IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2907/99

In the matter between

ROBERT LOBI ZWANE	APPLICANT
And	
AFRICAN ECHO (PTY) LTD t/a	
THE TIMES OF SWAZILAND	1st RESPONDENT
AFRICAN ECHO (PTY) LTD t/a	
THE TIMES SUNDAY	2nd RESPONDENT
THE SWAZI OBSERVER	3ND RESPONDENT
(PTY) LTD	
CORAM	MASUKU J
FOR 1st AND 2nd RESPONDENTS	MR. P.R. DUNSEITH
FOR 3rd RESPONDENT	NO APPEARANCE

JUDGEMENT

15/12/1999

By an application filed under a Certificate of Urgency, the applicant applied for an order in the following terms:

1. That the forms of service and time periods, provided for in the Rules of Court be dispensed with and that the matter be heard as one of urgency
2. That a rule nisi be granted calling upon the respondents to show cause, if any, to this Honourable Court on a date to be determined by this Honourable Court why:

    (a) The order set in paragraph 3 hereunder should not be made final:
    (b) The Respondents should not be ordered to pay the costs thereof.

3. That the Respondents be and are hereby interdicted and restrained from publishing and disseminating defamatory and/or injurious matter of or concerning Applicant to the public or to any other person.
4. That the order in Paragraph 3 hereof shall operate as an interim interdict pending the return date of the rule nisi
5. Granting to the Applicant such further or alternative relief as the above Honourable Court may deem just in the circumstances.

In the Founding Affidavit, the Applicant alleges that the Respondents, which are involved in publication of newspapers circulating within the Kingdom of Swaziland, caused certain articles to be published which contain defamatory and injurious matter of and concerning himself.

With regard to the 1st Respondent, it is alleged that it published a defamatory article of and concerning the Applicant, entitled "Zwane Ngcina folk square up over cattle". It is alleged in that article that the Applicant confiscated cattle belonging to some residents of Ngcina and charged E300-00 per

beast to secure their release. According to the Applicant, the article is untrue and is a fabrication of the events.

The Applicant further alleges that on the 28th November 1999, the 2nd Respondent published an article entitled "The King of Terror" alleging that the Applicant's behaviour and that of the community police resembles that of armed bandits in countries ravaged by civil war. According to the Applicant, the contents of the article are untrue and are highly defamatory of him. It is further alleged that the said article incites the people of Nyetane to act violently towards him.

On the 28th November 1999, it is alleged that the 2nd Respondent published an article entitled "More Horror Tales on Robert Zwane", in which it was stated that the Applicant abducted and tortured certain people. The Applicant again alleges that the article is a complete fabrication and is untrue. According to Mr. Dunseith for the 1st and 2nd Respondents, the authorship and publication of this article was wrongly attributed to the 2nd Respondent whereas it was published by the 3rd Respondent. Mr, Dlamini did not controvert this.

The Applicant further states that another defamatory article was published by the 1st Respondent on the 29th November 1999, entitled "What a Warlord Means to Swaziland". According to the article, the Applicant was referred to as a monster, which the Applicant regards as insulting and degrading to him.

On the 26th November 1999, the 1st Respondent published another article entitled "Is Mr. Hillary in Seclusion", and in which the Applicant was inter alia referred to as a bandit and a thief. The 1st Respondent also published another article on the same date entitled "Situation Remains Tense at Nyetane". The Applicant states that the said article falsely stated that he had deployed armed members of the community policemen who had besieged the area and were intimidating the residents.

The last two articles are attributed to the 3rd Respondent and are dated 29th and 30th November 1999, respectively. In the first article entitled "Tension High at Nyetane", the Applicant contends that it was implied that the Applicant is illegally seizing cattle from the Nyetane residents thus creating a "false innuendo". The last article, according to the Applicant implies that the Applicant is a very bad person and causes trouble in Swaziland-All the copies of the articles referred to herein above are annexed. The Applicant seeks an interim interdict restraining all the Respondents from publishing any matter which is defamatory and/or injurious of or concerning him. Mr. Dunseith, who due to time constraints was unable to file affidavits, stated that his clients have defences to the Applicant's allegations that the matter contained in the article was defamatory, injurious and/or insultive. Mr. Dunseith stated from the bar that the articles were true and to the public benefit. In order for a party to obtain an interim interdict, four requirements must be fulfilled, namely:

(a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;
(b) That, if the right is only prima facie established there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) That the balance of convenience favours the granting of interim relief; and
(d) That the applicant has no other satisfactory remedy. See Prest C. B, "Interlocutory Interdicts" Juta & Co, Ltd page 55, 1993 and Steel Engineering Industries and others vs National Union of Metal Workers of South Africa (2) 1993 (4) S.A. 196 at 199 G - 205 J.

All the above requirements ought to be satisfied seriatim by an Applicant for an interim interdict. It now behoves me to consider whether the Applicant in casu has fulfilled the requirements. I will begin with the first requirement.

(a) Prima facie right

Yvonne Burns, "Media Law", Butterworths, 1990, at page 139 - 140, states as follows:

"Personality rights are those rights which are closely tied up with the legal subject as a person., for example, the right to his good name, the right to dignity and honour, and the right to privacy All these aspects, which form an integral part of individual personality, define a sphere of human existence, which the individual considers private and wishes to keep inviolate".

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It is these rights that the Applicant contends have been violated by the articles published by the Respondents. I must however hasten to add that the bulk of the articles are not defamatory of the Applicant. They are just a report of factual and historical incidents involving the Applicant and members of the community policemen. In particular, I am of the view that articles "LRZ 1", "LRZ 2", "LRZ 5", "LRZ 6", " LRZ 7" and "LRZ 8" are not defamatory of the Applicant at all, even applying the most liberal and benevolent interpretation and standards. No further reference therefore needs be made to the above articles.

Regarding the balance of the articles, Mr. Dunseith contended that these articles were true and to the public benefit therefore justifying the violation of the Applicant's rights. As mentioned earlier, no affidavits have been filed for and on behalf of the Respondents except Mr. Dunseith's submissions. Even if affidavits had been filed, it would be impossible to decide whether the Applicant has established a prima facie right although open to some doubt.

In Webster v Mitchell 1948 (1) S.A. 1186 at 1189, Clayden J stated as Mows regarding the approach to be adopted in ascertaining whether a prima facie right had been established. The learned judge stated as follows:

"The use of the phrase "prima facie established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the Applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the Respondent which the Applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for Ms right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.

This approach is correct but only applies in cases where a full set of papers has been filed. In casu I am unable to assess whether the 1st and 2nd Respondents have thrown any serious doubt on the Applicant's right. In the circumstances, I will leave this aspect open deciding the issue on the other requirements.

(b) Well grounded apprehension of irreparable harm. In Ms papers, the Applicant states as follows at paragraph 15:

"The Respondents are currently engaged in publishing defamatory matter against me, I therefore have a well grounded apprehension that in the absence of a permanent interdict the Respondents (intend) to defame me in the future".

There are no grounds or facts disclosed by the Applicant showing or even suggesting that irreparable harm will eventuate if the interim relief is not granted. There is nothing at all in the papers to show that Respondents would continue to defame the Applicant. In paragraph 17, the Applicant states that the Respondents are agitating

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members of the public to assault him and that he may be killed in the process. Mr. Dlamini submitted

that the Applicant's death was the irreparable harm feared.

None of the articles by the Respondents in my view has the effect or suggestion of inciting or agitating members of the public to kill the Applicant. The articles seek to bring to the attention of the public the Applicant's conduct, which demands scrutiny. There is also no basis for the Applicant to believe that he will be killed. No threats of death of the Applicant directly or even indirectly arising from the articles have been disclosed to affirm the fear that he will be killed.
In C.B. Prest on Interlocutory Interdicts (supra) at page 72, the learned author states as follows;

"It is not sufficient for an applicant to merely allege that, unless an interdict is granted, he will suffer irreparable loss. A court will not be bound by the fears of an applicant; he must show that he has good grounds for his fears before his application can be considered. On the basis of unsubstantiated fears, a court will not be satisfied that irreparable injury will result if an order is not granted. The good faith of the applicant is not relevant; nor is the genuineness of his fears. What is relevant is reason to apprehend that the act complained of will be repeated. This must be established in the documents before court".

I am of the view that the Applicant has failed to show that there is well grounded (my emphasis) apprehension of irreparable harm. The articles that have been published are of no consequence as the Plaintiff has delictual remedies in respect thereof, if so advised. The question is whether enough has been placed before this Court to render the Applicant's fears that irreparable harm will eventuate reasonable. In my view, this requirement has not been satisfied, regard being had to the excerpt from Prest above.

(c) Balance of convenience

What the Court has to determine under this head is the potential prejudice liable to be suffered by the applicant if the interdict is withheld. This is viewed against the prejudice to the respondent if it is granted.

In casu, the Applicant has in my view failed to show that he has reasonable grounds to believe that the harm complained of will be repeated. In view of the circumstances of the case, it is unnecessary to consider this requirement, save to state that should the Respondents publish and disseminate defamatory and or injurious matter of and concerning the Applicant, he can apply for the appropriate delictual remedies. According to Mr. Dunseith, the Respondents have a duty to report to the public on matter of public interest.

This includes reporting on the behaviour of persons viewed as public figures. According to Mr. Dunseith, the Respondents should be allowed to report thereon and where necessary, even defame the Applicant, as long as some justification therefore exists at law e.g. truth and public benefit. According to Mr. Dunseith, the Respondents and the public will be prejudiced if the relief is granted.

I agree with Mr. Dunseith's contention. If the interim relief is granted, the Respondents may be barred from reporting on issues, which, even if they defame the Applicant, have some justification at law. There may be issues of fair comment etcetera. If the Applicant is aggrieved thereby, he is at liberty to claim appropriate relief, which will test the viability of any defence that the Respondents may raise. I am of the view that the Respondents stand to suffer more harm if the relief is granted whereas the Applicant will always have damages claim if the Respondents abuse their rights in fulfilling their duty to inform the public.

(d) No other satisfactory relief C.B. Prest (supra) at page 84 states the following:

"One cannot escape the fact that the interdictory remedy is extraordinary and discretionary. Any attempt to minimise this essential character of the remedy is destined to failure. At the same time it is always the task of the court when faced with this or any other type of remedy, to ensure that justice is done. Where an obvious alternative remedy presents itself, then clearly, the scope for the grant of an interdict is limited and justice can be done without the need for any interdictory application. On the other hand, where the alternative is not obvious, and emerges only with difficulty, it is submitted that the dictum of Sach L.J. should be the touchstone that is 'is it just, in all the circumstances, that the

plaintiff should be confined to his remedy in damages'.

The Applicant in casu operates from a self-inflicted disadvantage in this that he has made no allegation and has stated no facts showing that no other suitable remedy is available to him. This Mr. Dlammi conceded. The Applicant's complaint is that the articles published by the Respondents are defamatory and injurious to his good name and reputation.

As stated above, the question to be answered is whether given the totality of the attendant circumstances an order for damages would commend itself as an adequate remedy given the premise from which we operate; namely that an interdict is of an extra-ordinary nature. I answer the question in the affirmative. Damages would offer the Applicant sufficient and adequate relief and it is for that reason inappropriate to grant an interdict in the circumstances.

In Marshall & Co. Ltd v Bertola S.A. (1973) 1 All EM 992 at 1005, Sachs L.J. posed the following question:

"The standard question in relation to the grant of an injunction, are damages on adequate remedy? Might perhaps in the light of the authorities of recent years, be rewritten: it is just in all the circumstances, that plaintiff should be confined to his remedy in damages.

To the learned judge's question, I answer in the affirmative.

W.A. Joubert, "The Law of South Africa", Butterworth, 1979, Vol. 7 at page 216 par. 257 states that the publication of a defamatory statement may be restrained by an interdict. The applicant,, he continues, must establish on a balance of probabilities

(a) that the respondent is about to publish or to continue publication and distribution of a statement defamatory of him,
(b) that the respondent has no valid defence to defamation proceedings and
(c) that the applicant will suffer irreparable harm if the interdict is not granted.

From a consideration of what I have said above, I have no doubt that the Applicant has failed to meet the above requirements on a balance of probability.

In the result, I find that the Applicant has failed to satisfy a majority of the requirements for the grant of an interim interdict. The application is therefore dismissed with costs. Only the 1st and 2nd Respondents will be eligible to recover the costs in view of the fact that the 3rd Respondent did not oppose the application, notwithstanding service.

T. S. MASUKU

JUDGE