IN THE HIGH COURT OF SWAZILAND

CASE NO. 3454/2005

HELD AT MBABANE

BETWEEN **BRANDON LEO...**

PLAINTIFF

PALFRIDGE (PTY) LIMITED. ISABEL **FIRST DEFENDANT SECOND DEFENDANT**

CORAM **AGYEMANG J S. MAGDNGD ESQ.**

FDR THE PLAINTIFF:

FDR THE DEFENDANT: **J. HENWDDD ESQ.**

DATED THE 27TH DAY OF NOVEMBER 2009

JUDGMENT

In this action the plaintiff claims against the defendants, the following: general damages in the sum of E200.000; the sum of E5,000 being the cost of instructing attorneys; payment of the costs of this suit, and further and/or alternative relief.

The plaintiff is a businessman of Lobamba. He testified that he was one of two Directors of a company called TPL Investments. That company he said, was engaged in the business of repairing refrigerators, air conditioners and installing cold rooms. The business which was started in November 2004, had a workshop housed in the Maphiphisa Complex at Lobamba. Before the plaintiff started this business, he was an employee of the first defendant from the period AD 2001 until October 2004. He alleged that he started his business after he resigned from the first defendant's employment having duly informing the latter of his intention to start his own business. The first defendant is a company registered under the laws of Swaziland and although its business was not pleaded, it was clear from the evidence that its business included the production and sale of refrigeration spares. These are the matters that gave rise to the instant suit: On the 20th of July 2005 (the defendants maintain that it was rather the 19th of December 2005), the plaintiff was within the vicinity of his workshop at. Lobamba. He had been engaged by one Mr. Dlamini: the landlord of the business complex housing the plaintiffs workshop, to install a cold room for that gentleman. According to the plaintiff, he was inside a room installing the cold room when he heard someone asking for him outside and that when he got out, he saw the second defendant in the company of two gentlemen. The plaintiff alleged the second defendant to be the Head of Security of the first defendant company. The accompanying gentlemen were also known to him. It was the case of the plaintiff that when he saw the group, the second defendant was talking with the plaintiff's co-worker. The second defendant was allegedly pointing at a vacuum pump which she claimed belonged to the

first defendant. The plaintiff alleged that the second defendant informed him that they were looking for items, bought by the plaintiff, stolen by workers of the first defendant and sold to the plaintiff. She then, allegedly (although she produced no warrant), insisted that the plaintiff to take her inside his workshop for an inspection which the plaintiff allegedly did. This was some ten metres from the place where the plaintiff was installing the cold room. Due to all this, the plaintiff had to stop the work of installing the cold room thus prompting the said Mr. Dlamini for whom he was working, to come out and ask what the matter was. The plaintiff then informed him that the group were looking for goods

alleged to have been stolen from the first defendant and sold to the plaintiff. The plaintiff thus allegedly led the group into his workshop which was within a square-shaped complex, somewhere at the back and ensconced between shops. At the workshop, the second defendant allegedly ordered the plaintiff to bring out all the equipment, tools and spares he used in his trade. When the plaintiff did so, the second defendant allegedly pointed at a thermostat, a pinch of pliers, persisted in her allegation that they were stolen from the first defendant. The first defendant also asked the plaintiff where he had bought a vacuum pump from and when the plaintiff informed her that he bought them from the second defendant through the Factory Manager one Roy Singh, she ordered the plaintiff to produce his receipts for the purchases for inspection at the premises of the first defendant. The second defendant furthermore interrogated the plaintiff as to where he got his spares and when he said he got them from Hoagies, she allegedly maintained that they had been stolen from the first defendant and sold to the plaintiff by the first defendant's workers. She once again, ordered

the plaintiff to submit his receipts for the inspection of the first respondent. All this he said, happened in the presence of eight persons: three of the plaintiffs co-workers, the two men accompanying the second defendant and the plaintiffs landlord/client Mr. Dlamini. Afterwards, the second defendant and her companions left, promising to return but never did. It is the case of the plaintiff that he understood from the words used by the second defendant that he was being accused of being involved in the stealing of tools from the first defendant.

It is also the case of the plaintiff that the action of the plaintiff injured him in his trade. It was his testimony that immediately after the second defendant's visit and her allegations, his landlord/customer: Mr. Dlamini terminated the contract he had given him for the installation of a cold room at a price of E60,000. This he said immediately caused him financial loss as he had to return the money Mr. Dlamini paid to him for the work. Furthermore, the said Mr. Dlamini who owned a supermarket and butchery and often gave him contracts for the repair/maintenance of his refrigerators refused to work with him, saying that he had no wish to deal with one involved in crime and who would only bring him trouble with the Police. He even allegedly threatened to evict the plaintiff's

business from his premises should the allegations be found to be true. Thereafter, even after the second defendant failed to return to substantiate her allegations, the said gentleman never gave the plaintiff another contract but gave his business to others. Following Mr. Dlamini's repudiation of their contract, two other persons: Nonhlahla Dlamini and Mr. Khurnalo who had agreed to give contracts to the plaintiff that were to be executed right after he finished Mr. Dlamini's cold room installation, withdrew their offers citing information that had reached them that the plaintiff carried out his works with equipment and spares stolen from his former employer. One of them eventually sold her business and the other (who testified in support of the plaintiffs case), gave his business to other people. Indeed this gentleman alleged that when he heard the rumour regarding the allegations against the plaintiff, he went to investigate by approaching the plaintiff and although the plaintiff protested his innocence and he himself after a while was not persuaded that the allegations were true, he nevertheless decided not to give anymore business to the plaintiff. The contract he withdrew from the plaintiff would have been in the region of E41.000. The loss he sustained as a consequence of the second defendant's words and actions he said, was such that he was unable to meet his bills that month.

At the prompting of learned counsel for the defendants, the plaintiff tendered in evidence, bank statements of his business showing his business earnings from June 2007-June 2008. They were admitted as exhibits A and A1. He also tendered invoices of prospective clients of his business who withdrew their offers following the second defendant's conduct. They were admitted as exhibits B, B1-B13

The plaintiff alleged further that many people heard that the first defendant's workers had been to see him because he was suspected of having stolen items in his possession and that many businesses around Lobamba stopped dealing with him for that reason.

The plaintiff's case was supported by one of the prospective clients who withdrew their business. It was his testimony that he knew the plaintiff as one who repaired refrigerators, installed air conditioners, and installed cold rooms and that he had used the plaintiff's services before the incident the subject of this suit. He testified that he had intended to give the plaintiff the work of installing a cold room at his butchery and asked

the plaintiff for a quotation which he received, in the region of E40.000 - E41,000. He recounted that before he could give the contract to the plaintiff, he heard from people including some customers, persons in a gaming room next to his butchery, that the plaintiff had stolen things from another company, things used in the installation of a cold room. Corroborating the evidence of the plaintiff, he testified that although the plaintiff protested his innocence when he enquired about the goings-on from him, he decided not to give the plaintiff the business because it had been said that the plaintiff stole from his former employer. He said in further corroboration of the plaintiff's case that it came to his notice that the said Mr. Dlamini whose work the plaintiff had been doing at the time of the incident had stopped the plaintiff from working for him. The second defendant gave evidence for herself and the second defendant sued vicariously for her alleged conduct, and called one witness. The second defendant testified that in July 2005, she was the Loss Control Manager of the first defendant and that her job description included production issues, such as time wastage at the production line, quality issues and control of losses. She alleged that on 19/7/05, she was informed by the Factory Manager that one of the workers was breaching work regulations by leaving the refrigeration line once too often, and without seeking the requisite approval of his superior. The second defendant who was tasked to look into the activities of this worker: Musa Dlamini, found, upon enquiry that when the latter vacated his position on the line, he would go out to the gate to talk with the plaintiff a former employee of the first defendant. The said Musa Dlamini upon being confronted over this, admitted that when he went to talk with the plaintiff, it was in connection with clients he found for the latter. The plaintiff would then give him some money in appreciation. The second defendant was tasked by the Production Manager of the first defendant to go on a factfinding mission. The mission she alleged, was to find out the relationship between the Musa Dlamini and the plaintiff.

Thus did she leave the first defendant's premises for the plaintiff's workshop accompanied by two men: the said Musa Dlamini (who led the way), and one George Chary, the Stores Manager. She alleged that when they got to the complex in which the plaintiff had his workshop, they enquired from a bystander and were informed that the plaintiff was at the back of the building. The party went to the back of the building and

indeed found the plaintiff in an open space thereat. According to the second defendant, in a conversation that lasted about ten minutes, she first enquired if the plaintiff knew Musa Dlamini and that it was a matter of course, as they had been co-workers. She then asked the plaintiff where he obtained the spares he worked with from. The plaintiff she said, responded that he bought them from Hoagies, and from the first defendant's factory shop, and that he had receipts to prove it. At this, she told the plaintiff to bring the invoices to the first defendant's factory premises. Around the end of their conversation, an elderly gentleman who spoke in SiSwati joined them, he reportedly asked who they were and was allegedly informed that they were the plaintiff's old colleagues. Denying that she ever went into the plaintiff's workshop or that she was angry or confrontational, she alleged that there were welding rods lying close by in the open space and that she asked where the plaintiff got them from. Denying also that she accused the plaintiff of using stolen spares in his work or of stealing, the second defendant alleged that it was a conversation the plaintiff participated in without any form of resistance; nor did the plaintiff ask for the involvement of the Police. She added that in a short while, she and her companions left the premises and that after the incident (about three years before the day she gave her testimony), she recommended the plaintiff for work at Malandla's Restaurant and House on Fire where he was given jobs. The defendants called one witness: the said George Chary who had been one of the second defendant's companions on that day. He alleged himself to have been the first defendant's Stores Controller at the material time. This witness for the most part corroborated the evidence of the second defendant regarding the fact-finding nature of the mission, the short duration, of the visit and the non-confrontational attitude of the second defendant. He however acknowledged that the second defendant in fact pointed at, and asked the plaintiff where he got some refrigeration components that they saw in an open space. This open space, he alleged to be the plaintiff's workshop where everything was accessible. He alleged that there was no shouting and that they left in peace.

At the close of the pleadings the following stood out as issues for determination:

1) Whether or not the second defendant invaded the workshop of the plaintiff and wrongfully subjected same to a search;

2) Whether or not the second defendant made a statement that the plaintiff repairs his clients' refrigerators with spares stolen from the first defendant;

3) Whether or not the second defendant published the said statement;

4) Whether or not the plaintiff suffered damage as a result of the second defendant's statement and alleged invasion of plaintiff's premises;

5) Whether or not the plaintiff is entitled to his claim.

The plaintiff pleaded a wrongful invasion of his premises and an unauthorised search thereat by the second defendant and her companions. He testified that the second defendant and other employees of the first defendant went to him while he was working at an open space and ordered him to lead him to his workshop. This has been denied by the defendants who maintained that the plaintiff never at any time ordered the second defendant and her companions out of his premises but co-operated with them in the execution of their fact-finding mission. I have no doubt that if the circumstances alleged by the plaintiff, were proved to have happened, that is: that he was forced to lead the way into his workshop by the second defendant allegedly angry and confrontational, it may constitute an invasion of his privacy (although it was a workshop and not a private residence), even though the plaintiff himself may have led the way into his workshop. The difficulty with that allegation, is that in face of a denial by the defendants in their plea, the plaintiff did not produce any witness to corroborate his story although he alleged that it had happened in the presence of three of his co-workers and a client. There is no denying that in the evaluation of evidence, a matter is regarded as proven not by reason of the repetitive evidence of a multiplicity of witnesses, but by the quality thereof, so that corroboration is not always essential in the proof of a matter. In the instant matter however, I consider the matter of corroboration crucial to the proof of the plaintiffs assertion, for in the face of the defendants' denials in pleading and the evidence of the second defendant and her witness that they did not in fact move away from the open space where they found the plaintiff at work, it was imperative that the plaintiff's evidence be corroborated by one of the four persons (his co-workers and the client) he alleged to have witnessed the said invasion of his premises. It was not. I therefore find

that the plaintiff who had the burden of proving this alleged matter on a balance of the probabilities titled in his favour, failed to do so.

I hold therefore that there was no invasion of the workshop of the plaintiff.

The plaintiff furthermore failed to lead evidence on his assertion of an unauthorised search. He testified that the second defendant asked him to produce all his equipment and spares and that he did so. This also was denied by the defendants in pleading which put the plaintiff to proof. The second defendant as well as her witness testified that while the second defendant pointed at equipment (welding equipment and refrigeration spares), they were found lying in the open space where they found the plaintiff. It seems to me that for the same reasons as with the matter of the invasion, the allegation was not proven upon the uncorroborated evidence of the plaintiff.

The plaintiff further pleaded that the second defendant knowingly made a false statement that he repaired his clients' refrigerators with spares stolen from the first defendant and furthermore, caused the said false statement to spread to customers of the plaintiff and the public generally. He pleaded further that this false statement made knowingly, was intended by the second defendant to impute dishonesty to the plaintiff and cause people to shun him in his business.

It seems to me though that the plaintiffs pleading is at variance with his sworn testimony regarding the statement that was alleged to have been made by the second defendant. The plaintiffs evidence in summary is that on that day, while he was working in an inner room and heard that he was being asked for, he came out of the room to find the second defendant pointing out certain items to his co-worker and claiming that they belonged to the first defendant. The plaintiff alleged that the second defendant on seeing him informed him that they had come to look for items, stolen by workers of the first defendant which had been sold to the plaintiff. Thereafter, she allegedly ordered the plaintiff to lead her into his workshop where she asked him where he had bought some items found thereat, and further demanded that he present his receipts evidencing purchase to the first defendant.

Reprehensible as this conduct (if proven) must have been, no statement as pleaded by the plaintiff or to that effect, was, by his sworn testimony, actually made by the second defendant.

The statement pleaded was denied by the defendants and the plaintiff in an action grounded on the infringement of reputation, was required to prove that it had actually been made.

This was his primary duty which preceded any inquiry into its meaning and consequences.

In an action grounded on defamation (which learned counsel for the plaintiff in his submissions declared to be one of the causes of action, the other being negligence), it is trite law that the while it is not essential to set out the particular words the subject of complaint in the action, the plaintiff must plead words that provide information more or less, as to what was actually said, see: ***International Tobacco Company of SA Ltd v. Wollheim 1953 2 SA 603 (A) 613-614.***

In the instant matter, the plaintiff in his testimony failed to say the statement that was made by the second defendant, nor did he call any eyewitness to the scene, to corroborate what was pleaded as having been made by the second defendant.

The plaintiffs only witness testified as to what he had heard other people say. He never disclosed where those persons received their information from. On the plaintiffs own showing, during the scene created by the second defendant at his workplace, seven persons including the plaintiff were present. She was alleged to have pointed out items she claimed belonged to the first defendant and demanded the production of receipts by the plaintiff. This conduct spoke volumes of an imputation of dishonesty. Yet by the plaintiff's own testimony, he it was who told Mr. Dlamini his client, that Isabel was looking for goods stolen from first defendant and sold to him. He did not say that the second defendant at any time said anything to the said Mr. Dlamini in the words pleaded in this suit. In the absence of evidence from the plaintiff and eyewitnesses as to the statement made by the second defendant, it cannot be said without any contradiction that the statement that was heard by other persons must have been made by the second defendant. This is because the conduct of the second defendant (if such were proven),

was such as could prompt any of the persons present to draw their own conclusions and publish the statement pleaded as having been spread, to other persons.

It seems to me that the evidence of the plaintiffs only witness as to what he heard said about the plaintiff, cannot supply the defect in the plaintiff's evidence as to what was more or less uttered by the second defendant. I find then that the plaintiff failed in his duty to adduce sufficient cogent evidence regarding the false statement that he pleaded was made by the second defendant knowingly, which caused him loss, and is the subject of the instant claim.

In an action based on defamation, it was essential to establish that the offending statement was published of the plaintiff, by the second defendant. The plaintiff pleaded that the second defendant "caused a statement to spread among the customers of the plaintiff and the public generally that the repairs his clients' refrigerators with stolen spares or equipment stolen from the first defendant"

As aforesaid, not even the plaintiff testified to the uttering of that statement by the second defendant although he certainly described conduct by the first defendant from which such an inference could be made by observers. Nor did he call any of the four independent eyewitnesses that he alleged, to testify that such words as were pleaded, or even as could be reasonably implied from what was said by the second defendant, was actually heard by them as uttered by the second defendant. These persons were: the three coworkers of the plaintiff who he said were present, and the said Mr. Dlamini for whom he was installing the cold room prior to the incident and who cancelled his work order consequent upon the meeting, citing his fear of Police involvement.

Although in the Roman-Dutch Law unlike in English jurisprudence, words spoken are not distinguished from words written or other visual representations in defamation actions, see: *J.C. Van Per Walt and J.R. Midgley's Principles of Delict 3rd Ed. 117 at 82,* it seems to me that where the allegation is made of words spoken to, or heard by persons, (as distinguished from words written or representations displayed), the claim of publication can only be substantiated by those to whom the words were spoken or at the least, were within earshot of the witness. There had to be a nexus between the what came out of the mouth of the second defendant and was received into the ear of the witness brought to

testify regarding publication. I daresay that the burden of proving publication was not discharged when the plaintiff called a witness who received second-hand information. What that person's testimony established was that there was further publication of what may have been said. It did not identify what was said in the first instance by the second defendant.

In the circumstance, I find that the plaintiff failed to adduce evidence in proof of his allegation that it was the second defendant who caused the offending statement such as was heard by his witness Mr. Khumalo, to be spread. A cause of action in defamation has therefore not been established against the defendants.

A claim sounding in injurious falsehood may have been made upon the conduct of the second defendant in respect of which evidence was led, being: the pointing out of the plaintiff's goods, the suggestion that some belonged to the first defendant, the demand for the plaintiff's receipt, and even the suggestion that he harboured stolen items). And this would have been so for it seems to me that the said conduct could have given rise to the statement that was spread. It had to be demonstrated however that the conduct was malicious and intended to cause injury to the plaintiff's business. The plaintiff however did not rely on conduct in respect of which evidence was in fact led as his case, but on the alleged statement pleaded and the alleged invasion and unlawful search, all of which I have held were not proven to have obtained.

Besides these, no evidence was led of the second defendant's knowledge of the falsity of whatever statement she made, or that her statement or conduct or both were intended to injure the plaintiff in his trade, a *sine qua non* for a claim sounding in injurious falsehood, see: ***Geary and Son (Pty) Ltd v. Gove 1964 1 SA 434; Helios Ltd v. Letraset Graphic Art Products (Pty) Ltd 1973 4 SA 81 (T) 8 9 .***

in any case, learned counsel for the plaintiff did not address the court on this cause of action at all, and the court may have found itself improperly raising it *mero motu* when it was not the plaintiff's case. This is so even though earned counsel for the defendants addressed the court thereon, for there was simply no case upon which they should have made such answer. The plaintiff testified of the loss he sustained in his business as a result of the statement that was allegedly uttered by the second defendant, and reached

his clients and the public at large. He alleged that Mr. Dlamini, who heard what was said first hand, cancelled his order for the cold room installation. The plaintiff thus had to return what money had been paid to him. Unlike Mr. Khumalo who heard a statement second-hand, Mr. Dlamini was never called to testify as to what he heard the second defendant utter, nor did he corroborate the plaintiffs story that the cancellation of the order was the direct result of what he heard.

That order was considerable, for it was in the amount of E60,000. Then Mr. Khumalo who heard a statement second-hand, withdrew his work order which was also large and was in the region of E40,000 to E41,000. The plaintiff did not disclose his profit margin in either of these works. Even so, a deduction of significant profit may be made by the court. This could however not be assumed in the case of Nonhlanhla Dlamini who also allegedly withdrew her work offer, for there was no indication as to the degree of loss sustained.

The plaintiff tendered invoices which were admitted as exhibits B, B1-B13. Although these purported to show that plaintiff had lost a number of clients, the said invoices, in the name of Master Refrigeration and not the plaintiff herein, had little probative value in consequence.

What was perhaps heart-breaking was the plaintiff's assertion that in the month following the incident, he could not even pay his bills as a result of the loss of business opportunities one of which his only witness attested to. Yet this court finds itself in the unenviable position of rejecting the claim of the plaintiff simply because the plaintiff failed to prove on the preponderance of .the probabilities, that there was an invasion of the plaintiff's workshop, an unlawful search thereat, and the statement of the second defendant, such as were pleaded, that caused such loss or injury to the plaintiff in his trade. Regarding the statement, I have said before now that, whatever was spread to the detriment of the plaintiff and his business (and such as was heard by the plaintiffs witness), has not been proven to have been uttered and published by the second defendant.

Nor was the conduct of the second defendant in respect of which unchallenged evidence has been led, pleaded as the plaintiffs case. For what it is worth, I cannot end this

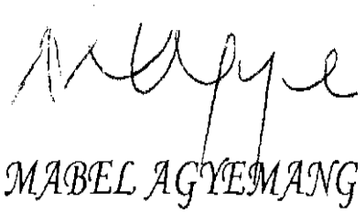
judgment without censuring the second defendant for the unacceptable conduct of enquiring in an open space and in the presence of persons other than the plaintiff (as the plaintiff alleges), where the plaintiff bought items he used in his trade from, or requiring him to produce receipts evidencing purchase. This was conduct, was such as observers were apt to draw conclusions from, and which may have been rendered in the words heard by second-hand hearers such as the plaintiffs witness.

I can also not end this judgment without commenting on the difficulty caused in the determination of this case, by reason of the insufficiency and inconsistency of the plaintiffs pleading. . Learned counsel for the plaintiff in his submissions, relied on twin causes of action: being: negligence and defamation. Yet while the plaintiff pleaded that the offending statement was false and was "caused to (be) spread" to inter alia, the plaintiffs customers, he did not plead that the words were defamatory and that it among other things was calculated to lower the plaintiff in the estimation of right-thinking members of the society as is requisite in defamation actions.

It seems to me also that the pleading of the alleged intentional publication of falsehood negated the allegation of negligence canvassed by learned counsel. On injurious falsehood, he made no submissions at all. But beyond the insufficiency of pleading, the evidence led did not support a cause of action in defamation or negligence.

It is small wonder that learned counsel for the defendants found himself groping for the cause of action upon which the suit was grounded and out of the abundance of caution chose to address the court on both the law on defamation and injurious falsehood, in answer to the suit. Having made my comments I must reiterate that the plaintiff's case for the reasons given must fail.

I have regard to the circumstances of this case including the conduct of the



MABEL AGYEMANG

HIGH COURT JUDGE