 2930, Dunn AJ stated as follows: *"The question to be decided by the court at this stage is one of law and the test* is *not whether the statement* is *defamatory but whether it is capable of a defamatory meaning. This* is *an objective test and the court must determine whether a reasonable man could or might have understood the words as defamatory.* "

[26] In **Nxumalo v Nxumalo and Another** [10] Dunn AJ captured the words of Colman J. in **Channing,** on the test to be applied, and stated as follows:

"The plaintiff has led evidence of the effect of the publication, and as stated by Colman J in Channing v South African Financial Gazette Ltd and Others 1966 (3) SA 470 (W) at 473 D-E, *'the test* is *not whether, to the court itself, after it has had the benefit of careful analysis of the article, the article seems to bear one meaning rather than another, or seems equally capable of bearing both meanings. The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action, and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even*

[10] SLR 1982 -1986 (1) 221 (HC) at 224 F - G

though there is room for a non-defamatory interpretation: is not, the plaintiff fails"'.

[27) In the search for the ordinary, natural meaning the court adopts an objective approach, being that of the ordinary reasonable person. In considering words alleged to be defamatory, Burchell (at pages 88 / 92) tells us that: *'The meaning which the ordinary reasonable reader would attach to a sentence is looked at* ***in the circumstances'*** or *'must be viewed through the eyes of the reasonable reader or listener* ***in the circumstances'.*** Words and sentences said to be defamatory must not be divorced from their context or background. Wessels JA, in **Johnson v Rand Daily Mails,** elaborates:

" *... There is no doubt that this sentence must not be divorced from its context. . . The proper way of reading it is to take the sentence as part and parcel of the context* and then consider what meaning an ordinary reader will give to it. 'We must take *the document as a whole.* ' *... Next, in considering the words we must consider how an ordinary reasonable man would read the whole passage. 'The test according to the authorities is whether under the circumstances in which the writing was published reasonable men to whom the publication was made would be likely to understand it in a libelous sense.* ' *.... We must not first consider how an astute lawyer or a supercritical reader would read the passage, but how an ordinary newspaper reader would judge of it. Would he in reading the words quoted attach a sinister meaning to them? !{there is any libel it must be contained in the words* .

"[11] (Emphasis added)

[28) Both parties have given their understanding of the meaning of the statements complained of, and having read the article as a whole, what then would the ordinary reasonable reader of the *Observer on Saturday* have understood the statements highlighted in paragraphs 6, 7, and 8, to mean? The statements are to be read and understood in the

[11] 1928 AD 190 at 204

circumstances in which they were published. In the spirit of fairness and impartiality and the need to strike a proper balance between the parties, the true meaning of the impugned statements is not necessarily that placed on them by the journalist nor that placed by the plaintiff. Hence the search for the understanding of the ordinary reasonable reader in the person of the hypothetical reader. Even the Judge, as arbiter in the matter, must proceed on that understanding: redefine himself by adorning the garb and assuming the mindset of the reasonable person of normal intelligence. Both the Respondent and the Appellants have told the Court what they think the ordinary reasonable person would understand the statements to mean. They cannot both be correct. The Court must decide, not only what the statements mean but also whether the meaning is defamatory of the plaintiff.

[29] We are warned to be alive to the fact that *"the reasonable reader does have shortcomings - he often simply skims through a publication, he may have a capacity for implication and be prone to draw derogatory inferences. He may also be guilty of a certain amount of loose-thinking and will jump to conclusions more readily than a man trained in the caution of the law. Similarly, the reasonable reader does not engage in elaborate and overly subtle analysis."* (See Burchell, at 85). And so, just like all of us: the reasonable reader or listener or person or the 'hypothetical reasonable man' (per Stratford JA in **Johnson v Rand Daily Mails** (at 189) or 'hypothetical reader' (per Greenberg JA in **Stewart Printing Co. (Pty) Ltd v Conroy** 1948 (2) SA 707 (AD) at 712, or the 'man on the streets of eSwatini' or better still the 'man on the Mbabane - Manzini omnibus', is not an epitome or model of perfection. Like normal persons he has shortcomings.

[30] Although the Respondent has identified specific parts of the article as defamatory the rule is that the article must be read and understood as a whole. It is only in this way that the context of the words said to be defamatory may be captured and utilized. The parts of the article identified by Respondent as defamatory are in paragraphs 7 and 8 of the article. We must read and understand these paragraphs in light of the whole article, including the headline *'Sarah, her children ran away from Phakama* 's *meetings';* to be read and understood as the ordinary reasonable newspaper reader would do.

[31] Although the learned Judge *a quo* who found the statements to be *per se* defamatory, was criticized by the Appellants of allegedly accepting the Respondent's version 'lock, stock and barrel', I respectfully agree with the learned Judge as I agree that the ordinary reasonable reader of the *Observer on Saturday*, a not so sophisticated newspaper, would understand the statements as set out by the Respondent, that is, that the Respondent was a dishonest and untrustworthy person who would cheat his own father of resources in order to start his own private businesses. And that since the allegations by the Appellants were false, the publication wrongfully and unlawfully injured and demeaned Respondent's reputation in the estimation of the newspaper readers by conveying a meaning defamatory of Respondent. I therefore have no doubt that the statements read in context were gratuitously defamatory of the Respondent as set out in his particulars.

[32] Colman J. paints a picture of the 'ordinary reasonable person or reader', (referred to by the trial Judge in para [30] as the 'man on the streets of eSwatini'):

> *"From these and other authorities it emerges that the ordinary reader is a 'reasonable' right-thinking person of average education and normal intelligence; he is not a man of 'morbid and suspicious mind', nor is he 'supercritical' 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 in* Basner v Tigger *1945 AD 22 at pp 35-6. 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".*[12]

[12] Channing v South African Financial Gazette Ltd 1966 (3) SA 470, 474 A-C

[33] And Lewis JA in **Sankie Mthembi-Mahanyele** [13]stated the test as follows:

"[25] The test for determining whether words published are defamatory is to ask whether a 'reasonable person of ordinary intelligence ***might*** *reasonably understand the words . . . . to convey a meaning defamatory of the plaintiff. ... The test* is *an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the court must take account not only of what the words expressly say, but also of what they imply', (per Corbett CJ in* ***Argus Printing and Publishing Co Ltd v Esselen's Estate*** [14]*)* "And, as Lord Morris in **Jones v Skelton** [15] says: *"The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words . . .* "

[34] Dr. Odoki JA in **Sipho Makhabane** [16] stated the position as follows:

"[13J In establishing the ordinary meaning of the words complained of, ... the court is *not concerned with the meaning the journalist intended to convey or the meaning given to it by the person to whom it is published (. . .), whether or not they believed it to be true, or whether or not they then thought less of the Respondent upon reading the article, but the test is objective and one that enquires into what meaning the reasonable reader of ordinary intelligence would attribute to the*

statement. "

---

[13] **Sankle Mthembi-Mahanyele v Mall** & **Guardian Ltd and Another** 2004 (6) SA 329 (SCA)

[14] 1994(2) SA 1 (A) at 20 E - G.

[15] [1963] 3 All ER 952 (PC) at 958 F-G

[16] **The Swazi Observer v Sipho Makhabane (2018] SZSC 41 (23 October 2018)**

[35] Holmes JA, in **Dorfman,** [17] says:

> *"A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is in general unlikely that the ordinary reader would peruse and ponder a single report in isolation."*

[36] Burchell further writes: *"If the words or conduct are alleged to convey a meaning that* is *per se defamatory, the court must determine the ordinary meaning of the words. The ordinary meaning of the words is not necessarily the dictionary meaning. It* is *the meaning*
which an ordinary or reasonable reader or hearer would attribute to words. The ordinary meaning of words is determined by looking at the context in which they were uttered. "(at
p. 84). Other than that the statements were defamatory, the Respondent did not allege expressly that the statements were *per se* defamatory in his particulars and replication. The Respondent does however state in 2.4 of his particulars that the article informed its readers *"in unambiguous language that plaintiff had surreptitiously utilized his father's estate in order to build his own business"* and also in his.replication at paragraph 6 that the article was *"patently defamatory"*. By these expressions Respondent may be understood to have alleged that the statements were *per se* defamatory. In the result, I agree with the finding ofHlophe J. that the statements were *per se* defamatory in that they perpetrated a falsehood about the Respondent. That is, that the ordinary reasonable reader would understand the statements to mean that the Respondent was not an honest and trustworthy person. In his judgment Hlophe J. stated:

---

[17] Dorfman v Afrikaanse Pers Publlkasies (Edms) Bpk en andere 1966 (1) PH J9 (A) at 43

"[30] Given my finding that the meaning attributed to the words by the Plaintiff was their natural and ordinary one, I have no hesitation that the words in question were defamatory per se. Words are per se defamatory where their meaning is apparent on their face and they are understood in that sense by the ordinary reasonable reader of the article concerned. That is what their real meaning is, not a secondary one based on special facts or circumstances known only to some people, which is an innuendo."

Analysis

[37] Except for the publication of the article, Appellants denied all the allegations made by the Respondent regarding the defamatory character and effect of the article. In essence, Appellants denied that the article was defamatory, unlawful, negligently or recklessly published. They averred that at any rate as a newspaper they have a responsibility to inform the public about newsworthy events having a public interest. It is common cause that the newspaper is published for sale to the public and to that end the newspaper must attract readers / purchasers, hence the μse of catchy headlines. The Appellants also denied the damages claimed. In elaboration of their denials, the Appellants submitted as follows: *"4.3 .....the Defendants state that an ordinary reasonable reader of the newspaper would not have understood the statements in the article to mean that the Plaintiff is dishonest and untrustworthy. The ordinary reader of the articles in question would have understood the statements in the article to be an account by the Defendants' sources of what the late Themba Richard Dlamini related to them about the plaintiff, his mother and his brother Muzi* ".

[38] I do not understand how the publication in this case could have been newsworthy and of any public interest. The matter which might have been of some public interest is that of the nullification of the bigamous marriages that Phakama had contracted with three of his wives. The public interest in this matter lay in the public being informed that a

siSwati (customary) law marriage is bigamous and invalid if one of the parties to it is already married by civil rites to another person. What is unfortunate is that these bigamous unions are still prevalent in our society and the consequences on being successfully challenged can be devastating to the woman, in particular. Whether the story of Phakama's concerns regarding the management or mismanagement of the family business by his son(s) can be newsworthy and of public interest. It is a matter that is private and personal to the family. Generally speaking, if the public has no interest in a matter it can have no compelling right to receive published information relating thereto.

[39] On the face of the article there was one main headline: 'PHAKAMA'S SISTER LOZIGA FURIOUS', whereby Loziga (seemingly playing the role of an *Inkhosatana* in a Swati family set up) claimed that the *civil rites* marriage relied upon by Sarah was a 'lie' and accused Sarah of being 'greedy' [18] . The immediately objectionable article with the headline: **"Sarah, her children ran away from Phakama's meetings"** is in the middle of the first page. At the very top of the pages of the article were the words: *'In the wake of Judge Mumcy's ruling on Late Phakama 's 4 wives'.* Among other things written is the following (paragraph 4) which reads: *"Loziga confirmed knowledge of his brother's attempts to resolve the issue of his estate before he died, but alleges that LaKunene and her other children who are central to the family business made sure that such meetings did not happen".*

[40] For convenience, the critical parts of the article were as follows: "5. *It is said that when Muzi took interest in running the family business, he suggested to his father that the public transport was in decline and recommended that they venture into the trucking business.* " Paragraph 6, in part: "**- - - -** *Allegations are to the effect that he (Phakama) gathered his children with the view to ascertain the state ofthe family business because he, on the other hand. had heard that despite owning 50 percent of Phakama Investment,*

[18] It is noted that under the common law, Sarah would be entitled to half plus a child's share of Phakama's estate.

Phakama Logistics was no longer registered in his name, but Muzi, whom he had appointed as Trustee to look into the family business"; paragraph 7 : *"On the other hand, Dr. Futhi who operates a private surgery also ventured into big business, by buying the Nandos franchise in the country and opened some outlets even in South Africa.";* and paragraph 8: *"The late business man is said to have been bothered by the sudden success of his sons, suspecting that they may have used the family finances to open their private interest".*

[41] In light of the foregoing, the clear implication was that Respondent also prospered by diverting family resources to his own private benefit. The learned trial Judge, in para [29] of the judgment, stated as follows:

> *"Equating [Muzi 's] situation to that of Plaintiff, who was the other son of Sarah Kunene in business, and who was apparently sharing the same ideals as Muzi Dlamini, had established a private surgery as well as bought or established Nandos franchises in Swaziland and South Africa. It was stated that he had established his said businesses in the same way as Muzi, which was borne out by the suspicions the late Phakama allegedly had about the two of them ..."*

[42] The said para [29] should be read in light of the preceding para [28] which opens thus: *"In that regard, a picture is painted of the said Muzi Dlamini proving to have been untrustworthy and dishonest to his father by lying to him,* **…."It** is somehow unfortunate that the paragraph [29] of the judgment seems to assume that Muzi had admitted or was found guilty of embezzling his family finances for his own benefit. Muzi was not party to these proceedings nor did he testify in the matter. The court's reasoning does not seem to have recognized this fact. The reference to 'equating' the brothers might have been proper if Muzi had confessed the alleged mischief or was convicted of it. In the result the statements stand defamatory of Respondent independently of any association with Muzi. In other words, the statements are defamatory not because of Muzi but in spite of him. It would be unreasonable of the reasonable reader to conclude that the Respondent misappropriated family finances in the same way as Muzi, unless of course, the reader

knew as a fact that Muzi did that, which is information not before this Court. In my view the opening words of paragraph 7 of the article 'On the other hand' should not be read as a bridge from paragraph 6 or a continuation of paragraph 6. This is so despite the fact that the article is to be read as a whole. I have no doubt that the Respondent did not see his position in the article from the point of view of his brother Muzi; hence no reference to him in his pleadings. In the circumstances, the statement equating Plaintiff and Muzi is meaningless.

[43] There was no verification that Muzi and Respondent used any family resources to establish their businesses. It must have been obvious to the Appellants that Loziga could not possibly have the full information necessary to support the published allegations, and that Phakama would also have needed an audit of his businesses to allege more than a mere suspicion. Thus, one way or the other, the statement involving Respondent in discreditable business deals is unsustainable, false and defamatory, whether *per se* or impliedly: I see no real difference.

[44] As pointed out above, Appellants denied "each and every allegation" and any imputation therefrom made by the Respondent about the article being defamatory of Respondent. They denied in particular that the publication was wrongful, reckless and intentional; that it was published with the sole intention of injuring the Respondent's reputation as such or as a medical doctor, business man and franchisee; and pleaded that they were not negligent or reckless in so publishing and were not aware of the falsity of any averment in the article. They also denied that the 'ordinary reasonable reader of the newspaper' would understand the *"statements in the article to mean that the Plaintiff (was) dishonest and untrustworthy"* as alleged by the Respondent and contended: "*... The ordinary reasonable reader of the articles in question would have understood the statements in the article to be an account by the Defendants' sources of what the late Themba Richard Dlamini related to them <u>about the Plaintiff: his mother and his brother Muzi"</u>*. [Emphasis added] Second Appellant (the writer of the article) had testified that as

the article was a sequel to the judgment of her ladyship Dlamini J and the Phakama broken family relations, the article was not as such about the Respondent as would require comment or verification from the Respondent before publication.

[45] That the article was not about the Respondent does not come out clearly in the pleadings *a quo*. One would have expected this to be at the forefront of the defence. That the article was not about the Respondent is stated in the heads of argument in para 7. Second Appellant, as DWI, did say in his oral evidence that the article was not about Respondent but was about *"the Plaintiff, his mother and his brother, Muzi"*. Unfortunately for the Appellants this kind of submission does not exclude or set apart the Respondent as not covered by the article. It is hard to understand how the Appellants understood their defence that the article was not about the Respondent (per se) but about him as one of Sarah's children, as mentioned in para 7. The defence, it would seem, was not well thought out. Respondent was directly affected by the defamation arising from the publication. Indeed, in the said paragraph 7 of the article, the phrase "On the other hand" meaning "from another point of view", includes rather than excludes the Respondent from the central thrust of the article. That position is further made explicit in the said paragraph 7 where it reads " .. ***.Dr. Fut/ti ... also*** *ventured into big businesses* .... " Thus, the argument that the article was not about Respondent to have required his comment before publication must fail. If that was not the clear intention of the Appellants, then they were negligent in failing to see that the article mentioned Respondent in a derogatory manner in the circumstances.

[46] It is said that the publication was *'merely relating the suspicions that the late businessman [Phakama] was said to have had with regards the Plaintiff'*. Regrettably, the lesson for the Appellants is 'never publish without verification a suspicion which may turn out to be false and or defamatory'. Publishing otherwise is assuming a risk which might turn out very expensive. But how does the reasonable reader react to a story or publication based on suspicion? Well, I guess, the law of defamation knows no suspicion, unless properly hedged. A publication is either true or false. That is, the publisher of a false

statement cannot be heard to say that the defamatory statement was an expression of mere suspicion; was never meant to be true or false, as the case may be. In other words, *in casu*, whether the Appellants knew the information to be false or not, they are liable in defamation if the statement, turning out to be false, was *negligently* published and cannot be said to have been reasonable and or was in the public interest or for public benefit or otherwise constitutionally protected. The authorities are clear on this point. See **Sankie Mthembi-Mahanyele** [19]where Lewis JA stated: *"[46] The press will thus not be held liable for the publication of defamatory material where it can be shown that it has been reasonable in publishing the material. Accordingly, the form of fault in defamation actions against the press is negligence rather than intention to harm".*

[47] Ultimately, the matter boils down to the legitimacy of the publication regardless whether it narrated the suspicion of Phakama or the unhappy allegations of Loziga (confirmed or not by Jiva) or Sarah and her children. If the article, at the very lowest, insinuated any misappropriation of Phakama's resources by the Respondent, *inter alias*, then the publication had to pass through a verification process. That is the long and short of it. That process did not happen because, as second Appellant testified, the publication did not concern the Respondent. Whether the publication was about Phakama and his desire to settle matters relating to his estate or about Sarah and her children not attending a family meeting convened by Phakama, "and **not just Dr. Futhi"** (as 2nd Appellant tried to clarify in his testimony - *Transcript,* at 28), is, in the circumstances, immaterial. What is material is that the article, as a matter of fact, expressly and specifically, mentions the Respondent by name and indirectly as one of Sarah's 'children' or Phakama's 'sons'. That, notwithstanding, the Appellants' claim not to have been aware that the article was also about the Respondent can only be the result of negligence or lack of attention. Since the Appellants were reckless and or negligent then the publication was not lawful. That they were not aware of any falsity in their article is of no respite to the Appellants.

---

[19] Sankie Mthembi-Mahanyele v Mail and Guardian Ltd and Another 2004 (6) SA 329 (SCA)

[48] There is evidence on record gleaned from the *transcript* and the article itself that the statements published were not confined to Phakama and or Muzi and the other family members but also referred to and concerned the Respondent. On pp 25-6 of the *transcript* DWI (2nd Appellant) responds to question asked: *"So that was one part, the other part, my lord, was the one where Dr. Futhi early in his practice had opened a clinic and ... was doing well; ...but he ventured also into other businesses like the Nandos franchise that he bought ....at the time their father wanted to have these meetings"*. In this excerpt, reading the article as a whole, the *'one part'* refers to Muzi and "the *other part"* refers to the Respondent. This is told by 2nd Appellant. As it were, both brothers were being implicated in the mismanagement or misappropriation of resources of the family busines·ses. We note, as already stated above, that Muzi has never been found guilty of misappropriating his father's resources. So, the Respondent was a part of the whole story whatever that story was. As such, Respondent had to be consulted in writing the article. The Appellants were like someone driving on a public road without due care and proper look out; they cannot escape liability for a collision occurring in the circumstances.

[49] Asked by the learned Judge below whether anybody could be faulted for having a 'suspicion' counsel for the Respondent stated that as far as his client was concerned the 'suspicion' was 'baseless'; that there was no evidence for suspecting the Respondent of any misappropriation of his father's resources for his own purposes; that the Respondent was never a shareholder or director or manager of the Phakama investments. There was therefore no basis for the article to place Muzi and the Respondent on the same footing, that is, under cover of the same suspicion. At the end, notwithstanding his persistent effort, DWI could not extricate himself from the clear statement that the article made allegations about the Respondent, allegations that needed to be verified if they were not to turn out false, baseless and defamatory of the Respondent as has happened. Accordingly, the suspicion and any associated allegations directed to Respondent were not reasonable in the

circumstances.

Strict liability rejected

[50] Burchell (at p. 1) tells us and Hefer JA in **Bogoshi** (at p. 1202G) reminds us that proof of the defamatory matter or liability for defamation imports two inferences or presumptions, namely, unlawfulness or wrongfulness objectively perceived and *animus iniuriandi* or subjective intention on the part of defendant to impair the plaintiffs reputation with knowledge of unlawfulness. The two elements are presumed on proof or admission of the defamatory publication. The defendant carries the burden of disproving *animus injuriandi* or the unlawfulness of the publication, in the circumstances, on a variety of defences generally open to a defendant in such cases. This then gives rise to an objective standard test.

[51] As Burchell says, liability of the mass media under the civil law is strict; that is, *animus injuriandi* is not a prerequisite. But the inference of unlawfulness may be rebutted. In support of their denial of liability, the Appellants argued that the article was not about the Respondent and in any case they were only reporting what they derived from their sources and they had no way of knowing that such information was false. Knowing or believing the article to be only concerned with the estate of the late Phakama, the Appellants were logically prevented from contacting the Respondent. It would then be only on the basis of strict liability that they would be held liable for any resultant defamation (without intention, without knowledge and without negligence). The Appellants submitted: In **Bogoshi** [20] the principle of strict liability in the case of media defendants had been rejected. In that case, it was accepted that the media should not be treated like ordinary members of the public by permitting them to rely on the absence of intention to injure, but that it would be appropriate to hold the media liable unless they were not negligent in the circumstances.

[20] National Media **Ltd** and Others v Bogoshi 1998 (4) SA 1196 (SCA)

[52] In the Court below, (per Eloff JP) **Bogoshi** had followed **Pakendorf** in holding the defendants strictly liable at common law. Hefer JA noted that in **Pakendorf** 'the Court took a policy decision' in relying on the principle of strict liability, and observed: *"In **Pakendorf** the Court recognized this form of liability in the law of defamation regardless of its fate in the country of birth, and of the criticism which it had already attracted. In England Prof Holdsworth, as long ago as 1941, claimed that strict liability was productive of undesirable litigation and that it encouraged purely speculative actions (. ..) ...* " (p 1206 I) And *"In **Pakendorf** the Court mentioned the inequity of permitting the owner of a newspaper to rely on the absence of animus injuriandi brought about by a mistake on the part of a reporter, but advanced no further reason for holding them strictly liable".* (p 1209 D).

[53] In the **Bogoshi** case, Refer JA made some critical remarks about the **Pakendorf** [21]case pointing out that

> "....The trial court followed the *obiter dicta* in **O'Malley,** but when the matter came on appeal to this Court, the Appellants' counsel argued that the *dicta* were wrong and that *animus injuriandi* in the form of consciously wrongful intent was required.,, This Court held the defendants liable for defamation in the absence of fault after mentioning the great injustice to the plaintiff if the defendants were to be permitted to rely on the absence of *animus injuriandi* because a mistake had been made. *The effect of the judgment was that, unlike ordinary members of the community* - and for that matter, also unlike distributors - *newspaper owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications* or *upon an erroneous belief in the lawfulness of the publication of defamatory material".* (Emphasis added). (at p. 1205F-H)

[21] Pakendorf en Andere v De Flamlngh 1982 (3) SA 146 (A)

[54] In the result the decision in **Pakendorf** was held to have been wrong and accordingly reversed in these terms (per Refer JA, for the Court):

> *"If we recognize, as we must, the democratic imperative that the common good* is *best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in* ***Pakendorf*** *Much has been written about the 'chilling' effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error. I say this despite the fact that some eminent writers such as Prof JC van der Walt .... hold a different view. Others like Prof*
>
> *Burchell ([22]) ... have criticized the decision in* ***Pakendorf*** *Strict liability has moreover been reiected by the Supreme Court of the United States of America (Getz v Robert Welch lnc ....323), the German Federal Constitutional Court (....), the European Court o{Human Rights (Lingens v Austria (1986) 8 EHRR 407), the courts in the Netherlands (....), the English Court o(Appeal, the High Court of Australia (.....), and the High Court of New Zealand (Lange* v. *Atkinson and Australia Consolidated Press NZ Ltd 1997 (2) NZLR 22(.....).* (My emphasis)
>
> *In my judgment, the decision,in* ***Pakendorf*** *must be overruled. 1 am, with respect, convinced that it was wrong",* (at 12100 - 1211C).

(See **Khumalo and Others v Holomisa** 2002 (5) SA 401 (CC) para [20] per O'Regan J)

[55] In **Bogoshi,** Refer JA stated that the solution which had been adopted in a number of other countries abroad which had abandoned the principle of strict liability was in his view *"entirely suitable and acceptable in South Africa"* and moved for the adoption of a similar solution to the effect that *"the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular*

[22] The Law of Defamation in South Africa (1985), 189.

facts in the particular way and at the particular time". The learned Justice of Appeal insisted, however, that *"the criterion of lawfulness must be the legal convictions in South Africa and not elsewhere".* And that in considering the reasonableness of the publication account must be taken of the nature, extent and tone of the allegations. (p 1212) See also **Argus Printing and Publishing Co. Ltd v Inkatha Freedom Party** 1992 (3) SA 579 (AD) at 593.

[56] In this appeal, the Appellants firstly argued that the court *a quo* erred in relying on strict liability instead of fault in the form of negligence to hold the newspaper liable for defamation: *"Put, differently, a newspaper in a defamation suit will be liable on proof that it published an article negligently".* The Appellants alleged that the court *a quo "reintroduced the rule on strict liability in the case of media defendants which had been discarded in most jurisdictions including a decision of this Honourable Court recognizing that the Plaintiff in a defamation must prove fault in the form of negligence for him to succeed in such action against a newspaper".* In this regard, the Appellants referred to para [32] of the judgment *a quo* as evidencing the strict liability approach. In para [32] the learned trial Judge stated:

> *"[32] By conveying such an ordinary and natural meaning the article was defamatory of the Plaintiff This in law means that for the Defendants to avoid liability, they have to establish or successfully raise defences recognized in law. This position was expressed in the following words ... [at paragraph 4[23] and paragraph 31[24]]:*
>
> > *'in terms of our law, where the words complained of are admitted and they are* per se *defamatory, the court is justified to find infavour of the Plaintiff However, the Defendants have an array of defences open to them. if they are successful, the Defendants would not be liable even though the words are per se defamatory'".*

[23] The Editor, The Times of Swaziland and Another v Albert Shabangu, Civil Case No. 30/2006
[24] African Echo (Pty) Ltd t/a Times of Swaziland and Others v lnkhosatana Gelane Simelane [2014] SZSC 83.

[57] In other words, the Appellants submitted that they should not be held liable on account of the words being defamatory of Respondent unless the Court finds fault in that the article was in the circumstances published negligently by the Appellants. The Appellants, however, denied that they were negligent in publishing the article containing *the words or statements* said to be defamatory. And, accordingly, contended that it is not enough that the words or statements be found to be defamatory: the Court must also find that Appellants were negligent to hold the newspaper liable for defamation. They asserted that *"the strict liability principle* is *inconsistent with the right to freedom of expression as enshrined in the Constitution in that it unduly limits the right to freedom of expression".* It is noted, for avoidance of doubt, that in such proceedings the burden of proof mainly rests on the defendant. It is therefore for the Appellants to show that they were not negligent in publishing the impugned article. In **Makhabane** [25] at para [44] it was submitted that it is now settled in South Africa that publication of false defamatory allegations of fact is not unlawful if upon a consideration of the facts of the case it is found to have been reasonable to publish the facts in the particular way and at the particular time. And since **Bogoshi** the media can escape liability for publishing false defamatory material if they acted reasonably in so doing.

[58] And Burchell writes: *"I have expressed open support for a negligence standardfor both the individual and the mass media, and drawn attention to the possible policy repercussions for press freedom of a no-fault liability for the media..... There are weighty policy considerations against holding the mass media strictly liable for defamatory matter published by them ..."*

[59] It may then safely be said that strict liability, that is, liability without fault, in defamation matters involving the mass media as defendants has been abandoned in South Africa. **Bogoshi** is authority for that view. Unless another position has since been taken, I

[25] The Weekend Observer (Pty) Ltd and Others v. slpho Makhabane [2018] SZSC 41 (23 October 2018)

see no reason why this jurisdiction should not follow suit. The so called *"Bogoshi* defence" was stated, without a clear position being taken, by Ota JA in the **Inkhosatana Gelane** case. At para [33] [26], her ladyship wrote:

> *"The* raison d'etre *of this defence is best summarized as follows: In an action for defamation against the media the defendant is entitled to raise* 'reasonable publication' *as a defence; the publication of defamatory statements will not be unlawful if upon a consideration of all the circumstances of the case, it* is *found to have been reasonable to publish the particular facts in a particular way and at a particular time; protection is only afforded to publication of material in which the public has an interest (i.e. which it is in the public interest to make known) as distinct from material which is interesting to the public; the form of fault in defamation actions against the media is thus negligence rather than intentional harm; - in appropriate cases where the publisher reasonably believes that the iriformation published is true, then the publication is not unlawful, political speech might depending upon the context be lawful, even where false, provided that its publication is reasonable.*
>
> *[34] It is imperative that I point out at this juncture, that the* ***Bogoshi*** *decision, just like all foreign decisions of South African courts, are merely of persuasive authority in the Kingdom. They are not binding on our courts. It needs also be emphasized that the* ***Bogoslti*** *decision was based on the uniquely liberal Constitution of South Africa, which exhibits some marked difference with our Constitution and should be approached with trepidation. The foregoing notwithstanding, since the reasonableness concept of the Bogosh! phenomenon, which commends itself to me, was relied upon by the court* a quo. *I am compelled to consider it in that regard".*

[26] African Echo (Pty) **Ltd** t/a Times of Swaziland and Others v lnkhosatana Gelane Simelane [2014] SZSC 83.

[60] Counsel for the Appellants strongly relied on the *Bogoshi defence* in challenging what he considered to be the strict liability approach by the court *a quo* to newspaper liability in the defamation. Counsel insisted that once the published words or statements are admitted or found to be defamatory, at the very least, negligence on the part of the defendant should also be found to hold the newspaper liable. The negligence operates as a form of fault. In other words, where the statements published were not attended by negligence the publication should not be held unlawful unless intention to injure is shown. Counsel for the Respondent, on the other hand, argued that the *'Bogoshi defence'* was rejected in the **Inkhosatana Gelane** case. In my view, Justice Ota only warned against casually treating the *Bogoshi defence* as binding, which, of course, like all foreign judgments, is not binding, but may be persuasive.

[61] With great respect, I do not see why we should approach the **Bogoshi** decision with 'trepidation' as Ota JA cautioned. If I understand Ota JA correctly, notwithstanding the *warning*,[27] I share with her Ladyship the attraction of the 'reasonableness concept of the *Bogoshi* phenomenon'. However, I do not see the **Bogoshi** judgment as necessarily a product of the 'uniquely liberal Constitution of South Africa'. I emphasize 'necessarily' because in coming to that judgment, Refer JA cited some pre-democratic South African judgments and academic opinions critical of the strict liability concept. In the above excerpt, declaring that **Pakendorfwas** wrongly decided, Refer JA also referred, *inter alia*, to.cases in the United States of America, the German Federal Constitutional Court, the Netherlands, the English Court of Appeal, European Court of Human Rights, High Court of Australia, and High Court of New Zealand. At home, Prof. Burchell, writing in 1985, had criticized the decision in **Pakendorf.** If Justice Ota was correct, it means that we cannot abandon strict liability until we amend the Constitution. I do not think so. At any rate I do not believe that our Constitution (2005) is so wanting in democratic ideals as to find the **Bogoshi** judgment hostile. Ifwe should reject the *Bogoshi* defence and adhere to the strict

[27] *Justice Ota's **warning** reminds me of o former expat Attorney General who, when returning from Cabinet or Parliament, would say 'Ay, the Swazi are very interesting: they see a lion behind every bush'.* We *would all laugh.*

liability approach in defamation actions affecting the media, we may as well forget democratic discourse in this country and resign ourselves to the potentially speculative and chilling effects of the concept. Hereinbefore, eminent Judges and jurists were cited on the desirability and usefulness of the press and mass media in democratic society. In **Inkatha Freedom Party** case (supra, p 593) E,M Grosskopf JA wrote that *"(f)oreign authorities can be very valuable in showing how problems have been dealt with elsewhere",* bearing in mind differential circumstances and that the basic criterion be the juridical convictions of the local jurisdiction. That is what Hefer JA has done in **Bogoshi.**

Reasonableness of conduct

[62] Lewis JA in **Mthembu-Mahanyele** [28]wrote:

> *"[44] In **National Media Ltd v Bogoshi** [supra] this court held that in an action against the press for defamation a defendant is entitled to raise 'reasonable publication' as a defence. The publication of defamatory statements will not be unlawful if 'upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time' 'Publication in the press of false defamatory statements of fact will be regarded as lawful if, in all the circumstances of the case, it is found to be reasonable; ... protection is only afforded to the publication of material in which the public has an interest (. . .) '. . . . . 'Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence"'.*

[63] Hefer JA in Bogoshi (p 1213G) had remarked:"My *conclusion on Pakendorf renders it necessary to consider the liability of members of the press on some other basis".* The alternative approach to strict liability in defamation cases involving media defendants had also been considered by some Commonwealth jurisdictions. What may be worth noting is that whether the person defamed is a public or private figure does not matter as far as the

[28] Mthembi-Mahanyele **v** Mail & Guardian and Another 2004 (6) SA 329 (SCA)

preferred defence fits the occasion. The English Court of Appeal, in **Reynolds TD v Times Newspapers Ltd and Others,**[29] (per Lord Bingham CJ) reviewed a number of cases and adopted a three-test approach and observed: *"It seems to us on the strength of this very powerful and consistent line of authority, that the ultimate question in each case is whether the occasion of the particular publication, in the light of its particular circumstances, contains the necessary ingredients to give rise to the privilege, always bearing in mind that the rule is an aspect of public policy as epitomized in Baron Parke's statement in* Toogood v Spyring *that the protection must be fairly warranted by any reasonable occasion or exigency'. . . . It follows that in our judgment, when applying the present English common law of qualified privilege, the following questions need to be answered in relation to any individual occasion:*

1. *Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material? (We call this* ***the duty test).***
2. *Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this* ***the interest test).***
3. *Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this* ***the circumstantial test).*** '"

[64] The learned Chief Justice continued:

"We make reference to 'status' bearing in mind the use of that expression in some more recent authorities to denote the degree to which iriformation on a matter of public concern may (because of its character and known provenance) command respect: see Perera v Peiris., *.at p. 21;* Webb v Times Publishing Co, Ltd *[1960} 2*

[29] [1998] 3 All ER 961 (CA), [1998] EWCA Civ. 1172 (8 July 1998)

QB 535, 568; Blackshaw v Lord *I ([1983] 2 All ER 311 (CA)) ... The higher the status of a report, the more likely it is to meet the circumstantial test. Conversely, unverified information from unidentified and unofficial sources may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publisher undertakes a heavy burden in showing that the publication is 'fairly warranted by any reasonable occasion or exigency'. In* Blackshaw v Lord *(at p. 327) Stephenson LJ gave some examples which put the requirement quite high:*

> *'There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information so reliable,* ***that the publication of suspicion is justified:*** *for example, where there is a danger to the public from a suspected terrorist or the distribution of contaminated food or drugs;'*
>
> ...."(Emphasis added)

[65] The strict liability approach employed in dealing with the defamatory statement in **Pakendorf** but rejected in **Bogoshi** gave rise to "reasonableness of conduct" as a standard test for media protection in defamation actions. Refer JA after pointing out that the law of d.efamation requires a balance to be struck between the right to unimpaired reputation on the one hand and the freedom of expression on the other, remarked that strict liability does not take account of these competing interests, bearing in mind that neither of these rival interests is more important than the other in most democratic societies. Refer JA, realising that the issue facing the Court was not endemic as it had also arisen elsewhere, looked at home in South Africa and abroad on how other jurisdictions had grappled with and got out of strict liability. The learned Justice of Appeal remarked that in **Pakendorf** *"the defamatory statement was the result of unreasonable conduct in obtaining the facts by incompetent Journalists",* and noted that in **Lange v Australian Broadcasting Corporation** (1997) 189 CLR 520, Brennan CJ of the High Court of Australia had dealt with the issue of qualified privilege and considered that for the media to be protected it

must show **'reasonableness of conduct'** which it then explained in terms of the *three stage tests* rehashed in **Reynolds TD** in the English Court of Appeal.

[66] According to Brennan CJ the Australian community *"has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. . . ."* This interest in public affairs allows for the defence of qualified privilege to a defendant in defamation proceedings. But a newspaper is required to prove reasonableness of publication. The High Court observed: *"Having regard to the interest that members of the Australian community have in receiving information on government and political matters that affect them,* ***the reputation of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct.*** *The protection of those reputations will be further enhanced by the requirement that* ***the defence will be defeated***

if the person defamed proves that the publication was actuated by common law malice .

. . ." The Chief Justice further stated:

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

[67] And whilst emphasizing that the criterion of unlawfulness must be South African informed, Hefer JA in **Bogoshi** stated that *"in considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations".* In this regard, to be considered, a greater latitude for political discussion, the tone of the article; the way or manner of presentation; the nature of the basis of the information; reliability of the source; steps taken to verify information. A high degree of circumspection to be expected of editors and editorial staff; and opportunity to respond. But *"ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Prof Visser is correct in saying (1982 THRHR 340) that a high degree of*

circumspection must be expected of editors and their editorial staff on account of the nature of their occupation".

[68] Hefer JA also considered that whilst a negligence based liability for newspapers was rejected in the **O'Malley** case that case did not overrule the principle that news *"distributors can escape liability if they are not negligent".* The learned Judge further remarked whether lack of knowledge of the wrongfulness ofa publication could be allowed as a defence where the lack of knowledge was due to negligence on the part of the defendant. Further drawing from the Australian case of **Lange** which by the requirement of a show of no negligence as an additional burden upon the media in order to escape liability for defamation, Hefer JA wrote: *"In that country, and in all the others mentioned earlier where strict liability is not accepted, the media are liable unless they were not negligent",* and says, in light of the *"credibility which the media enjoys amongst large sections of the community, such an additional burden is entirely reasonable".* In the result, the media like any other defendant cannot rely on absence of knowledge of unlawfulness due to negligence on their part. That is, lack of knowledge of unlawfulness must not be due to negligence on the part of defendant. It is observed that this approach seeks to address the issue of ignorance and mistake at the level of lawfulness, noting that in some instances

negligence may be determinative of the legality of the publication while absence of *animus injuriandi* as a defence will not be available to the defendant.

[69] At the outset of its report, the Faulks Committee (England, 1975) stated as follows: *"The law of defamation has two basic purposes: to enable the individual to protect his reputation and to preserve the right of free speech. These two purposes necessarily conflict. The law of defamation is sound if it preserves a balance between them".* This statement reflects what has been termed the 'proper balance'.[30] In the case of **Silkin v Beaverbrook Newspapers Limited** [31] Diplock, J. (as he then was), directed the Jury on the law as follows:

> *"Let us look a little more closely at the way in which the law balances the rights of public men, on the one hand, and the rights of the public on the other in matters of freedom of speech. In the first place, every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking* ***men".***

[70] Lord Bingham C.J., in **Reynolds TD,** continued (at pp 34-35): [32]

> *"We do not for an instant doubt that the common convenience and welfare of a modern plural democracy ....are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression 'public life' activities such as the conduct of government and political life, elections ....and public administration, but we use the expression more widely than that, to embrace*

---

[30] See **Reynolds TD v Times Newspapers Ltd** [1998] 3 All ER 961 (CA) (at p27)

[31] [1958] I WLR 743, 746 (fair comment).

[32] The bracketed pages are not the correct **Law Reports** pages.

matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, ***but excluding matters which are personal and private, such that there is no public interest in their disclosure.*** *Recognition that the common convenience and welfare of society are best served in this way* is *a modern democratic imperative which the law must accept... As* ***it*** is *the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognized as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large".* (My emphasis)

[71] After referring to the duty test and interest test, the Lord Chief Justice further stated, in **Reynolds TD:**

"It would, however, in our judgment run counter to English authority and do nothing to promote the common convenience of our society to discard the circumstantial test. Assuming in each case that a statement is *defamatory and factually false although honestly believed to be true, it is one thing to publish a statement taken from a government press release, or the report of a public company chairman, or the speech of a university vice-chancellor, and quite another to publish a statement of a political opponent, or a business competitor or a disgruntled employee;* ***it is one thing to publish a statement which the person defamed has been given an opportunity to rebut, and quite another to publish a statement without any such recourse to the person defamed where such recourse was possible; it is one thing to publish a statement which has been so far as possible checked, and quite another to publish it without such verification as was possible and as the significance of the statement called for.*** *While those who engage in public life must expect and accept that their public conduct will be the subject of close scrutiny and robust criticism, they should not in our view be taken to expect or accept that their conduct should be the subject of false and defamatory statements of fact unless the circumstances of the publication are such as to make it*

proper, in the public interest, to afford the publisher immunity from liability in the absence of malice". (My emphasis)

[72] In paragraph 29 of their heads of argument, the Appellants argue: "The court *a quo* failed to properly apply the reasonableness defence established in **Bogoshi",** in that the trial Judge *"emphasized aspects of the factors to be considered in determining whether the publication was reasonable and ignored some equally relevant considerations...*"and by so doing misdirected himself. On the defence of the 'reasonableness of conduct', Hefer JA in **Bogoshi** stated that *"the publication in the press of false defamatory statements of fact will be regarded as lawful if, in all the circumstances of the case, it is found to be reasonable"* and that crucially *"protection is only afforded to the publication of material in which the public has an interest ..."* Drawing from the **Lange** case, what Hefer JA was saying is that reasonableness of the publication is largely circumstantial, it depends on the prevailing conditions and particulars in which it was made. Where the defamatory publication proves to be reasonable it is then clothed with lawfulness which protects the defendant from being liable in damages. Put differently *"false defamatory allegations of fact will not be regarded as unlawful if upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish ..."* But proven reasonableness alone is not sufficient security and the protection will not avail if the public has no interest in the material published or the publication is actuated by malice or any form or manner of personal or private spite or prejudice. I have no doubt in my mind that in the present case, there was no public interest entitling the Appellants to make the publication complained of. The third test also fails in light of the 'nature, status and source of the material and the circumstances of the publication'. Accordingly, any defence based on public interest under the common law must fail. The publication cannot be justified and protected under the defence of reasonableness.

[73] For the Appellants it was submitted in their heads that the learned Judge *a quo 'failed to consider all the circumstances of the case in determining whether the publication*

was objectively reasonable and therefore not unlawful". In this judgment, I have endeavoured to consider all the circumstances of the case but have found nothing objectively reasonable to render the publication not unlawful. Under paragraph 33 of their heads of argument the Appellants have listed eight things they allege the Judge *a quo* overlooked and failed to consider regarding the reasonableness of the publication; but considering the list I still could not come to the conclusion that it was reasonable to publish the article in all the circumstances and in the manner it was presented, The criteria for assessing reasonableness in publishing defamatory material are set out in **Bogoshi** and **Mthembi-Mahanyele,** being, *inter alia,* the interest of the public being informed, nature of the information published, reliability of the source, steps taken to verify the information, opportunity to respond, tone and manner of presentation of the publication.

[74] Elsewhere in their written heads, the Appellants refer to the publication as having been an *"account by a reliable source"* and even state in paragraph 24: *"The article was reported in such a way that it detailed the source's account of what Phakama told her".* We may then reasonably infer that 'her' refers to Loziga, Phakama's sister. But it is not for the Court to make such inference: it was for Appellants to disclose their source of information. Otherwise the Court is not in a position to know if the source is reliable or not. Under the circumstantial test there is reference to the 'nature, status and source' of the material published. It is said that where defamatory statements are widely published on the information of a person who is of unidentified and unofficial source the publisher undertakes a heavy burden in showing that the publication is 'fairly warranted by any reasonable occasion or exigency'. As it is, one is not in a position to determine if the source is of a high or low status. Thus even assuming the matter was of public interest, the Appellants in my view would not pass the circumstantial test. In the present matter it seems to me that the reliability or otherwise of the source is of no assistance to the Appellants.

[75] On the other hand, if the Appellants were arguing that the source of their information was so reliable that publication of suspicion or speculation was justified, then the

Appellants had to show reasonable occasion or exigency. Even then the publication of suspicion or speculation without verification concerns urgent matters in which the public has an interest. It is clear from the **Lange** case that the publication of 'suspicion' is exceptional and would have to be justified by reference to the exigency of the situation. Otherwise even suspicion ordinarily would require verification since it speaks to some practical life situation. The Appellants have stated that the reason for not verifying the information is that the publication was not about the Respondent. This amounts to saying that they were not aware of the injury caused to Respondent. In this the Appellants were plainly reckless. To avoid liability the Appellants had to show that they were not negligent in making the publication complained of in this matter. This they were unable to do.

[76] 2nd Appellant, the editor of the newspaper, in his oral evidence told the court below [33] that *"The story was published on the 9th, it was the judgment by Judge Dlamini. 'Judge Mumcy cancels Phakama 's 3 marriages'. So that story my lord that appeared on the 23rd is actually a follow-up to that judgment.* " Now if the publication was a follow-up to the High Court judgment nullifying Phakama's marriage to his other three wives, one would have thought the publication would deal with the reasons for the nullification and not pry into and expose Phakama's private family life. On the contrary, the publication only touches on the judgment and hardly if at all deals with the reasons behind the decision of the court but mainly delves into gossipy issues around Phakama's family and his estate. That was not called for and like the Judge *a quo,* I cannot see any public interest in the publication as presented. The story of Sarah and her children running away from a meeting with Phakama is ofno public interest. What right would the public have in knowing about such incident whether true or not? What right would the public have in knowing about what Phakama thought or suspected about his children? None of Phakama's children was convicted of anything in any court of law. Like all ofus, Phakama's children are entitled to be presumed innocent until this veil of presumption is lifted by a court of law.

[33] Transcript, pages 10 and 11

[77] The Appellants admit not having approached the Respondent for his side of the story because as far as they were concerned the publication did not concern the Respondent. By this admission it follows that Respondent never got the opportunity to comment or have his comments, if any, published, with appropriate apology, if any, by the Appellants. The question that immediately arises is whether the failure to consult Respondent for his comments gives rise to a series of defaults on the part of the Appellants having a possible bearing on the award. In my opinion, what all this amounts to is whether the Appellants can ever be forgiven for making the initial principal mistake of thinking that the publication did not concern the Respondent even though mentioned in it. The answer depends on whether the mistake was reasonable or not. Generally speaking, the mistake would be unforgivable if it was a product of unreasonableness. It was for the Appellants to show the reasonableness of their mistake. In this matter, this was not shown.

Whither public interest?

[78] The Appellants further argued that the Court *a quo* erred in finding that the *"defendants could not show [the] court that the publication was a matter of public interest"*. I agree with the learned Judge in this regard. Appellants have merely alleged but have not supported their allegation that the publication was a matter of public interest. I have in various ways laboured to show that the publication could not possibly be a matter of public interest. I have explained that the heated debates did not escalate the family affair to a public affair. Even from the point of view of the Appellants, if the publication was about Phakama's suspicion that his children were mismanaging the family businesses or the Court "Ruling on Phakama's 4 wives", that did not transform the otherwise private matter to a matter in which the public had a legitimate interest. In what specific way or ways the publication was a matter of public interest is not explained. That Phakama was a public figure does not without more render his estate a matter of public interest. In this country many an estate are contested. The article reflects gossipy issues about the family in which the public has no legitimate concern. The trial Judge was correct in his finding.

[79] The Appellants also submitted as follows: *"The statements were published in the heat of a debate about a High Court judgment nullifying Phakama 's marriage to his three other wives and the consequences of the judgment on his estate".* Reference is then made to the newspaper articles on pages 11 and 12 of the record. That the trial Judge misdirected himself in finding that the Appellant could not show that the publication was a matter of public interest and not just a matter interesting to the public and deserving no protection under the law. That in the failure to find the public interest the decision of the court *a quo* may be *"described in a nutshell as regressive, anti-free speech and contrary to the values enshrined in the Constitution".* I am not persuaded. And that because Phakama was a well known businessman, a former Senator and a public figure then: *"the dispute over his estate was a matter of public interest"* and *"there was a clear urgency in publishing the statements in question as they related to a matter that was a subject of public debate".* One notes in passing that it is not explained how the public debate gave rise to a clear urgency to publish the statements. How was the public affected? What was going to be lost by waiting and checking on the veracity of what was debated? The examples of what may constitute urgency given by Stephenson LJ referred to in the case of **Reynolds TD** are not exhaustive but are worth noting and learning from them. I do not think that the purported urgency in this matter falls into any of the examples mentioned.by Stephenson LJ.

[80] I have already said that the publication of suspicion or speculation must be justified. Appellants would seem to be arguing that the 'heat of the debate' was sufficient justification for the publication. If I am correct in this view, then I do not agree with the Appellants. Any 'heat' that may have been generated by the judgment or the debate remained private and personal to the family and estate of Phakama. The public had no apparent interest in this; the alleged public debate alone is not enough of the requisite interests. Where the publishees have no interest the publisher cannot have a duty to publish. As Lord Hobhouse said in **Reynolds:** *"The publisher must show that the publication was in the public interest and he does not do this by merely showing that the subject matter was of public interest.* " And Stephenson LJ concurs: *"There must be a duty to publish to the*

public at large and an interest in the public at large to receive the publication; and a section of the public is not enough The subject matter must be of public interest; its publication must be in the public interest. "

[81] Looking at the said pages 11 and 12 in which the article as a whole is contained I cannot find fault will the finding of the learned Judge *a quo.* The article as a whole, that is, the two main headlines and the various subheadings, is such a jumble of topics from different angles such that the real purpose of the article is hard to establish. Even accepting that the wrangle derives from the judgment ofDlamini J, the controversy rages at a family level. Nothing in the article draws any general conclusions from the judgment which could be instructive to the Swati generality. Even the submissions in the heads of argument as shown above there is nothing set out to advance the bare allegation that the publication was a matter of public interest in which the Appellants had a duty to report. Reading the article as a whole the ordinary reasonable reader's attention would invariably be drawn to the manifestly negative fa9ade of the publication from which nothing seriously positive emerges beneficial to the public. The alleged debate over the estate that may have followed from the judgment may have been an expression of something merely interesting but of no real benefit to the public. Not all public debates have a public interest.as the defence of qualified privilege requires. The **Bogoshi, Lange** and **Reynolds** cases refer.

[82] That Phakama was a well-known businessman, a former senator and public figure does not mean that he had no private life - an aspect or corner of his life into which the public had no right to pry. Even high ranking public personages do have a private life; their reputations ought not to be assailed without good and sufficient cause. Assuming, for a moment, that Phakama did not have a private life, it would not mean all of his family members also did not have private lives. If the publication was about Phakama's family estate or for that matter about the Respondent's mother and her children, the publication had to be very circumspect when it came to mentioning other family members who prided their privacy and reputation. Not to recognize the separate individuality of the other family

members was not reasonable in the circumstances. It being a matter allegedly already in the public domain I can see no exigency to justify the publication with all its short-comings in the manner it was made. There is nothing to absolve the Appellants from the complaint by the Respondent. Lord Nicholls, in **Reynolds** [34], says: *"Public interest has never been defined, but in* London Artists Ltd v Littler *[1969] 2 QB 375, 391, Lord Denning MR rightly said that it is not to be confined within narrow limits. He continued: 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make comment".*

[83] In para 5.3.1 the Defendants say the impugned statements in the article was information protected by section 24 (I) and (2) of the Constitution in that the statements were published *"in discharge of their duty to inform the public about newsworthy events and matters of public interest"* and *"the public had a corresponding right to receive the information"*. But the factual imputation involved was found to be false. After saying that the citizen was at liberty to comment and take part in free discussion, Lord Hobhouse noted that it was of fundamental importance to a free society that this liberty be recognized by the law, and, in words quite apposite, continued:

> *"The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of the liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being*

[34] Reynolds v Times Newspapers Ltd and Others [1999) 4 All ER 609 (HL)

misinformed. These are general propositions going far beyond the mere protection of reputations. "

Whether Appellants protected by Section 24?

[84] The Appellants also contended that the decision of the trial Judge that a case for public interest had not been made out was *"regressive, antijree speech and contrary to the values enshrined in the Constitution.* " It will be recalled that the main ground of appeal was that the decision of the High Court had proceeded on the basis of strict liability which had been rejected in **Bogoshi.** The strict liability approach hits harder on free speech than normal. If, indeed, the decision of the trial Judge ignored **Bogoshi** then that decision may fairly be characterized as regressive, retreating to **pre-Bogoshi.** But I have rejected this understanding of the judgment. The Appellants did not say much either in their written heads or their argument in Court, as to what exactly they meant by "values enshrined in the Constitution." Be that as it may, and whatever those values referred to may be, I am almost certain in my mind that none was adversely affected by the judgment of the court *a quo.*

[85] The published statements having been found to be defamatory, we now tum to consider whether the Appellants are protected from liability by reason of the *"right to freedom of expression as provided in section 24 of the Constitution".* All being equal, the issue is whether the individual's freedom of expression will trump another individual's integrity of reputation. The Appellants assert: *"Section 24 guarantees the right to freedom of expression which includes the freedom to hold opinions without interference, the freedom to receive ideas and information without interference and the freedom to communicate ideas and information without interference . . . . .* "; and they *"submit that on the facts of the present case, considering all the relevant circumstances, the right to freedom of expression should be upheld and the Respondent's claim be dismissed on the grounds that it was not unlawful to publish the statements".*

[86] For the Respondent it was submitted that the Appellant's purported reliance on section 24 was 'devoid of merit' because *"there is no general constitutional right that allows one to tarnish the reputations of others and section 24 cannot be read to afford such right".* Respondent further submitted *" .....the right to freedom of expression is not absolute nor is it perceived to be more important than the other rights protected by the Bill of Rights ..., (it) must be balanced with the other rights enshrined by the Constitution including section 18 which provides that the dignity of every person* is *inviolable .....(and) the appropriate balance must be struck between the right to freedom of expression on the one hand and the value of human dignity on the other ....* " **Khumalo v Holomisa** [35] was referred. On this point, the High Court stated the position as follows and I agree:

> *"[55J I therefore agree with what was stated by the Plaintiff in her (sic) replication that section 24 of the Constitution does not entitle the press to publish false, unjustifiable, unreasonable and patently false iriformation particularly where such violates the rights of others as that is the effect of publishing a defamatory statement.* "

[87] Section 24 guarantees freedom of expression· and opinion and says that a person shall not be hindered in the enjoyment of the freedom provided except with his own free consent. This right of freedom of expression extends to "the press and other media". Clearly this right is not absolute and subsection (3) reads: *"Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision (a) ... (b) that is reasonably required for the purpose of (i) protecting the reputations, rights and freedoms of other persons, ..(ii) ....(iii)..., (iv)....; (c)...., except so far as that provision or, as the case may be, the thing done under the authority of that law, is shown not to be reasonably justifiable in a democratic society".* The protection of the person's reputation is not at odds

[35] Khumalo & Others v Holomisa 2002 (5) SA 401 (CC) para [24]

with democratic principles, Clearly then section 24 (3) limits the guaranteed freedom of expression and opinion to the extent that the exercise or enjoyment of that freedom does not adversely affect the reputations and rights and freedoms of other persons, unless the limitation is shown, by the person claiming the right to enjoy the free expression, not to be reasonably justifiable in a democratic society. *In casu,* it is for the Appellants to show that the limitation stopping them from exercising their freedom of expression, is not reasonably justifiable in a democratic society. The Appellants have not met this requirement. The burden is upon Appellants because what they want to do, that is, publish defamatory material, would contravene or adversely affect the reputation of the Respondent. In the result, section 24 provides no relief to the Appellants.

[88] In any consideration of Section 18 of the Constitution, it should be remembered that Burchell says reputation is distinct from dignity or self-esteem. Section!8 protects the dignity of every person, which dignity is declared 'inviolable'. That protection prohibits the subjection of any person to, *inter alia,* degrading treatment. That treatment is what Respondent is in essence complaining about. He alleges that the defamatory publication has violated the integrity of his honour and respect. What is to be noted is that, unlike

, section 24, section 18 has no derogation or limitation. In other word the protection of the person's dignity under section 18 is technically absolute. Section 38 of the Constitution bears witness to the sanctity of section 18. It is the inevitable holding therefore that any exercise of a right in terms of section 24 cannot override the protection provided under section 18. Rare would be the situation where section 24 would trump section 18. In South Africa the 'right to dignity' has been described as a 'cornerstone' of their Constitution.[36] K.C.Wheare,[37] writes:

> *"ff a Constitution declares that it guarantees to citizens, say freedom of speech, ji-eedom of the press, ji-eedom of assembly, ji·eedom of street processions and demonstrations, and inviolability of the person and of the home, surely it guarantees*

[36] **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) para [28]
[37] **Modern Constitutions** (1966) pp 38-39

licence. There must, it would seem, be some restrictions on these rights. Most Constitutions which contain declarations of rights do recognize that some qualifications must be attached to their exercise".

[89] In para [41] this Court in **Makhabane** referred to, *inter alia*, para [84] of the judgment a quo which in part reads: "... *the defence under section 24 cannot avail the* Observer. *Makhabane 's dignity is to be 'inviolable' as per section 18(1) of our Constitution."* Again in para [34] of **Makhabane** this Court accepted the Respondent's contention that the judgment of the court *a quo* was *"unassailable in so far as it struck the right balance between freedom of expression and the right to dignity which incorporates reputation as an important component".* The apparent paradox of balancing freedom of expression on the one hand and right to dignity on the other was not then appreciated. To the extent that the Respondent has in this case also referred to section 18 I think something needs be said about sections 18 and 24 in defamation actions.

[90] Speaking generally, a person's reputation may be violated but his dignity is described by the Constitution as 'inviolable', that is, "never to be infringed or dishonoured" (per *Concise Oxford English Dictionary,* 12th ed). What this means is that contrasting or balancing free speech and dignity is balancing values of a dissimilar nature. The two can never balance. Section 24 will never win against section 18. Burchell (p. 19) further says that"... *reputation may be won or lost, deserved or undeserved, but character (dignity) is an inherent attribute of all persons"* and that *"publication is not necessary for an iryury to dignity, as opposed to reputation",* (p. 73). In my view it is unfair and wrong to seek to rely on section 18 in defamation actions *simpliciter.* The battle should be fought within the four corners of section 24. Breach of section 18 is without contest: it is not or rather ought not be debatable. The protection provided by section 24 is not absolute while that by section 18 is. Reference is made to section 38 of the Constitution which provides no derogation to section 18. Dignity is inestimable; it is a person's very humanity; it cannot be objectively evaluated by reference to the ordinary reasonable person's estimation.

[91] In **Argus Printing & Publishing Co.** Corbett CJ touches on this issue where he says: *"The firmly entrenched principle of Roman Dutch law is that* every person *is entitled, as a primordial right, to be protected against unlawful attacks upon his reputation and to legal relief when such an attack has taken place.* " The learned Judge then refers to Melius de Villiers [38] where the learned author wrote:

> *"The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of iryuries are those which every man has, as a matter of natural right, in a possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character or social worth to which he is entitled amongst his fellow-men: by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, sub;ected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.*
>
> *"The rights here referred to are absolute or primordial rights; they are not created by, nor dependent for their being upon any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion".*

Even though the exposition of these rights is somewhat tangled it is clear that there is reputation and dignity. The dividing line may not be very clear in some instances, but it is there; it's only that it was not the concern of de Villiers. (My emphasis)

[92] Once reference to dignity or section 18 is excluded in defamation actions, there remains section 24 to deal with in the battle between freedom of expression [s 24(1) and (2)] and reputation [s 24(3) (b) (i)]. It is trite that free speech and reputation are equally protected and are both not absolute under the Constitution. This then imports the balancing exercise where the two values collide as they often do in any democratic society. What may be said to be weighed are the mitigating and aggravating factors on both sides of the scale. In my view, the process is circumstantial: the issue is, given the prevailing conditions

[38] The Roman and Roman-Dutch Law of Injuries (1899) at 24

in which the defamation occurred, what are the mitigating or aggravating factors. The answer to this inquiry provides the proper balance necessary to decide whether freedom of expression or reputation will prevail in the particular case. The balancing process may be considered under reasonableness, justification or privilege.

Conclusion

[93] The defence,justification or explanation for not consulting Respondent or verifying the truthfulness or otherwise of the part of the article referring to Respondent or not acknowledging in the article the legitimate sources of Respondent's finances for his businesses is that the focus and concern of the article was not Respondent. In the same way, the proceedings were not about whether Phakama lost any money from his businesses. For even if he had lost any money that would not necessarily mean that Respondent had acquired it for his own purposes. I would accept the explanation given by second appellant for not checking on the veracity of the statements about the Respondent. But that is not the end of the issue. The article did in fact impute ill of the Respondent. Even if the article_ as a whole was not about Respondent, the fact that an aspect of the article did touch or mention Respondent should have been a wake-up call for Appellants to consult so as to avert any unintended defamatory imputations to the Respondent. Even if the article as a whole was not about the Respondent, due care and attention should have informed the Appellants to check their sources of information affecting the Respondent. In my view, the Appellants failed to exercise due care in the circumstances and cannot say that they were not negligent. The article may well have focused elsewhere but the Appellants were negligent in not realizing that somehow it affected the Respondent.

[94] It does not mean that because the article was not mainly concerned about the Respondent, the Respondent became totally submerged in the article and lost his individuality. In law that could not happen without his consent. If the Appellants were initially not aware of the defamatory nature of the publication, they could still have tendered due apology after publication on being alerted to that effect. It appears, however,

that that opportunity did not arise. Respondent testified that had Appellants contacted him before publication he would have"... *tried to explain that the information they had was wrong and untruthful (and) would also try to explain (his) side of the story"*, and *"by alerting them that I never took my father's money for my private businesses"*. [39] Further, it also appears that after publication the Respondent did not demand withdrawal and apology from Appellants. An apology after the event would not undo the defamation, but might have softened the sting and ultimately mitigate the damages.

[95] I have considered most if not all of the defences and justifications raised by the Appellants but have found none capable of absolving the Appellants from liability in the circumstances of the case. The publication, in the circumstances, was defamatory of the Respondent; that is how the ordinary reasonable reader would understand the statements; that the article imputes dishonesty to the Respondent. Holding the media liable is not to deny their importance and role in a democratic or aspiring democratic society. It is only to encourage the media to observe the due limitations in the execution of their mandate. Any award made should not be construed as a punishment but a recognition that the injured party ought to be compensated. Some may say the media are a necessary evil in modern society, but I only reiterate what O'Regan says in **Khumalo and Others v Holomisa** that in a democratic society the mass media play a role of undeniable importance, but they cannot be allowed to be a law unto themselves. This is a statement well and broadly supported in many Commonwealth jurisdictions as shown above.

[96] In my judgment, the liability of the Appellants is anchored on their negligent or unintentional publication of the defamatory material injuring Respondent. This would necessarily exclude express malice, or *animus injuriandi*. Being negligent, the Appellants acted unreasonably and accordingly unlawfully in the circumstances. We have seen that media defendants cannot properly rely on absence of malice when they have in fact injured

[39] See Transcript at 251

a defendant. Having come to the conclusion that the statements complained of were defamatory *per se*, the learned Judge *a quo* rounded off as follows, to which I agree:

> *"[31] I must say I agree with the conclusion drawn by the Plaintiff on what the words complained of meant about him, which is that he swindled or misappropriated or helped himself of monies from his father's businesses to establish his own businesses; that he was untrustworthy and that he had as a result avoided meeting his father so that he could not be confronted by him for his alleged unbecoming conduct. If this was not the direct meaning of the words, it is then their implied meaning which still conveys a natural meaning different from an innuendo as was stated in the* Argus Printing & Publishing Company Ltd *case refer.red to in paragraph 22 (sic) above".*

[97] In dismissing the Appellants' defences which he summarized in para [33], the trial Judge went on to state in para [35], *inter alia*, that the *"publication had to be reasonable, which means that it could not lawfully be done without the Defendants firstly having taken reasonable steps to verify the truthfulness or authenticity or accuracy of the allegations or statements complained of and secondly without the Plaintiff having been given an opportunity to respond to the allegations against him so that his side could be heard for balanced reporting and thirdly without showing that there was a reasonable basis for them to have believed that the statements were truthful and correct".* The learned Judge concluded at para [36] that the *"publication therefore showed recklessness . . . "*

[98] I agree with what the learned Judge says above except to note that the three levels of verification need not all be satisfied in the same proceeding. One level should suffice. That is, once the first level or tier of verification is done i.e. the truthfulness or authenticity or accuracy is satisfied the second and third tiers need not be undertaken. But if the first tier has not been met then the second or third has to be met; and if the second level has also not been satisfied then the third must be satisfied if reasonableness of the publication is to

be shown. *In casu,* none of the three tiers of verification was undertaken. Since these levels of verification are in the alternative failure to perform all does not necessarily aggravate the unreasonableness of the conduct.

[99] The Appellants argued that the publication was not about the Respondent as such so that his mention in the article was only incidental. I agree that it would be contradictory as a matter of conscious action for the Appellants to approach the Respondent for comment when the Appellants were of the view that the matter did not concern the Respondent. Accordingly the failure to consult, take reasonable steps to verify the truth or accuracy or give opportunity to plaintiff to respond constitutes one offence as part of the original sin of overlooking the fact that the Respondent was in fact mentioned in a derogatory sense in the publication and therefore had to be consulted or the information reasonably verified. In the circumstances this oversight in law equates to negligence on the part of the Appellants; the negligence in tum renders the act unreasonable which makes the act unlawful. Accordingly to avoid liability, Appellants had to show that the publication was not negligent or not unreasonable or not unlawful. This they have averred but the evidence in all the circumstances of the case does not show it. Being negligent the Appellants acted unlawfully and are legally liable for the damage caused. In this regard I agree with Jhe learned Judge *a quo* who wrote *"[36] ..... This failure to secure a response from the Plaintiff before publication also indicates that the Defendants' did not act reasonably in publishing the article complained of".* In thinking that the publication did not concern the Respondent the Appellants erred and made a mistake for which they cannot be exonerated in law.

[100] In **Media 24 Ltd** [40]we are told of the readership of the newspaper involved, that is,. Daily Sun; that its *"targeted readers are what was described in the evidence at the trial as the 'blue overall person', this being a reference to persons in the lowest rung of the social*

[40] **Media 24 Limited t/a Dally Sun and Another v Bekker Du Plessis** [2017] ZASCA 33 at [6]

stratum, i.e. someone who is neither highly educated nor well informed and critical". We are also told that the Daily Sun *"enjoys a country-wide circulation".* In the present matter we are only told that the *Observer on Saturday,* in which the article(s) were published, *"is widely distributed and is also read both in Swaziland and internationally on the internet by members of the public".* What in estimate numbers is meant by 'widely read' is hard to tell. Does it matter whether those who read the newspaper know or do not know the Respondent? How widely known in the country and internationally is the Respondent? It is also stated in the judgment that Respondent testified to having been called by "several people" who confirmed that they understood the article to mean what he said it meant; these people "included the auditor of his business, Mr. Kobla Quashie". Even if Mr. Quashie had testified, his evidence might not have meant much? Is Mr. Quashie representative of the readership of the *Observer on Saturday?* Or, is it that the readership of the newspaper is 'highly educated and sophisticated' and is not the 'blue overall' type of readership? The evidence on record is not sufficient to help guide the Court assess the extent of the damage. The Court is then left with its normal discretion which is what the court below exercised. To this end, EM Grosskopf JA says: *"Finally, if all the defences fail, the Court would award damages. Our Courts have not been generous in their awards of* solatia. *An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches. This is a further factor which reduces the inhibiting effect of the law of defamation on freedom of expression".* [41]

The award

[101] The court *a quo* described Mr. Quashie as a 'client' of the Respondent. In what sense Mr. Quashie is a client it is not explained. In my view, Mr. Quashie as the auditor is not such a client as likely to reconsider his relationship with the Respondent as a result of the publication. Respondent's business is unlikely to lose much if anything by losing clients like the auditor. In my view, the publication did not have any perceptible impact on the

[41] Argus Printing & Publishing Co, Ltd v Inkatha Freedom Party 1992 (3) SA 579 (AD) 590E - F

profession or business of the Respondent. Only his reputation was likely to be affected. Robertson also states: *"There is nothing objectionable in the principle that a person's reputation should be protected from falsehood. The libel law makes an entirely reasonable demand that the media should be restrained from lying or making reckless allegations with impunity,"* (at p. 317).

[102] In the case of **Alpheous Nxumalo** [42] I had occasion to write:

> *"[43J As it is in the nature of general damages, the defendant is somehow punished for the defamatory statement. In casu, the Respondents, it may fairly be 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***
>
> *[43], 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*** *[44] paras [JO] 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 affecting anyone' and that the* 'teach them a lesson' *approach to defamation awards is wrong. As was stated by Hattingh Jin* ***Esselen v Argus Printing*** & ***Publishing:*** *[45] '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 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*

[42] **Alpheous Nxumalo v The Observer on Saturday and Others** [2022] SZSC 50 (17 February 2022)

[43] **Supra**

[44] **Charles Mogale and Others v Ephraim Selma Civ Case No. 575 /04 (SCA) (14 November 2005)**

[45] **Esselen v Argus Printing and Publishing Co. Ltd and Others** 1992 (3) SA 264 (T) at 271F-T

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"'.*

[103] There is a tendency to compare awards in defamation cases. The usefulness of this tendency leaves a lot to be desired having regard to the diverse circumstances in which defamation occurs. The issue may be stated thus: What factors or elements should compare and what not? Given the Kelsey Stuarts list of (a) to (t) there will always be differences of opinion as to the proper use of such a list. Further, how are 'punitive' damages to be reconciled with what had been said to be the purpose of an award, namely, 'to vindicate the reputation of the plaintiff and 'to compensate not to punish'? But, ordinarily, it seems that the punitive aspect is an element added to, and over and above, the award representing the vindication and compensation of the plaintiff. A reference to 'punitive damages' simply confuses the award rendering it partly a vindication and compensation and partly a punishment. The question may well be asked whether 'substantial damages' is another term for 'punitive damages'. I should point out that Respondent has been well advised to ask for substantial damages instead of punitive damages. It is only in paragraph 61 of his heads of argument that the Respondent refers to his claim as "punitive damages in the sum of at least E450, 000.00".

[104] In **Alpheous Nxumalo,** supra, we also said as follows:

"[59] In para [48] of the ***Van der Berg*** *case ([46]) Smalberger JA stated:*

'We were referred to a number of cases reported over a period of years which were claimed to be cpmparable or roughly comparable to the present ... Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two

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

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 has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings. '"

[105] The court *a quo* remarked that the article was "published widely within the borders of Swaziland as well as internationally, given that the newspaper is now available on internet". It noted that the imputation was serious and unjustifiable. And there was no retraction by the Appellants. *"This means that (the Respondent) deserves to be compeµsated with damages that reflect this, which should be more than the usual damages payable in matters of defamation"* said the learned Judge. Notwithstanding all the noted shortcomings associated with the publication of the article(s) and the injury caused to Respondent, the Court *a quo* quite correctly observed, with conviction, that ,the publication of the defamatory statements was a sign of recklessness and was not a deliberate or calculated injury to the Respondent, (at para [64]). But all in all, the court said the sting in the matter was not as venomous as in the *lnkhosatana Gelane* matter and, I may add, nor as in the **Sipho Makhabane** [47]case which was also considered by the learned Judge.

[47] **Sipho Makhabane v The Weekend Observer (Pty) Ltd and Others** (High Court Case No. 1681 / 2007)

[106] There is a cross-appeal challenging the award ofE200,000-00 by the High Court as being nominal and undeserving in the circumstances of the case. Respondent contends that the court *a quo* erred in law and in fact in its award *"when the author of the article in question had malice by failure to get a comment from the Respondent before he wrote the defamatory article"* and that the court *a quo* erred in law in *"not following the current trend in the award of damages in our jurisdiction".* Reference was made to the judgment in **Inkhosatana Gelane** case where an award ofE550, 000-00 granted by the High Court was upheld by this Court. It was then contended that at least an amount ofE450, 000-00 ought to be awarded in this matter. It was argued that the Respondent is a *"well known, successful businessman and a prominent figure just like Inkhosatana Gelane Zwane* ". I may point out here that even assuming that the two do stand shoulder to shoulder, the critical question is whether the gravity of the injuries is comparable or near comparable. As the learned trial Judge properly stated the defamation in the **Inkhosatana Gelane** case was quite egregious. *Inkhosatana* was a duly gazetted Acting Chief of her area and President of Senate.

[107] In response to the cross appeal, the Appellants felt that the award was unjustly punitive in the circumstances and pleaded for usual damages. I note that it has been said that *"awards made in other cases are of limited value as they only provide a generalized form of guidance in assessing damages.* " [48] The learned Judge *a quo* conducted a fair comparison of damages in recent judgments of this jurisdiction and in the absence of any misdirection I have nothing to add or subtract. Generally speaking, assessment of damages is a preserve of the trial court. I do not consider the award to be excessive or nominal. It has been well said:" ... *It is trite that when it comes to the assessment of damages a trial court exercises a wide discretion. Accordingly, an appellate court will not decide the question afresh. It will interfere with the exercise of tlwt 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*

[48] See **Media 24 Limited** & **Another v Du Plessis** [2017] ZASCA 33 at para [34] {29 March 2017)

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. " [49]

[108] In the determination of the amount of the award it should not be forgotten that in a democratic society there is need for the media with their faults and shortcomings. For that reason the award should not be viewed as a punishment intended to see the newspaper run out of circulation; but it should be understood as a consolation to assuage the injured feelings and reputation of the plaintiff. Short of serious self-censorship, the role of the media is fraught with challenges; there will always be overlaps onto prohibited zones and miscalculations on the part of journalists no matter their education and experience.

[109] It is my considered judgment that -

1. The appeal be dismissed with costs.
2. The cross-appeal be dismissed with costs.
3. The order of the High Court is hereby confirmed.

I Agree

J Matsebula JA

" Ibid, para [32]

I Agree

MJ Manzini AJA

For Appellant M. Magagula

For Respondent N.D. Jele