IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 01/2022

HELD AT MBABANE
In the matter between:

TIMOTHY SHONGWE **Appellant**

And

THE SWAZI OBSEVER (PTY) LTD **1st Respondent**

THE EDITOR OF THE SWAZI OBSEVER **2nd Respondent**

Neutral Citation: *Timothy Shongwe vs The Swazi Obsever (Pty) Ltd and 1 Another (01/2022) [2022] SZSC (28/11/2022)*

Coram: **S.B. MAPHALALA JA;**
S.J.K. MATSEBULA JA; and
J.M. CURRIE AJA

Heard: 15 September 2022.

Delivered: 28 November 2022.

SUMMARY: *Civil Appeal – Action for damages arising from publication of defamatory article – Before Plaintiff complains Defendants retract article and offer unconditional apology – Plaintiff sues for damages – Court a quo finds article defamatory – holds timely retraction and apology cleanses the Plaintiff - Reasonable conduct of Defendants after publication absolves them from liability to pay damages – on Appeal.*

Held: *Retraction and apology is not one of the defences to a defamation action but can be a mitigation factor.*

Held: *Appeal succeeds and matter referred back to Court a quo for determination of quantum of damages.*

JUDGMENT

S.J.K. MATSEBULA,JA

INTRODUCTION

[1] At the onset it must be pointed out that this Appeal is not opposed and proceeds as an unopposed Appeal. That does not mean a stroll in the park, the Appellant stills has to make its case and convince this Court the order it seeks is justified.

[2] The Appeal was filed on the 12th January, 2022. The cause of action arose on the 7th March, 2015.

The matter was heard some four (4) years down the line and judgment was delivered some two (2) years later on the 11th November, 2021. The Appeal was filed timeously, that is as per the requirements of the Rules of this Court (Rule 8 (1)).

The Appellant further filed its Heads of Arguments and Bundle of Authorities on the 21st July 2022 and same was served on the same date on Respondent's attorneys, Magagula Hlophe Attorneys. The Respondent's Attorneys did not file their Heads of Arguments and Bundle or list of Authorities. On the 15th September 2022, the date set for the hearing of the Appeal, they had still not filed any document in opposition or defence, be it a counter or cross-appeal nor an application for extension of time (Rule 16) or an application for condonation (Rule 17).

[3] On the date of hearing, that is, the 15th September, 2022 there appeared attorney B. Nkonyane for the Respondents who said she was standing in for Mr. Z. Shabangu, the substantive attorney in this matter. B. Nkonyane appeared before us empty- handed except to inform the Court that Mr. Z. Shabangu had been involved in a near fatal automobile accident somewhere in January 2021 and had only returned to the office the previous day hence neither Heads of Argument and list of Authorities had been filed nor applications for extension of time or condonation. When asked by the Court, B. Nkonyane could not give any satisfactory answer why Magagula Hlophe Attorneys could not file any document if their intention was to defend their client's case in the absence of Mr. Z. Shabangu except to say personally she was not aware of this matter as she is not in the list of attorneys that receive a Court Roll that indicates matters to be heard in any particular Court session. She could not truly vouch that Mr. Z. Shabangu had only returned to office

the previous day. Her mandate seemed limited to seeking a postponement and nothing more. When the Court pointed out that the matter was 7 years old and finality was therefore an essence of the rule of law as due notice through the issuance of a court roll had been given, she submitted that her mandate was limited and she could not assist the Court any further.

[4] On the other hand the Appellant submitted that he was ready to proceed and make submissions in support of the Appeal and submitted that the matter was 7 years old and justice requires finality. Since Mr. Z. Shabangu was now back in office, it could not be established why he was not in Court so that the matter could proceed in his presence as he is the attorney of record.

[5] On consideration of all the attendant factors in the preceding paragraphs the Court was of the considered view that the matter should proceed, more so, in that the sought postponement could not be explained what it was for. Court Rules specify time limits and what is expected of one where, for just reasons, the time limits are likely not to be met. The Court also felt disrespected that an application, oral as it was, was made from the Bar. Judges take time to read and familiarise themselves with a case not only to be told at the hour of hearing that one party has not done his work in terms of the Rules of this Court.

[6] **HISTORICAL BACKGOUND**

The Respondent's Case

The Respondents are a weekly newspaper under the banner: The Eswatini Observer/Swazi Observer. The Respondents published an article on the 7th March 2015 in their newspaper concerning the Applicant (the Appellant

herein) and the headline was **"RSSC probe Timothy Shongwe on missing E300 000.00"**. The article was to the effect that RSSC (a football club) was probing the Appellant and another football administrator for misappropriating the team's funds amounting to E300 000.00. There was no truth in the story as the Appellant was not probed for anything let alone misappropriation of funds.

[7] The following weekend the Respondent published an apology and retracted the story as an untruthful account. By retracting the story and publishing an apology, the Respondents were acknowledging that the story written about Appellant was not truthful and that defamation damages should not attach to them because they had retracted the story and apologised within the shortest possible time, that is, by the next issue of the newspaper. The retraction and apology was offered by the Respondents on their own accord and not by prompting from the Appellant. Their submission and which was accepted by the court *a quo* is that they should not be held liable to damages arising from the defamatory publication since they quickly (within 7 days) retracted the story or article and offered an unconditional apology to the Appellant.

[8] **THE APPELLANT'S CASE**

The Applicant contends that the contents of the publication were untrue and are a pure fabrication of the Respondents and are defamatory to him. He contends that the article was wrongful and grossly defamatory against him as it conveyed a message to ordinary readers of the Respondent's newspapers that he was a fraudster, a thief, and not trustworthy with finances. He submits further that before being defamed he enjoyed a good untainted reputation or

fame amongst citizens of Eswatini and even beyond the borders of Eswatini. He testified that the defamation occurred during the period when he was vice chairperson of the Eswatini National Sports Recreation Council, also a member of the Tournament's Organizing Committee of the Council of Southern African Football Association (COSAFA) and also a FIFA Instructor for the African continent. He suffered physically and emotionally through personal contacts as well as telephonic contacts as people were shocked by the article. What also pained him is that the newspaper published the article without first contacting him to get his side of the story from him. The publication was itself shocking without any prior warning or anticipation. He claimed the esteem held of him by others was lowered or his reputation was injured.

UNDISPUTED FACTS

[9] The Second Respondent, Mr Alex Lushaba, the Editor of the Observer on Saturday testified at the Court *a quo* that the said article was indeed published by his newspaper on the 7th March, 2015 and without an input or response from the Appellant. Mr. Lushaba submitted before the Court *a quo* that after realising (after further investigations) that the story which he had published was untrue, he commissioned a retraction of the story together with an unconditional apology to the Appellant through the Ombudsman. He was not prompted by any complaint from the Appellant when he commissioned a retraction and an unconditional apology but his so doing was as a result of his discovery from a follow up investigation that it was in fact not true that the Appellant was being investigated for misappropriation of funds or at all. The retraction and the apology was offered the same prominence in the newspaper

in terms of print size and as a headline in the sports section the following week as it is a weekly publication.

FINDINGS OF THE COURT *A QUO*

[10] The Court *a quo* found that the Appellant herein was indeed defamed. At paragraph [18] of his judgment, His Lordship, Maseko J. held -

> *"It is common cause that the defendants published the alleged defamatory material on the 7th March 2015, and exactly on the next publication of the 14th March, 2015 published a retraction of the article and an apology. I have no doubt as to the pain and anguish that the plaintiff went through as a result of the publication of this defamatory article which was published when he was out of the country on official sport activities".*

[11] At paragraph [22] of the Judgment, His Lordship continues and states-

> *"I have no doubt in my mind about the* bona fide *intention of the defendants in admitting and acknowledging that the story was defamatory to the plaintiff and then tendering an unreserved and unconditional apology... This is the maturity and positive attitude blended with the intention to correct an error of this nature that is expected of a media house..."*

[12] At paragraph [38] His Lordship also found that –

"The article of 14th March 2015 withdrew entirely the contents of the story alleging that the plaintiff was involved in any mal-practise resulting to misappropriation of RSSC funds.... The speed with which the article of the 14th March 2015 was effected is an indication that the said article was not published by defendants recklessly, that is, not caring whether the contents were true or false, I say this because the falsity and defamatory nature of the said article was quickly and speedily retracted and an apology rendered"

[13] It would appear the internet publication of the same story or version was not withdrawn and this assertion by the Appellant has not been refuted. The Appellant asserts that since the story was not withdrawn from the internet, the internet as well as international readers of the newspaper still see and read the story or article even this day .

THE APPEAL

[14] The Appellant has framed his appeal as follows-

" (1) The Learned Judge a quo erred in law and in fact in dismissing the action for damages brought by the Appellant against the Respondents. The Judge a quo erred in holding that even though the words were defamatory, however despite that, the Appellant is not entitled to compensation for the same.

(2) The Learned Judge a quo erred in law and in fact in refusing to grant damages to the Appellant on the ground that the defamatory words were retracted by the Respondents seven days after the publication of the same. The Court a quo ignored to consider that, despite the retraction, damages had already been done to the good name of the Appellant and placing undue emphasis on the retraction and downplaying the damages done to the Appellant.

(3) The Learned Judge a quo erred and grossly misdirected himself in placing too much emphasis on the apology and retraction by the Respondent as if these are defenses which excludes wrongfulness of the defamatory publication and wrongly relied on South African decided cases which have altered the Roman Dutch Common Law and recognized an apology as a mitigation factor, yet according to the Roman Dutch common law applicable in Swaziland an apology is not recognized as a defence but could be a mitigating factor.

(4) The Learned Judge a quo also erred in that he misunderstood the very cases he purported to be relying on, in that he treated the retraction as a defence yet the cases he relied on, an apology was used as a mere mitigation factor not interfering with the wrongfulness of the defamatory words.

(5) The Learned Judge a quo erred in issuing a judgment the effect of which is that a person is free to insult anyone publicly in so far as the insultive words will be withdrawn within seven days or soon thereafter, accompanied by an apology. The judge a quo has opened a can of worms and made insultive publication lawful if withdrawn within seven days accompanied by an apology. This is a question of policy which the Learned Judge a quo has no authority to unilaterally determine, but his duty is to enforce the Roman Dutch Law as it was in 1905, not even the South African version of the Common Law.

(6) The Learned Judge a quo erred in applying a version of the Roman Dutch law which had been modified by the Courts in South Africa and wrongly felt bound by these cases despite that in Swaziland the Roman Dutch Common Law can only be modified by statue not by judicial decisions.

(7) The Learned Judge also erred in placing too much emphasis on the size of the retraction story and apology as if this has the effect of legitimizing the defamatory words.

(8) The Judge a quo also ignored the evidence before him that the defamatory story was never withdrawn from internet and that the international readers still see the defamation against the Appellant even to this day on internet. The Learned Judge never reflected on this aspect

on his judgment yet it was relevant and crucial in showing the precise effect of the retraction.

(9) The Learned Judge a quo erred in refusing to grant the Appellant the costs of the action including the costs of Counsel employed by Appellant."

[15] The first eight grounds of appeal can be lumped together for purposes of this judgment and conveniently summarised as follows -

> *"The Court* a quo *erred in not awarding the Appellant damages notwithstanding that the Court* a *quo did find that the Respondent had defamed the Appellant and further erred by holding that a timely retraction plus an apology absolved the Respondent from payment of damages when such is not a defence to an action for defamation".*

[16] The 9th ground of Appeal relates to the discretionary powers of a Court to award costs in a suit. The general rule is that costs follow the event. Since the Appellant lost the claim for damages the Court did not find any justification in awarding the loser with costs. It is not alleged that the discretion of the Court was un-judiciously exercised.

[17] The High Court case of *Lumbela General Trading v Swaziland Industries Agencies (Pty) Ltd and Others (668 of 2018) [2020] SZHC 207 (14 October 2020)* per J. Fakudze J, at paragraph [10]-

> *"[10] The basic rule pertaining the award of costs are awarded based on the discretion of the Court. Such discretion should be exercised judiciously and judicially otherwise it becomes no discretion at all. In the case of Nedbank Swaziland v Sandile Dlamini N.O. civil case 144, His Lordship Maphalala M.C.B. J (as he then was), cited with approval at page 10, the case of Kruger Brothers and Wasscíman v Ruskin 1918 A.D. 63 to 69 where Innes C.J. stated the basic rule as follows-*
>
> *"...the rule of our law is that costs unless expressly otherwise enacted, are in the discretion of the judge. His discretion must be exercised judicially".*

[18] In the absence of compelling reasons to the contrary, the general and basic principle of our law is that the unsuccessful party pays the costs of the successful party (see paragraph [45] of the *Swaziland Lottery Trust (Pty) Ltd v Swaziland Revenue Authority (civil case No. 65/2001) [2022] SZSC11 (13 May 2022).* In *casu,* the Respondent was the successful party and the Court *a quo* exercising its discretion ordered the parties to each pay for its costs. The Appellant was not a successful party and I find no merit why it should have been given costs. In *Sikhumbuzo Thwala v Pholile Thwala (nee Dlamini) case No. 101/12* Otta J. had the following to say-

> *"Now the award of costs and incidental to any proceedings is at the discretion of the Court. This discretion like any other discretion must*

be exercised judicially on fixed principles, that is, according to rules of reason and justice, not according to private opinion. Similarly, the exercise of the discretion must not be affected by questions of benevolence and sympathy. In exercising its discretion the Court looks at the result of the action itself as well as the conduct of the parties to see whether either of them had in any way involved the other unnecessarily in the expense of litigation. The Courts looks at all the facts of the case"

[19] This disposes off the 9th ground of Appeal on the issue of costs. The Court *a quo* exercised its discretion, I may add judiciously. The question that remains to be determined is whether after the Court found that the Appellant was defamed but for the quick retraction and an apology offered to the Appellant, the Respondent could be absolved from the payment of damages, that is, is the Appellant entitled to an award for damages.

THE LAW ON DEFAMATION

[20] The Newspaper's Guide To The Law, 5th Edition by Bell, Dewarar & Hall, Butterwooths at page 42 has the following passages-

"The wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification or excuse (Mckerron; The Law of Delict, 7 ed 170);

Defamation may be defined as consisting of the intentional publication of matter which tends to lower the esteem in which the plaintiff is held

by others (Ranchod Foundations of South African Laws of Defamation)...

The essential elements of defamation by the press are therefore -

- *The publication,*
- *Of defamatory matter,*
- *Concerning another,*
- *Without lawful justification".*

[21] The two definitions for defamation in the preceding paragraph do not mention or consist of intention to injure, that is, *animus injuriandi*; otherwise the defamation would have been-

> *"the delict of defamation is the unlawful publication, animus injuriandi, of a statement concerning another person which has the effect of injuring that person in his reputation (Joubert (ed) The Laws of South Africa)".*

[22] The debate still rages on whether the requirement of the presence of *animus injuriandi* is an element required in defamation by an individual person but not required in defamation cases by the press, radio or media digital or electronic. The case of *EFF and Others v Manuel (711 of 2019) 2020 ZASCA 172 (17 December 2020)* is instructive in this regard. At paragraph 47 the Court states-

> *"[47] Bogoshi recognised that the new defence of lawful publication by the media raised the question, left open in Pakendorf v De Flamingh,*

whether absence of knowledge of wrongfulness could be relied upon as a defence of animus injuriandi, if the lack of knowledge of wrongfulness was due to the defendant's negligence. Because the new defence was explicitly based on the lawfulness of the publication, and negligence might be determinative of its lawfulness, Hefer JA said that if media defendants could raise the same negligence as a basis for claiming absence of animus injuriandi it would obviously make nonsense of the approach...to the lawfulness of defamatory untruths. He explained that absence of animus injuriandi was concerned with ignorance or mistake regarding one or other of the elements of defamation. The Bogoshi defence is based on the reasonableness of the publication. In short, unreasonable publication of defamatory matter by the media is unlawful, and the corollary is that a defence of absence animus injuriandi, based on negligent absence of knowledge of wrongfulness, is not available to the media. The result is that in principle the media and non-media defendants stand on a different footing as appears from this concluding passage,

.... There are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of animus injuriandi, and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case".

[23] The issue of *animus injuriandi* is still not settled in our jurisdiction relating to the media, whether it should or should not be a requirement. Since this Court

had not been required to determine that issue it chooses not to make any pronouncement to it.

[24] The law allows several defences to an action for defamation for the defamer to escape liability which include the following-

(a) justification or truth for public benefit;

(b) fair comment (on a matter of public interest)

(c) absolute privilege;

(d) qualified privilege; and

(e) responsible communication on matters of public interest.

The first four defences are straight forward and need no comment. It is the fifth which is usually misunderstood. Public interest relates to issues of safety, welfare, health, benefit and security of the public and such like issues. It does not relate to untruths, gossip, juicy stories, falsity that normally attracts public attention. Public interest is different from matters appealing or are interesting to the public.

[25] In *casu* the words complained about need to be interpreted to see if they impute or constitute defamation. The words are-

"RSSC probe Timothy Shongwe on missing E300 000.00". That was the heading of the story and the substantial article, supported the heading.

It is common cause that this publication was not true as the Appellant was not being probed at all.

[26] Several authorities bear out that the imputation of the commission of a crime or the suggestion that someone has embarked on a course of conduct which will lead to his imprisonment or to say a person has been charged with a criminal offence when no such thing is true has been held to be defamatory against the plaintiff. See the following cases *Mecromatis v Douglas 1971 2 SA 520 (R); SA Associate Newspapers LTD v Klisser 1965 1 PH J2 (AD); R v Nkomo 1965 1 SA225 (SA) Glass v Perl 1928 TPD 264; Kernick v Fitz Patrick 1907 TS 3 &9; Lewis and Another v Daily Telegraph LTD (1963) 1 QB 340 (CA) 347 and Hassen v Post Newspapers (Pty) Ltd and Others 1965 3 SA 562 (W).*

[27] At paragraph [18] and [19] of the Court *a quo*'s judgment His Lordship Maseko J found as a fact-

> *"[18]. It is common cause that the defendants published the alleged defamatory material on the 7th March 2015 and exactly on the next publication of the 14th March 2015 published a retraction of the article and an apology. I have no doubt as to the pain and anguish that the plaintiff went through as a result of the publication of this defamatory article which was published when he was out of the country on official sports activities.*
>
> *[19]. On the other hand I cannot ignore the swift action of Mr. Lushaba and his editorial team in retracting the publication of the previous week, the 7th March 2015, and tendering an unconditional apology and retraction on the following publication of the 14th March 2015. It is*

common cause that this retraction and apology to the plaintiff by the defendants was not induced by any action on the part of the plaintiff, but rather such retraction and apology was self-induced by the realization by Mr. Lushaba and his editorial team that the story they published concerning the plaintiff was in fact incorrect hence it deserved a retraction and apology..."

[28] At paragraph 22 of the judgment His Lordship continued-

"[22] I have no doubt in my mind about the bona fide intention of the defendants in admitting and acknowledging that the story was defamatory to the plaintiff, and then tendering an unreserved and unconditional apology both in the publication of the 14th March 2015, as well as in a correspondence of the 23rd April 2015 quoted herein above..." (underlining mine)

[29] It is common cause that the above findings of His Lordship in the Court *a quo* have not been challenged in this appeal and therefore remain un-controverted. That being the position, what follows logically and legally is for this Court to determine whether the Appellant was entitled or was not entitled to an award for damages.

ISSUES FOR DETERMINATION

[30] The issue for determination in this case is whether the Appellant, herein, is entitled or not to an award of damages in the face of the fact that the Respondent timeously retracted the story and offered an apology in the next

publication of the weekly newspaper and without being urged to do so by the Appellant.

[31] In conclusion at the Court *a quo* His Lordship when emphasising the importance of a retraction and the offering of an apology, at paragraph [50] states-

> *"[50] As I have stated in the preceding paragraphs above, this conduct of the defendants was reasonable and constitute fair comment, and in the process negate the unlawfulness of the article of the 7th March 2015"* (my underlining).

[32] In reaching this conclusion, His Lordship at paragraph [30] reasoned that –

> *"[30] A genuine and passionate retraction coupled with an unconditional apology from the media is what takes off the sting and negative effect of a defamatory article from the victim. The negative impact that is caused by the defamatory article is neutralised by the retraction of such article and in the process the dignity and respect of the victim is restored. In other words a retraction and apology cleanses the victim of the tainted reputation caused by the defamatory publication".*

[33] It was through such reasoning that His Lordship concluded by dismissing the Plaintiff's claim for defamation and awarded no damages as he held that a

retraction coupled with an apology cleanses the victim of a tainted reputation caused by a defamatory publication.

ANALYSIS OF THE JUDGMENT

[34] His Lordship, on paragraph [23] under the heading **"Applicable Law",** was influenced by the South African case of *National Media LTD and Others v Bogoshi 1998 (4) SA 1196 (SCA).* From the traditional defences to defamation actions of –

(a) truth or justification (for public benefit);

(b) Fair comment (on matters of public interest and not what interests the public);

(c) absolute privilege (such as statements made in Parliamentary session);

(d) qualified privilege (statements made in discharge of a duty, judicial proceedings and such like provided are not activated by malice);

(e) public interest, although this one overlaps on the preceeding defences,

was added,

(f) "reasonable publication"

The Bogoshi case (as the case is commonly referred to) introduced an additional defence of reasonableness in the circumstances "or" "reasonable

conduct" which I presume, though not clearly stated in the case that "reasonable conduct" refers to conduct before publication, including verification of the facts with the person to be defamed, and not to what one does after publication.

[35] In expousing the defence, the Court there at page 30 stated -

> *"In my judgment we must adopt this approach by stating 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 facts in the particular way and at the particular time"*

But there is a rider or restriction to this new defence and it found on page 31 of that judgment and reads -

> *"...ultimately there can be no justification for the publication of untruths, and readers of the press should not be left with the impression that they have a licence to lower the statements of care which must be observed before defamatory matter is published in a newspaper".*

My underlining seeks to draw attention to the fact that the reasonable conduct must be *before and not after publication* as His Lordship Maseko J. seems to attach reasonableness of conduct to the retraction and apology which followed after publication.

[36] In the case of EFF and Others v Manuel (711/2019) [2020] ZASCA172 (17 December 2020) at page 26 the issue of reasonableness is captured as follows-

> *"The Bogoshi defence is based on the reasonableness of the publication. In short unreasonable publication of defamatory matter by the media is unlawful and ... the defence of absence of animus injuriandi; based on negligent absence of knowledge of wrongfulness, is not available to the media".*

[37] But what is the position in our jurisdiction relating to the Bogoshi defence of reasonableness. Whilst the Bogoshi case in its totality is a useful case, with sound arbiters caution was suggested by OTA JA in *African Echo (Pty) Ltd, Thulani Thwala and Mabandla Bhembe v Inkhosatana Gelani Simelane (48/2013) [2013] SZSC71 (29 November 2013)* at paragraph [34] -

> *"[34] It is imperative that I point at this juncture, the Bogoshi decision, just like all other 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 Bogoshi decision was based on the uniquely liberal Constitution of South Africa, which exhibit some marked difference with our Constitution and should be approached with trepidation. The foregoing notwithstanding, since the reasonableness concept of the Bogoshi phenomenon, which commands itself to me, was relied upon by a quo,* I am compelled to consider it in this regard".

Therefore this new defence of reasonableness of publication still requires full interrogation by the Court and parties when faced with such question squarely in the face. Until then, the Bogoshi defence of reasonable publication remains

not part of our law but persuasive in supporting the well-established defences to a defamation action set out in our paragraph [24]. It is my considered opinion that the Court *a quo* committed a misdirection in relying on the Bogoshi defence of reasonable publication at paragraph [50] of its judgment

[38] In *casu* we also have to determine whether a retraction of a defamatory article and an apology can be a complete defence to an action for defamation or put differently can a retraction and an apology be sufficient to absolve the Defendant/Respondent of blameworthiness in a defamation action.

[39] Our law is aptly stated in Kelsey Stauart's Newspaper's Guide To The Law, Bell Dewar & Hall, 5th Ed at page 68 where the following is stated -

> "*Although the publication of an apology will not be a defence to an action for defamation, it may reduce the amount of damages which the Court will award. The sooner the apology is published the more effect it will have as a mitigation factor*". (my underlining)

Issues to be considered in mitigation include the time of publication of the apology and the prominence of its publication.

[40] The apology must, as a mitigation factor show genuine repentance: see *Simpson v Williams 1975 (4) SA 312 (N) 316 A.*

A reluctant correction of an incorrect report containing very little in the way of a frank expression of regret, may still have some mitigating effect- see SA *Associated Newspaper v Samuels 1980 1 SA 24 (A).*

[41] In the cased of *EFF and Others v Manuel (711/2019) [2020] ZASCA* the Court referring to the case of *La Roux v Dey* said at paragraph [128] -

> *"It must be born in mind that the apology in that case was ordered in conjunction with an award of damages, not separately from it"* (my underlining).

And at paragraph 130 the Court reasoned as follows-

> *[130] Neither of these two judgments suggested that an Order for publication of a retraction and apology on its own and not in conjunction with an award of damages would be an adequate remedy. The High Court's order for publication of a retraction and apology in this case was made in conjunction with its order for damages. We have held that the latter should not have been made without hearing evidence. The Applicants had suggested in their challenge to the quantum of damages, that an apology would be sufficient redress, but that suggestion can only be considered in conjunction with the consideration of whether an award of damages should be made and the quantum of that award. An apology has always weighed heavily in determining the quantum of damages in defamation cases as occurred in Le Rous v Dey. In our view, whether an order for an apology should be made is inextricably bound with the question of damages* (my own underlining).

[42] From the foregoing paragraphs, we hold that, it is our law that a retraction and an apology is not a complete defence to an action for defamation. If the Court finds that the plaintiff was defamed, as it happened in the present case, it should have awarded damages. A retraction and an apology could be a mitigation factor in the determination of the quantum of damages.

[43] It must be mentioned too, that the Court *a quo* at paragraph [50] also found that the conduct of the Respondents constituted *fair comment.* We hold this was a misdirection as well as the defence of fair comment relates to a truthful comment on a matter of public interest which was not the case in this matter. An untruthful publication cannot constitute of public interest. As mentioned above: A comment to be fair must be truthful and be on a matter of public interest

[44] Lastly, the Appellant pleaded with this Court that in the event an order for an award for damages is made, the Court should also grant the quantum or an amount for damages. In support of this suggestion, this Court was referred to this Court's judgment of *Simon Mandla Yende vs The Swaziland Government and Another* (61/2020) [2021] SZSC12 (04TH June, 2021) wherein I was part of the panel of the Justices who decided the case. That case is distinguishable from the present case, in that in the former case referred to, both parties had their attorneys present in Court and both submitted on the issue of the quantum of damages. In the present case, the substantive attorney of the Respondents is not in Court but represented by Counsel B. Nkonyane who had limited mandate which only went as far as asking for a postponement of the hearing.

At the hearing of this matter the Court did point out that fairness requires that the issue of quantum of damages should be fully interrogated by the parties before a proper Court. Counsel Z. Dlamini for the Appellant rightly did not insist on his plea. The danger of the Supreme Court determining in the first instance the quantum of damages is where one or both of the parties is not satisfied with the determination, an avenue for challenging the determination is closed. There would be nowhere to appeal.

CONCLUSION

[45] The appeal stands unopposed by the Respondents as they have not filed any opposition, no Heads of Argument, no Authorities and no cross-appeal. The Court *a quo* did find the publication to have defamed the Appellant but was not entitled to an award of damages because the Respondents timeously and without any prompting from the Appellant retracted the publication and offered an unconditional apology. There is no evidence that the internet version of the article was retracted as per a submission by the Appellant. The Respondents have not refuted this submission.

[46] A retraction and an unconditional apology is not a complete defence to an action for defamation and we have not been referred to any decided cases to the contrary and we have not found any support for such a view in our law. A retraction and an apology has always been a mitigation factor in determining the quantum of the award for damages. It is only fair to the parties that the issue of quantum of damages be fully argued before an appropriate Court.

[47] In the result-

1. The appeal succeeds;

2. The judgment of the Court *a quo* is set aside and replaced with the following orders-

   (a) Plaintiff's claim for damages, subject to paragraph (3) herein, for defamation succeeds;

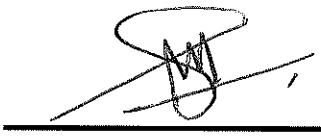
   (b) Plaintiff is awarded costs of suit.

3. The matter is referred to the Court *a quo* for the determination of the quantum of damages to be awarded to the Appellant.

4. Costs granted to the Appellant.

S.J.K MATSEBULA
JUSTICE OF APPEAL

I AGREE



S.B. MAPHALALA
JUSTICE OF APPEAL

I AGREE

J.M CURRIE
JUSTICE OF APPEAL

For the Appellant: Z. Dlamini from Dlamini- Kunene Associated

For the Respondent: B. Nkonyane from Magagula Hlophe Attorneys