IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 12/2021**

In the matter between:

SIMANGALISO PATRICK MAMBA **Appellant**

and

ACKEL ZWANE **1st Respondent**

MBONGENI MBINGO **2nd Respondent**

THE SWAZI OBSERVER **3rd Respondent**

Neutral Citation: *Simangaliso Patrick Mamba vs Ackel Zwane and Two Others* (12/2021) [2022] *SZSC* 51(30/11/2022)

Coram: **M.J. DLAMINI JA; S.J.K. MATSEBULA JA AND M.J. MANZINI AJA.**

Date Heard: 17 August, 2022.

Date Delivered: 30 November, 2022.

SUMMARY : *Delict – defamation – High Court dismissing an action for defamation – appeal - Appellant alleging that High Court misdirected itself in dismissing action – Appellant alleging that article published in newspaper imputing dishonesty and therefore defamatory – Appellant further alleging that article false and inaccurate –principles governing interpretation of words or conduct alleged to be defamatory discussed – Whether High Court applied the correct test in determining if the article complained of was defamatory of the Appellant.*

Delict – Defences – Truth and public benefit – requirements of this defence discussed.

Held: That High Court misdirected itself in failing to apply the correct test in the interpretation of words alleged to be defamatory.

Held: That the article read as a whole was defamatory of the Appellant.

Held: That Respondents failed to discharge onus of proving on a balance of probabilities that defamatory allegations were true or substantially true.

JUDGMENT

M.J. MANZINI AJA:

Background

[1] This is an appeal against a High Court Judgment handed down by Hlophe, J. (as he then was) on the 4th March, 2021, dismissing an action for defamation instituted by the Appellant against the Respondents.

[2] In his Particulars of Claim the Appellant (as Plaintiff) described himself as a *"male Swazi businessman, practicing attorney and Chairman of the Teaching Service Commission."*

[3] The Respondents (cited as 1st, 2nd and 3rd Defendants in the Court *a quo*) are Ackel Zwane (a reporter and Chief Investigator employed by the 3rd Respondent); Mbongeni Mbingo (employed by the 3rd Respondent as a Managing Director); and the Swazi Observer (a company which publishes and distributes the newspaper called The Swazi Observer).

[4] The genesis of the dispute between the parties is an article that was published in The Swazi Observer on the 14th March, 2015 concerning the Appellant. The newspaper article, dealt with in more detail in upcoming paragraphs, was authored by the 1st Respondent. The Appellant complained that the article was false, malicious and defamatory of him. He alleged that the article contained words which were wrongful and defamatory of him in that they were intended and understood by readers of the newspaper to mean that he was dishonest in one or more of the following ways:

(a) He was a controversial lawyer who overcharged his clients;

(b) He concealed information from his clients and refused to disclose the amount of money he had received on their behalf after overcharging them;

(c) He did not adhere to decisions of the Law Society when called to order;

(d) He adamantly refused to disclose monies he received on behalf of his clients;

(e) He charged his clients more than half of what he collected for them;

(f) He colluded with opponents of his clients in order to deceive his clients.

[5] The Appellant further alleged that the Respondents had refused to apologize and retract the article, even after his legal representatives had written a letter setting out the correct events or facts that unfolded in relation to the matter.

[6] The Appellant claimed payment of damages in the sum of E500,000.00 (Five Hundred Thousand Emalangeni) from all the Respondents, jointly and severally.

[7] The action was opposed by the Respondents, who admitted publication of the article but denied that it was false, malicious and defamatory of the Appellant. In amplifying their Plea the Respondents denied that the words complained of were, in the context of the article, wrongful and defamatory of the Appellant. The Respondents further denied that the words in the article were intended or understood by readers thereof to convey the meanings ascribed by the Appellants or had a defamatory meaning at all.

[8] The Respondents further pleaded that an ordinary reader of the article would have understood the words in the context of the article to mean any of the following:

(a) That the Appellant was embroiled in a dispute over legal fees with his clients;

(b) That the Appellant was refusing to disclose to his clients how much he had collected on their behalf from Satellite Investments;

(c) That Appellant's clients had reported him to the Law Society for misconduct;

(d) That the Law Society had ordered the Appellant to disclose to his clients how much he had recovered from Satellite Investments.

[9] The Respondents also pleaded that the article was accurate and based on interviews with reliable sources and the Law Society. The Respondents denied knowledge of the falsity of any averment in the article. The Respondents claimed that the article was published 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.

[10] The Respondents also set up the defence of media privilege, commonly referred to as the *"Bogoshi defence"*, in terms of which the publication of a defamatory statement by the press may be lawful if the publication was reasonable. To this end, the Respondent denied that they were negligent in publishing the article. They pleaded that the article was not published recklessly, that is, not caring whether its contents were true or false. They also claimed that the publication of the article was objectively reasonable in that they took steps to verify the information contained in the article; that the Appellant and his attorneys were afforded an opportunity to comment on and reply to the allegations contained in the article; and that the tone of the article was moderate.

[11] Lastly, the Respondents put up a constitutional law defence, contending that the article complained of was not unlawful by reason of the protection afforded by section 24(1) and (2) of the Constitution of the Kingdom of Eswatini.

[12] On the face of the Judgment it appears that the trial was conducted over a period of seventeen days, spanning from the 31st January, 2018 up to the 10th December, 2020. It is not clear why the trial took that long as only two witnesses testified, that is, the Appellant and the author of the article (1st Respondent). At the end of the trial the action was dismissed. The Court *a quo* found that the article was not defamatory because the words contained in the article did not carry the meaning ascribed to them by the Appellant, as they were true. In effect, the Court *a quo* upheld the defence of truth and public benefit. However, the Court *a quo* rejected the "*Bogoshi defence*", and did not deal with the constitutional law defence at all. The Court *a quo* ordered the Respondents to pay 50% of the Appellant's costs.

The appeal

[13] The Appellant subsequently noted an appeal to this Court. The Respondents have not filed a cross-appeal against the rejection of the "*Bogoshi defence*", or the failure of the Court to deal with the constitutional law defence. Therefore, there is no legal basis on which this Court will pronounce itself on whether the Court *a quo* was correct in that regard.

[14] The Notice of Appeal contains ten (10) grounds of Appeal. As is often the case where there is a multitude of grounds of appeal, some are clearly misdirected. For instance, there are grounds of appeal wherein the Court *a quo* is alleged to have erred in law and in fact for *"observing"* certain facts. An appeal cannot lie against *"observations"* made by a Court in the course of a Judgment. This Court has previously stated that an appeal lies against the substantive order made by the Court against whose Judgment the appeal lies, and not against findings or reasons for the Judgment. A notice of appeal ought to state succinctly why the substantive order is wrong or misdirected.

[15] The grounds of appeal are further clouded by reliance on *"falsity"* in attacking the Court *a quo*'s interpretation of the words contained in the article, and its resultant conclusion that they were not defamatory of the Appellant. The Appellant seems to proceed from the premise, which is mistaken, that the publication of a false statement about a person, in and of itself, amounts to defamation. It is trite law that falsity is not a consideration where a Court is interpreting words or conduct alleged to be defamatory. Whether or not words or conduct complained of are/is defamatory must be established objectively, without reference to falsity. Where a Court concludes that words or conduct complained of are/is defamatory, it then proceeds to deal with any defences

put up by a defendant such as truth and public benefit (see *infra*). The Appellant's conflation of the objective test and falsity is perhaps largely due to the approach of the Court *a quo* in dealing with the matter. The Court *a quo*, too, seems to have conflated these two issues, whereas they ought to be considered separately as will be discussed below.

[16] In this regard the Appeal ought to have been directed, firstly, at the correctness or otherwise of the Court a *quo*'s interpretation of the article and conclusion that the ordinary and natural meaning of the words contained in the article were not defamatory of the Appellant, without reference to falsity. Taking away the reliance on falsity, only grounds 2, 3, 4 and 5 pass muster. These grounds of appeal read as follows:

> *"2. The court a quo erred in law and in fact in failure to hold that the contention by respondents that appellant failed and/or refused to disclose how much he collected on behalf of his client was false and defamatory of appellant.*
>
> *3. The court a quo erred in law and in fact in failure to hold that the contentions by respondent that appellant was ordered by the*

law society to settle the matter and that appellant has refused to disclose the amounts after being ordered by the law and receiving repeated queries directed to him in that regard is false and defamatory of appellant.

4. *The court a quo erred in law and in fact in failure to hold that the contention by respondent that Mr Derrick Jele, an attorney for satellite security services, was a lawyer for appellants well, was false and insinuating that appellant and the said lawyer had colluded in the matter and therefore defamatory of appellant.*

5. *The court a quo erred in law and in fact in failure to hold that the articles were wrongful and defamatory of appellant and that they were understood by readers to mean that appellant was dishonest and that he was a controversial lawyer who overcharged his clients and that he charged each one of them the same amount of work notwithstanding that they had engaged him as a group as they were false and inaccurate."*

[17] Although there is reliance on falsity, the substance of these grounds is enough to support an attack on the correctness or otherwise of the Court *a quo's* conclusion that the article was not defamatory of the Appellant.

The Appellant's submissions

[18] The main thrust of the Appellant's argument was that the Court *a quo* focused on a narrow component of the article and failed to deal with other equally prominent allegations. Appellant's Counsel submitted that there were three distinct *"stings"* of the article: that the Appellant was a *"controversial lawyer"*; that the Appellant had refused to disclose how much he had collected from Satellite Investments; and that there had been collusion between Appellant and Mr. Jele (from Robinson Bertram). It was argued that the Court *a quo* failed to deal with the allegations of refusal to disclose and collusion, yet the evidence led at the trial confirmed that the Appellant had made all appropriate disclosures, and there was no collusion. Furthermore, that the Law Society had not issued an Order or directive that the Appellant must disclose. The Appellant argued that these allegations were not only false, but defamatory of him as they injured his character and his standing as an attorney.

[19] The Appellant's main argument was largely premised on the definition by **Black's Law Dictionary** to the effect that defamation is *"the act of harming the reputation of another by making a false statement to a third person"*, or *"a false written or oral statement that damages another's reputation."* The Appellant argued that the article was defamatory largely because it was based on falsehoods which injured his character.

[20] The Appellant's Counsel also argued that the Court *a quo* failed to deal with the undisputed evidence to the effect that the article did not state that the issue around his overcharging had been resolved between the Appellant and his former clients. He submitted that owing to this omission the article created the impression that the Appellant was involved in an on-going dispute relating to overcharging, yet the issue had been resolved. He submitted that even if the Appellant had initially overcharged his former clients, the issue had been resolved and there was no justification for reporting the story as if it was still live. He argued that it was not in the interest of the public to publish the story in the manner that it was published. It was argued that the story remained *"ashes of the past which ought to have been left to lie."*

The Respondent's submissions

[21] The Respondent's contentions were that the Court *a quo* arrived at a correct decision in dismissing the action. The Respondents submitted that although the Judgment contained, to a large extent, *obiter dicta* where it criticized the manner and method of investigation carried out by the 1st Respondent before publication of the article, the Court *a quo* correctly concluded that the natural and ordinary meaning of the words used in the article was that the Appellant was currently involved in a dispute with his former clients who were accusing him of overcharging them. The Respondents submitted that it was factually correct that the Appellant had initially overcharged his former clients, and had later corrected his statement and reversed the fees payable. The Respondents submitted that a lay reasonable citizen would not consider the publication to have been defamatory, based on what had previously happened. The Respondents further argued that the words contained in the article did not have the effect of lowering the Appellant in the eyes of right-thinking members of the society.

[22] The Respondents also contended that the Court *a quo* was correct in finding that the publication was substantially true, and therefore lawful. The

Respondents submitted that the crux of the matter were the two contradictory statements which gave rise to the misunderstanding between the Appellant and his former clients. The Respondents submitted that according to the evidence the Appellant had admitted that after introspection he felt that perhaps he had acted out of anger in preparing the first statement, which he later reversed. The Respondents argued that this issue was the gist and/or thrust of the article published. The Respondents argued that although there were inaccuracies in the article, the gist and/or thrust of the article was therefore substantially true. It was further argued that it is for the public benefit that the conduct of individuals be known, especially that of public figures. The Appellant, so the argument went, was the Chairman of the Teaching Service Commission, a Board Member of Eswatini MTN and an admitted attorney of the High Court. It was contended that the article related to monies belonging to the Appellant's clients, and was therefore a story of public interest. The Respondents claimed they had a duty to report in matters of public interest, especially those involving public figures.

Issues for determination

[23] This Court must, first and foremost, determine if the Court *a quo* applied the correct test and relevant legal principles in assessing whether or not the words used in the article complained of were defamatory of the Appellant. If this Court concludes that there was no misdirection on this score, the appeal stands to be dismissed. However, if there was a misdirection, this Court is enjoined to reconsider the question whether or not the words in the article complained of were defamatory of the Appellant. If, after this exercise, this Court concludes that the words in the article were defamatory of the Appellant, the next step is to enquire whether or not the Respondents successfully discharged the onus cast upon them to prove on a balance of probabilities the defence of truth and public benefit. The other defences set out in their Plea will not be considered, as there is no cross-appeal.

Analysis

[24] At the outset I must say that on a proper analysis of the impugned Judgment, the Court *a quo* failed to adopt the correct procedure of dealing with an action for defamation. It is trite law that in dealing with an action for defamation the trial court must first establish whether or not the ordinary and natural meaning

of the words or conduct complained of are/is defamatory of a plaintiff. If the court finds that the words are, or conduct is, indeed defamatory, it then proceeds to enquire into the defences that may have been put up by a defendant. If the words or conduct complained of is found not to be defamatory, the action is dismissed.

[25] In the Judgment under scrutiny the Court *a quo*, quite correctly, first set out what the pleadings contained (the first fifteen paragraphs of the Judgment). Thereafter, the Court *a quo* dealt with the testimony of the Appellant, which constituted a detailed background of his interactions with his former clients, how he had pursued their claim, and his interactions with the Law Society over the complaint lodged by his former clients.

[26] Thereafter, the Court *a quo* dealt with the evidence of the 1st Respondent, which mainly comprised denials that there were any falsehoods in the article, and assertions that the story was substantially true. The Court *a quo* also considered the 1st Respondent's evidence demonstrating the attempts he alleged to have made to consult the Appellant or obtain his comments before publishing the article.

[27] After largely being pre-occupied with an analysis of the evidence of both parties, the Court *a quo* then turned to deal with the crucial enquiry, that is, the interpretation of the article, towards the tail end of the Judgment. This is what the Court *a quo* ought to have started with. Interpretation of the article came after the Court *a quo* had already made findings of *"falsehoods"*, *"the need for realistic investigation, consultation and the seeking of a comment from the Plaintiff before publication"*, and *"recklessness"* on the part of the author of the article (1st Respondent). The Court *a quo* ought to have first dealt with the question whether the words in the article, objectively considered, were defamatory of the Appellant, and only deal with any possible justification if it came to the conclusion that they were defamatory. The defence of truth and public benefit becomes relevant only if a court has concluded that the publication complained of is defamatory. The defence justifies the publication of defamatory matter (see *infra*). In this regard I am of the view that the Court *a quo* committed a material misdirection.

[28] Paragraphs [63], [66] and [67] of the impugned Judgment demonstrate the material misdirection committed by the Court *a quo*. I intend to reproduce these paragraphs for the purpose of highlighting the misdirection. At paragraph [63] the Court *a quo* stated as follows:

"[63] The question is simply whether it can be said that the article in question had the effect of lowering the estimation of the Plaintiff from right thinking members of society. It could be that the falsehoods referred to above taken together with the failure to consult the Plaintiff before publication had the effect of injuring the Plaintiff for which he would be entitled to redress in law, but it is highly arguable it was defamatory given that the controversy had occurred sometime back although it was later corrected. The question to grapple with therefore is whether the article and sub articles were defamatory of the Plaintiff"

(Own underlining for emphasis)

[29] The Court went on to say that:

"[66] It seems to me that the natural and ordinary meaning of the words used in the article is that the Plaintiff is currently involved in a dispute with his former clients who are accusing him of having overcharged them by charging or billing them the same

amounts individually for work they instructed him to do as a group. What is real is that, it is not true that the controversy on what the Plaintiff's clients were charged is still ongoing and that the Plaintiff charged them individually for work he had been instructed to do by the group.

[67] The reality is that whilst it is arguably true that the Plaintiff overcharged his clients not in the manner suggested by the Defendants but through a statement not fully particularized, which had happened in the past and had gotten corrected sometime later and as at the time of the publication which did not acknowledged (sic) the said correction,...can it be said that by publishing that in the manner the Defendants did; that had the effect of lowering the Plaintiff's estimation in the eyes of right thinking members of society? In my view whilst it cannot be disputed that the article is characterized by a number of falsehoods, and was possibly maliciously published, including that because of the falsity it is injurious, can it be said that it amounts to defamation of the Plaintiff in that context? I will say I do not think so because based on what had previously happened

it can be said although deliberately stated falsely and perhaps even maliciously so, it cannot be said to be defamatory as the overstated statement had been issued and payments had been made based on it although later reversed with the statement itself being correct in so far as an agreement was reached. I do not think that a reasonable lay citizen would have considered that publication to have been defamatory in the circumstances."

(Own underlining for emphasis)

[30] From the preceding paragraphs it is implicit that the Court *a quo* factored in its conclusions on the evidence led at the trial of what was *"real"; "reality"; "falsehoods"; "possibly maliciously published"; injurious falsehoods"; "what had previously happened"* in determining whether the article complained of was defamatory of the Appellant. The statement to the effect that *"I do not think that a reasonable lay citizen would have considered that publication to have been defamatory in the circumstances"* clearly proceeds from the premise that the lay citizen would have had prior knowledge of all the background facts when reading the article. It is more subjective rather than objective. The Court *a quo* did not consider the article objectively as it ought

to. Would the average reasonable reader have had knowledge of what was *"real"*, *"reality"*, *"injurious falsehoods"* or *"what had previously happened"*? The answer is in the negative. The probabilities are such that the average reasonable reader would not have applied his mind to such issues, for he would not have had knowledge of them. Put somewhat differently, the average reasonable reader would not have had knowledge of the background facts preceding the publication of the article, nor what was *"real" or the "reality"*.

[31] Based on the foregoing I have come to the conclusion that the decision of the Court *a quo* cannot be sustained as it was influenced by a material misdirection. The Court *a quo* ought to have applied an objective test, and determined the natural meaning of the words in the article, and how an average reader would have understood it, without reference to the truthfulness or otherwise of the background facts which are highlighted above. In the circumstances the Court *a quo* committed a material misdirection which warrants this Court to intervene and have the decision set aside. In the result, we are enjoined to reconsider the question whether the article was defamatory of the Appellant.

[32] The Respondent's argument that the Court *a quo* applied the correct test in concluding as it did, therefore, stands to be rejected. This Court cannot overlook the material misdirection simply because it has not been properly articulated by the Appellant either in his Notice of Appeal or Heads of Argument. To do so would be to allow a Judgment that is clearly wrong to stand.

The relevant and applicable law

[33] Before considering whether the article complained of was defamatory of the Appellant I find it apposite to set out the relevant and applicable legal principles underlying actions for defamation. It is now well settled law that in an action for damages for defamation the starting point is ascertaining what the words or conduct complained of mean(s), and whether they convey the defamatory meaning ascribed to them by a plaintiff. **(See The Swazi Observer Newspaper t/a The Swazi Observer on Saturday, Alec Lushaba, Bodwa Mbingo vs Doctor Johannes Futhi Dlamini (13/2018) [2018] SZSC 51 (07 March 2022)** Where the publication of a defamatory statement is proved or admitted, two presumptions arise, namely, that the publication was wrongful and the defendant acted *animo injuriandi*. The onus is then cast

upon the defendant to establish either a lawful justification or excuse, or the absence of *animus injuriandi*. Failure to do so entitles the plaintiff to succeed in its claim.

[34] The principles to be applied in the interpretation of words or conduct alleged to be defamatory have crystallized and can be summarized as appears below.

[35] First, the Court must engage in a linguistic interpretation of the words alleged to be defamatory of the plaintiff. The meaning of words or conduct under consideration does not necessarily correspond with its dictionary meaning. The test to be applied is objective. In accordance with the objective test the question is, what meaning would a reasonable reader of ordinary intelligence and development attribute or ascribe to the words or conduct, in its context? Stratford, JA in **Johnson v. Rand Daily Mails 1928 AD 190 at 194** aptly stated the principle as follows:

> *"The words must be construed to have the meaning which a reasonable person reading them in their context, would likely to give them."*

In **Demmers v. Wylie and Others 1978(4) SA 619 (D & CLD) at 624A-E** Didcott J (as he then was) articulated the objective test in the following manner:

> *"....The article itself was put before me as the only material which I needed for my answers to the first and second questions. This of course was in keeping with the rule that evidence is inadmissible to prove how anyone in fact understood a statement said to be libelous in its 'primary' sense, or to show whether it indeed disparaged the claimant in his eyes. The test in such a case is objective, not subjective. It does not matter what effect or different effects the statement happened to have on some or other assortment of its readers or hearers. The best evidence of that, and all that may be considered, is the language used at the time. The statement's interpretation, and its appraisal as defamatory or not once it has been construed, are therefore issues which the Court must decide with reference to such language alone... This does not mean, however, that the statement should be examined in isolation. Something else written or spoken on the same occasion, though not itself the focus of attention, may illuminate what is and reveal its true import. It follows that the statement must always be*

viewed within, and seen as part and parcel of, its particular context....."

[Own underlining for emphasis]

[36] Second, in determining the natural and ordinary meaning of the words complained of, the Court must take account not only of what the words expressly say, but also of *what they imply*.

See: **Argus Printing & Publishing Co. Ltd v. Esselens' Estate 1994(2) SA 1 (A); Mthembi – Mahanyele v. Mail & Guardian 2004 (6) SA 329 (SCA) 342 F 343C; Sindani v. Van der Merwe 2002 (2) SA 32 (SCA) 36C.**

[37] Third, in applying the reasonable man test the criterion is the fictitious, normal, balanced, right thinking and reasonable person who is neither hypercritical (such as a sharp-witted lawyer) nor over sensitive, but is someone with normal emotional reactions. He or she is likely to skim through an article casually and not give it concentrated attention or a second reading.

See: **Channing v. SA Financial Gazette Ltd 1966 (3) SA 470 (W) 474 A – C; Ngcobo v. Shembe 1983 (4) SA 66 (D) 71A; Demmers v. Wylie (*supra*) 847-848; Sindani v. Van der Merwe (*supra*) 37.**

[38] Fourth, the reasonable man is a member of the community as a whole and not of a particular group or segment of the community only. The words or conduct complained of must have the tendency to infringe the good name of the Plaintiff in the opinion of reasonable people in the community in general. This includes views held by a substantial and respectable section of the community.

See : **Botha v. Marais 1974(1) SA 44(A) 49; HRH Zwelithini of KwaZulu v. Mervis 1978(2) SA 521 (W) 528-529; Ngcobo v. Shembe (*supra*)**

[39] Fifth, a reasonable reader will read a statement *in the context in which it appears*. If the allegations appear in a book or a newspaper or magazine article, it may be necessary to read the whole book or article in order to judge whether or not the allegations are defamatory (that is of course if in the opinion of the reasonable man the whole book or article should be read).

See: **Black v. Joseph 1931AD at 143; Stewart Printing Co. (Pty) Ltd v. Conroy 1948 (2) SA 707 (A) 714; Demmers v Wylie (*supra*) 842.**

[40] Sixth, statements or words may have a primary (*per se*) meaning or a secondary meaning. The primary meaning is the ordinary meaning given to the statement in its context by the reasonable person. The secondary meaning may be described as a meaning other than the ordinary meaning, which it derives from special circumstances, or as an unusual meaning which could be attributed to the statement by a person having knowledge of special circumstances (innuendo).

See: **National Union of Distributive Workers v. Cleghorn & Harris Ltd 1946 AD 984 at 992 and 997; Argus Printing and Publishing Co. Ltd v. Esselen's Estate (*supra*) at page 21.**

[41] Lastly, if the words complained of have a double or ambiguous meaning – one defamatory and the other non-defamatory – the meaning inferred must be the one most favourable to the defendant. There is a presumption that the words are innocent until the Plaintiff proves the contrary on a balance of probabilities. If the Plaintiff fails, the action is dismissed.

See: **Channing v. SA Financial Gazette Ltd (*supra*); Demmers v. Wylie (*supra*).**

Was the article defamatory of the Appellant?

[42] Determining what an average reasonable lay citizen may understand of an article in a newspaper means may at times be a daunting task. It is not easy for a Judge to discard his legal garb and don that of an ordinary lay citizen. This, however, is an exercise we must engage in, in order to determine whether or not the article is actionable. For the purpose of this exercise it is inevitable that the article must be analyzed in accordance with the principles outlined in the preceding paragraphs. I now turn to deal with the article.

[43] The article complained of has bold heading – *"Lawyer Simanga Mamba in clients' money controversy"*. Beneath the bold heading is a sub-heading – *"The Teaching Service Commission Chair Person, also in Private Practice, is refusing to disclose how much he collected from source on behalf of his clients after overcharging them in legal costs despite being ordered to do so by the Law Society of Swaziland"*.

[44] The bold and sub-heading set the tone for the article. They make it clear that the subject matter of the article is the conduct of the Appellant, a lawyer in private practice. Next to the bold heading there is a picture of the Appellant and beneath it there is a caption which reads. *"Controversial: Lawyer Simanga Mamba"*.

[45] The first paragraph of the article narrates that the Appellant is at the centre of a controversy with his clients, whom he charged individually yet they had opened one file for their common case. The second paragraph article then proceeds to allege that *"shockingly, the fees are more than the amount claimed"*. The article thereafter tabulates some calculations showing how much was to be deducted from each of the claimants. The article states that the figures were extracted from a payment schedule from Mamba Attorneys.

[46] In the third paragraph the article narrates that the Appellant is *"adamantly refusing to disclose how much he collected from source, Satellite Investments"*. It is further alleged that this is despite that the Law Society of Swaziland, where Appellant was reported for the misconduct, ordered that he solve the matter with his clients. The article further alleges that one of the

Appellant's clients *"reclaimed his file, opened a case with another lawyer (Zonke Magagula Attorneys) to pressure the Appellant into disclosing the moneys he collected from the security firm"*. It is stated that the new lawyers had also tried for a year running to get the Appellant to own up to the problems.

[47] In the fourth paragraph the article tabulates how much each of the Appellant's clients allegedly paid in fees, concluding that the total amount paid was 60% of what was due to the claimants.

[48] In the fifth paragraph the article relates the services for which the Appellant had been engaged. It states that the Appellant performed his duties until he secured the moneys even though *"the actual amount obtained by Mamba is readily not known"*.

[49] In the sixth paragraph the article gives further detail on the engagements between the Appellant and his former clients. The seventh paragraph refers to the appeal which was lost by Satellite Investments and that the loss

guaranteed the Appellant's former clients payment of their claim. The article states that one of the Appellant's former clients wanted to know what was due to him and when it was forthcoming.

[50] The main article is followed by a sub-article with a sub-heading which reads that *"A Statement of account was indeed issued on the scale of E800 per hour with no dates to each entry such as."* The article proceeds to state the particulars of work done, hours and the fees charged. This is basically the author's extracts from what was presumably the full statement of account prepared by the Appellant.

[51] There is a further sub-article with a sub-heading which reads that *"He must disclose – Law Society"*. In this section the first paragraph refers to the then President of the Law Society who is said to have acknowledged the old matter of the Appellant and his clients as having been brought to the Society, and that he was ordered to settle it.

[52] In the following paragraph the article states that the Appellant, however, *"has refused to disclose how much he obtained from Satellite Security even after repeated queries to him on the matter"*. The article further states that the attorneys for Satellite Investments, *"Derrick Jele of Robinson and Bertram law firm in Mbabane, is also refusing to disclose the amounts."* The article relates that Satellite Investments was also requested *"on several occasions"* and they were informed that Satellite Investments *"had instructed Jele to release the information but he is refusing with it."* The article further states the author was in possession of *"several correspondent"* calling upon Jele to release the information and *"repeated visits to enquire from Satellite Investments whether they were now colluding with Mamba not to disclose how much he was actually paid."*

[53] In the concluding paragraph the article refers, again, to what is alleged to be Zonke Magagula Attorneys difficulties with the Appellant. The article purports to quote an extract from lawyer Zonke Magagula who is stated to have responded by saying that they *"were also not able to get the original amount from Mr. Mamba and this has made it difficult for us to determine whether our client recovered what was due or not"*. As a parting shot the article again refers to what was supposedly said by the President of the Law

Society, namely that *"there was no reason for Mamba to withhold the information because it is vital to prove that the complainants have no case against him as he now claims to have settled the matter with them"*.

[54] I have endeavoured to read the article as a whole through the eyes of an ordinary reader, and in my opinion the article means the following:

(a) The Appellant was involved in an on-going dispute with his former clients over money he had collected on their behalf;

(b) The Appellant had overcharged his clients, claiming up to 60% of what was due to them;

(c) The Appellant was refusing to disclose how much he had collected from Satellite Investments (his former clients' employer);

(d) The Appellant's former clients had engaged another lawyer, who also could not get the Appellant to disclose the amount he collected from Satellite Investments;

(e) The Appellant's former clients reported or lodged a complaint with the Law Society of Swaziland, who ordered the Appellant to disclose or settle the matter.

[55] The gist of the article is about the Appellant's overcharging and his alleged refusal to disclose how much he received from Satellite Investments. In light of the above I do not agree with the conclusion of the Court *a quo* that the *"natural and ordinary meaning of the words used in the article is that the Plaintiff is currently involved in a dispute with his former clients who are accusing him of having overcharged them...."* The article goes beyond the allegation of overcharging. The allegation that the Appellant was refusing to disclose to his former clients how much he had collected from Satellite Investments is prominent in the article. In fact, it is so prominent that the Respondents themselves pleaded that *"...an ordinary reasonable reader would have understood the words in the context of the article to mean that the Plaintiff was refusing to disclose to his clients how much he collected on behalf of his clients from Satellite Investments."*

[56] The Court *a quo's* interpretation totally ignored the repeated allegations that the Appellant was refusing to disclose how much he collected from Satellite

Investments – he is said to have "*adamantly*" refused to do so. The Appellant is stated to have refused to disclose how much he collected even to another lawyer (Zonke Magagula Attorneys) and was also directed to disclose by the Law Society (*"He must disclose – Law Society"*). The Appellant is stated to have refused to disclose even after *"repeated queries"* by the author of the article. These allegations are unmissable and any ordinary reader of the article would have understood them to be saying that the Appellant is refusing to disclose how much he collected from Satellite Investments. This, in addition to the allegation that the Appellant had overcharged his former clients.

[57] In my opinion any reasonable reader of the article, in its context, would not have missed the serious imputation being made against the Appellant, namely dishonesty. Dishonesty in the sense of refusing to disclose to his former clients the amount he had successfully claimed on their behalf. The article repeatedly states that the Appellant refused to disclose how much he collected from Satellite Investments, notwithstanding the intervention of Zonke Magagula Attorneys and the Law Society of Swaziland. The allegation that the Appellant refused to disclose the amount collected is repeatedly made notwithstanding that the author of the article had the information at his disposal, and was able to calculate that the Appellant had charged his former

clients *"60%"* of the total sum collected. Any reasonable reader would have been left with the impression that not only did the Appellant overcharge his former clients, but he was also dishonest in that he refused to disclose how much he collected from Satellite Investments. The Appellant's alleged refusal to disclose how much he collected on behalf of his former clients is one of the main thrusts of the article under consideration.

[58] It is trite law that defamatory matter comprises that which tends to lower the Plaintiff in the estimation of right-thinking members of society generally. Allegations placing a person's moral character in a bad light, such as that he is dishonest or has otherwise acted improperly towards others have been characterized as defamatory in terms of the reasonable man test, and thus wrongful. In **Mineworkers Investment Co. (Pty) Ltd v. Modibane 2002 (6) SA S12 WLD at S19, Willis J** (as he then was) stated the legal position as follows:

> *"[12] In the absence of any of the recognized defences, allegations whether direct or indirect, that a person is dishonest are defamatory."*

(See for example, **Van der Berg v. Coopers Hybrand Trust (Pty) Ltd**

and Others 2001 (2) SA 242 (SCA); Jasat and Another 1983 (4) SA 728 (N))"

[59] Other leading authors also support the view that imputations of dishonesty are defamatory of a person. See in this regard **Neethling et al, "Neethling's Law of Personality" (1996) Butterworths** at page 151; **LAWSA, Volume 7, Paragraph 238; R.G. McKerron "The Law of Delict" (1971) Juta & Co. Limited** at page 172.

[60] In my view, the aspect of the article which relates to the Appellant being involved in *"an ongoing"* dispute with his former clients does not have the same effect as the imputation of dishonesty, as it does not lower a plaintiff in the estimation of right-thinking members of the society in general. Being in a dispute with your former clients does not place an attorney's moral character in a bad light. Thus, I do not find that component of the article to be defamatory. However, the imputation of dishonesty stands on a different footing. The article, in so far as the imputation of dishonesty is concerned, is defamatory of the Appellant. An allegation that an attorney is refusing to disclose how much he has collected on behalf of his clients is not to be taken

lightly, it is serious and reflects badly on his character and his professional practice. Potential clients may refuse to engage his services. One of the most important virtues of the legal profession is honesty. An attorney who is alleged to be dishonest is bound to be perceived in a bad light by right-thinking members of the society. In the circumstances, the conclusion of the Court *a quo* was incorrect and stands to be set aside.

[61] Having concluded that the article was defamatory of the Appellant, I now turn to deal with the defence raised by the Respondents. It is trite law that proof of a defamatory statement raises two presumptions:

(i) That the publication was wrongful; and

(ii) That the statement was made *animo injuriandi*.

The onus then shifts to the maker of the statement to rebut wrongfulness and *animo injuriandi*. A defendant may rebut the presumption of wrongfulness by proving the existence of a ground for justification. Should he fail to do so, wrongfulness is established, and the action succeeds.

Truth and Public benefit.

[62] The Respondents' first line of defence was that the article was *"an accurate report"* based on interviews with reliable sources and the Law Society; and that it was published in the discharge of their duty to inform the public about newsworthy events and *"matters of public interest"*. I understood this to be a ground of justification based on *"truth"* and *"public benefit"*.

[63] Before considering whether on the facts of this particular matter the defence of truth and public benefit was proved by the Respondents I find it apposite to restate the relevant principles of the defence. This is by no means an exhaustive exposition of the legal principles underlying the defence. The basis of the defence is that it is lawful to publish a defamatory statement which is true, provided that the publication is for the public benefit. See: **Sutter v. Brown 1926 AD 155 172; Kemp v. Republican Press (Pty) Ltd 1994 (4) SA 261 at 265 – 266; Graham v. Kerr (1892) 9 SC 185, 187.**

[64] Thus, a defendant who relies on the defence of truth and public benefit must plead and prove that the defamatory statement complained of is true or substantially true. A defendant need not prove the truth of every allegation

made, but it is sufficient to prove that the gist of the defamation is true. In other words, the defendant must prove the sting of the defamation to be substantially true. Anything that does not add to the sting need not be justified.

See: **Johnson v. Rand Daily Mails (*supra*) at 205 – 207; Kemp v. Republican Press (Pty) Ltd (*supra*) at 264; Independent Newspapers Holdings Ltd v. Suliman [2004] 3 All SA 137 (SCA) 154 E – 155 E.**

[65] Furthermore, a defendant who relies on the defence bears a full onus to prove the truth, or substantial truth, of the facts which he asserts, on a balance of probabilities. The rationale of burdening a defendant with a full onus was aptly articulated by **Hoexter JA in Neethling v. Du Preez and Others 1994 (1) SA 708 (A) at page 770**:

> *"Apart from the fact that in principle all three defences should be governed by the same onus, there are in the case of the defence of truth in the public benefit cogent policy considerations for burdening the defendant with the full onus of proof. In the case of qualified privilege*

the defendant who transmits the defamatory matter is generally thus impelled by considerations of duty or of protection of an interest. The matter stands rather differently in regard to the defence of truth in the public benefit. Here no form of compulsion operates on the mind of the defendant whose decision to put the character of the plaintiff in jeopardy proceeds entirely from his own volition. The rationale of the defence seems to be that the law will not allow a person to recover damages in respect of an injury to a reputation which he does not, or at any rate should not, possess; coupled with the fact that society has an interest in correctly estimating the true character of its members.....

Since it is entirely of his own accord that the defendant elects to vilify the Plaintiff, justice demands that he should do so at his peril; and that in an action for defamation he should have to establish what he should have troubled to verify before he maligned the plaintiff."

[Own underlining for emphasis]

[66] The principle that a defendant bears the overall onus of averring and proving all the facts which would rebut the presumption of unlawfulness was also

reaffirmed in the leading case of **National Media Limited and Others v. Bogoshi** (*supra*).

[67] Furthermore, whether the publication of a particular defamatory statement is for the public benefit depends on the subject matter of the statement and the time, manner and occasion of the publication. I find the words of Leach J. (as he then was) in **Kemp and Another v. Republican Press (Pty) Ltd 1994 (4) SA 261 (ECD) at 265H – 266C** to be particularly instructive in this regard, where he said:

> *"It seems to me that, just as in general the alleged truth of a defamatory charge cannot be enquired into on exception – Hertzog v Ward 1912 AD 62 at 72 – so too is it, in general, impermissible to deal with the question of public benefit on exception, as the Court will ultimately be called upon to decide that issue in the light of the evidence led at the trial. In deciding the issue of public benefit the trial Court will be obliged to take into account all the relevant facts and circumstances. Inter alia, on the one hand, it will have to take into account the general principle that it is for the public benefit that the truth as to the character*

or conduct of individuals should be known – compare the remarks of De Villiers CJ in Graham v Ker (1892) 9SC 185 cited with approval, inter alia, in Iyman v Natal Witness Printing and Publishing Company (Pty) Ltd 1991 (4) SA 677 (N) at 686C – while, on the other hand, having regard that care should be taken to extend protection to the individual against attacks on his character made from motives of self-interest by persons who trade for profit in the characters of other people – compare Neethling's case supra at 784 – and that merely to publish old scandals for the sake of satisfying the salacious appetite of readers cannot be justified – See Yusaf v Bailey and Others 1964 (4) SA 117 (W) at 127. Thus, at the end of the day, the trial Court will be obliged to weigh up in the scales all relevant considerations before deciding whether the publication of the matter per se defamatory of the plaintiff was lawful and in the public benefit. This can only be done when all relevant evidence has been placed before Court."

[Own underlining for emphasis]

[68] It is clear from the above paragraphs that the Court in deciding whether the publication of a defamatory statement is for the public benefit, it must engage

in a balancing exercise. On the one side of the scale is the principle that it is for the public benefit that the truth as to the character or conduct of individuals should be known; whilst on the other side care should be taken to extend protection to individuals against attacks on character for motives of self-interest. The emphasis, undoubtedly, is on the truth (or substantive truth, as the case may be).

[69] Therefore, the element of truth, or substantial truth, plays a significant role in establishing the defence. Failure to establish that the defamatory allegation is true or substantially true should ordinarily lead to a collapse of the defence, as false statements can never be for the benefit of the public. The preponderance of authorities support this view. In **Yazbek v. Seymour 2001 (3) SA 695 (ECD)** the Court took the view that *"there is no protection for false statements"*. There, the Court was dealing with the requirements of the defence of truth and public benefit and fair comment.

[70] Even where the truth, or substantial truth of a defamatory statement is established, it may still not be in the public benefit to publish it. Thus, it does not automatically follow that the truth, or substantial truth, of a defamatory

statement is for the public benefit. A defendant must establish that the publication was for the public benefit. In **Yusaf v. Bailey and Others 1964 (4) SA 117 (WLD) at 127A-C** Vieyra J stated as follows:

> *"It is always a matter of difficulty to determine in what circumstances it can legitimately be in the interest of the public good to rake up the past misdoings of a person: See Graham v Ker 9 S.C. 185, Patterson v Engelenburg and Wallach's Ltd 1917 T.P.D. 350; Lyons v Steyn 1931 T.P.D. 247. Merely to publish old scandals for the sake of satisfying the salacious appetite of readers can certainly not be justified.*
>
> *But here we have a man who in the past has succeeded in acquiring big sums of money to which he was not entitled, by means of pretending to a gullible public that he was someone other than he really is, and also continues to make claims to an identity which it has been established is untrue. It is not then the case of a man who has ceased to make false representations. He persists and has persisted in this Court in so doing. It is my view in the public interest that the history of such a man be made known so long as he continues to make his false claims."*

[71] On the facts of the **Yusaf** case (*supra*) public benefit was established because the claimant persisted in making false representations about himself to the public. The public, in these circumstances, had a right to know about the history or past misdoings of the claimant. Raking up ashes of his past was for the benefit of the public in those circumstances.

[72] On the face of the Judgment under scrutiny it is apparent that the Court *a quo*'s interrogation of truth or substantial truth was limited in scope to the issue of overcharging, and whether the dispute between the Appellant and his former clients was ongoing, as reported in the article. Hence, the conclusion that *"it is not true that the controversy on what the Plaintiff's clients were charged is still ongoing and that the Plaintiff charged them individually for work he had been instructed to do by the group."* The Court *a quo* further concluded that *"...whilst it is arguably true that the Plaintiff overcharged his clients not in the manner suggested by the Defendants but through a statement not fully particularized..."* The Court *a quo* did not enquire whether or not the allegations of overcharging were for the public benefit, as this matter had been settled.

[73] As has been found by this Court the narrow interpretation of the article by the Court *a quo* was incorrect. It follows that the Court *a quo*'s interrogation of truth or substantial truth proceeded from a narrow and incorrect premise, and therefore cannot be sustained. In light of this conclusion this Court must assess whether the thrust or gist of the allegations which it has found to be defamatory are true.

[74] I now turn to deal with the question whether the Respondents on the facts of this matter discharged the onus of proving, on a balance of probabilities, that the defamatory allegations in the article were true, or substantially true. According to the evidence led at the trial the Appellant had disclosed in a schedule of payment prepared for his former clients that he had received the sum of E147, 353.49 as a settlement from Satellite Investments. In a letter dated 10th August, 2011, whose contents were not disputed, the Appellant advised (Joseph Dlamini), one of his former clients, that *"Satellite Investments has paid in terms of the payment schedule"*, and requested him to *"attend to the office with the other two clients to give us instructions whether you accept the money or we pursue the matter further."* The payment schedule is on Satellite Investments (Pty) Ltd letterhead and dated 29 March 2011. The payment schedule sets out the gross amount due to each of the

three claimants, tax deductible and the net payment due, which totals E147, 353.49. There was no evidence led at the trial to suggest that the Appellant received or was paid anything above the aforesaid sum.

[75] Apart from the letter alluded to above, during cross examination the 1st Respondent made concessions which were destructive of his defence. Firstly, he conceded that disclosure had been made by the Appellant to his former clients. Secondly, he conceded that the Appellant's former clients had not reported him to the Law Society for failure or refusal to disclose how much he had received from Satellite Investments, rather they were not convinced that the figures set out in the payment schedule were genuine. As a consequence, 1st Respondent conceded that the Law Society did not order the Appellant to *disclose* how much he received from Satellite Investments, contrary to what was stated in the article.

[76] In my view the Respondents failed to discharge the onus cast upon them to prove on a balance of probabilities that the Appellant refused to disclose to his former clients the total amount he collected on their behalf from Satellite

Investments. On this basis the defence of truth and public benefit must fail. The Appellant's action, therefore, must succeed.

[77] In light of the conclusion that I have reached, I do not find it necessary to deal with the question of whether the appropriate remedy for the Appellant was a claim premised on injurious falsehood.

[78] The Appellant urged this Court that in the event of the success of his appeal, we should proceed to quantify damages as this would be expedient. We were referred to **Alpheous Nxumalo v. The Swazi Observer and Two Others (7/2018) [2022] SZSC 50 (17th February 2022)** where this Court is said to have quantified damages and made an appropriate award. The latter case, however, is distinguishable. There, this Court dealt with an appeal against the quantum of damages awarded by the High Court. The initial quantification had been done by the High Court, and the Appellant was dissatisfied with the award. Hence, the appeal. In the matter at hand, this Court is being urged to undertake the initial quantification of damages. This Court is not well suited for that exercise, as this would leave no room for an appeal if either of the

parties be dissatisfied with an award made by it. Therefore, the matter ought to be referred back to the High Court for quantification of damages.

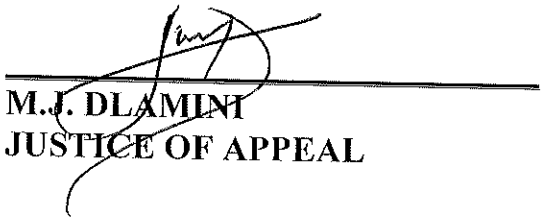
Conclusion

[79] In conclusion this Court finds that the Court *a quo* committed a material misdirection in deciding that the article complained of was not defamatory of the Appellant. The Court *a quo* failed to apply the objective test correctly, in determining whether the article bore the meaning ascribed to it by the Appellant. Instead, the Court *a quo* conflated the objective test and the requirements of the defence of truth and public benefit, thereby coming to a wrong conclusion. On its own assessment this Court has concluded that the article complained of was indeed defamatory of the Appellant. Further, that on the facts of this matter, the Respondents have failed to establish on a balance of probabilities that the defamatory allegations in the article were true or substantially true.

Costs

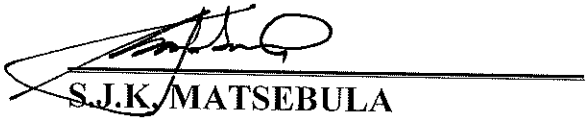
[80] Costs of the appeal are awarded to the Appellant.

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree



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JUSTICE OF APPEAL

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