

THE HIGH COURT OF SWAZILAND

Wachira et uxor

Plaintiffs

V

The African Echo (Pty) Ltd and others

Defendants

Civ. Case No. 608/98

Coram

Sapire, CJ

For Plaintiffs

Mr. P. Flynn

For Defendant

Mr. Matsebula

JUDGMENT

(19/11/99)

The First Plaintiff is David Wachira who at the time of the institution of this action was employed on contract as Senior Crown Counsel in the office of the Director of Public Prosecutions. He is joined with his wife, Jane, who is the Second Plaintiff.

The First Defendant is the proprietor and publisher of a leading newspaper circulating in Swaziland, namely "The Times". The Second Defendant is an employee of the First Defendant while the Third Defendant is the printer employed by the First Defendant.

The plaintiffs, each claim E250 000,00 for damages they have allegedly suffered, from the publication of a photograph of them as part of an article in The

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Times on 5th April 1997. The article canvasses the opinions of prominent people, under the banner "What the People Have to Say" and deals with the then currently debated topic of the church's not being able to require couples intending to marry in the church to undergo HIV testing. Prominently, under the words

"... it is up to those who want to marry to decide whether or not they want to be tested for AIDS"

appears a picture of the plaintiffs taking their marriage vows. The caption appearing under the photograph does nothing to identify the plaintiffs as the persons in the therein. On the other hand by virtue of his position in this small community there must be many who would have recognised the plaintiff and perhaps less so his wife.

There is nothing in the photograph or the surrounding material to suggest that the persons whose images appear in the photograph had tested themselves either voluntarily or on the insistence of the church in which they were married. There is certainly nothing defamatory in the publication by way of implication that the plaintiffs or either of them were, or had reason suspect or fear that they might be, infected with the virus.

The basis of the Plaintiffs' claim is the invasion of their privacy and the sentimental injuries they have suffered therefrom. As in South Africa, with which country we share a Roman Dutch common law such an action is maintainable in Swaziland.

When the Plaintiffs were married in 1995, the Plaintiff engaged a photographer employed by the First

Defendant to take photographs of the ceremony, which took place at All Saints Church, and of the reception, which took place at the Mountain Inn Hotel. There is some dispute as to the terms upon which the photographs were to be taken. There is some conflict on the evidence as to the exact terms upon which the photographer acted and the extent of his mandate. The conflicts need not be addressed or resolved. For the purposes of this case I accept that the Defendant, it was contemplated would use the photographs to record the social occasion in its appropriate columns.

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It is common cause that a series of photographs were taken at least one of which appeared soon after the wedding in the social news of the newspaper of which the Defendant is the proprietor. Some of the photographs remained on file with the First Defendant. Two years after the wedding the photograph selected from the material on file was published. This time in connection with the subject matter I have described, but without prior consultation with the plaintiffs, and without their authorisation and consent. This very publication the plaintiffs claim constitutes a wrong done them by the defendants. The plaintiffs claim that the injury to them was acerbated by the subject matter with which the publication was connected.

The Defendants have pleaded that there was not any reference in the article on page 8 to the Plaintiffs. This is true but irrelevant. The defendants deny that the article contained any words defamatory of any one or which could be considered humiliating. Again true but not an answer to the Plaintiffs' claims

The Defendants continue in the plea to explain that the publishing and printing of the photograph of the Plaintiffs was " simply to illustrate a typical wedding ceremony and had no reference to the pronouncement by the Free Evangelical Assemblies Church." This disclaimer is difficult to maintain if one looks at the article and photograph from the point of view of the average reader.

The fact remains, that it was the publication of the photograph for this purpose which was unauthorised. This purpose was entirely different from that for which the photographs were originally taken.

Public discussion on the question of AIDS is necessary and to be encouraged if the gravity of the problem is to be widely understood. One can however appreciate that participants in a wedding ceremony may reasonably not want that occasion to be associated with a disease, which in the minds of many has its origins, and the cause of its spread, in sexual infidelity, immorality and promiscuity.

In chapter eight of his work "The Law of Privacy in South Africa", David McQuoid-Mason examines and analyses the authorities, (Local,American and British) on this topic under the rubric "Appropriation: use of a person's image, name or

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likeness". The essence of the wrong as described by the author, is the exposure of the plaintiff to publicity by having his image name or likeness used by another. It is such misuse which constitutes an affront to his dignitas and entitles him to an action for evasion of privacy.

In the present case the publication of the photograph two years after the event negates any suggestion that the plaintiffs may have consented to the publication. Moreover the original consent related to the illustration of a social event which had just taken place. The subsequent publication related to the illustration, of an article on the subject earlier described. However praiseworthy the publication of the article, and however innocuous the use of the photograph in connection therewith may have been, the absence of the plaintiffs' consent thereto, makes it a wrongful invasion of their privacy. For this they are entitled to damages. For the Defendant the moral in this is, if in doubt, ask permission to publish.

The amounts claimed by the Plaintiffs (E500 00,00 a piece) are optimistic beyond reason. They have suffered nothing but sentimental damage and no material loss whatsoever, five thousand Emalangeni each would seem to be adequate solatium. The award will carry with it an order for costs.

There will be judgment for each of the plaintiffs against the defendant in the amount of E5 000.00 with

costs

S. W. SPIRE . C J