IN THE HIGH COURT OF SWAZILAND

Case No. 2362/2009

In the matter between:-

INKHOSATANA GELANE SIMELANE **Plaintiff**

and

AFRICAN ECHO (PTY) LTD **1st Defendant**

THULANI THWALA **2nd Defendant**

MABANDLA BHEMBE **3rd Defendant**

Neutral citation: *Inkhosatane Gelane Simelane v African Echo (PTY) LTD* and Others (2362/09) [2013] SZHC 277(5th December 2013)

Coram: HLOPHE J

Delivered: 5th December 2013

JUDGMENT

[1] The Plaintiff instituted action proceedings against the Defendants claiming payment of a sum of Two Million Emalangeni (E200 000.00) together with interest thereon at 9% per annum, from date of summons to date of payment as well as costs of suit for alleged defamation arising from the publication of an article titled, "**I am Gelane's Father**." The contents of the said article were attributed to a certain old man, called Ambrose Mahlangu, whose photograph was published as part of the lead story and next to the words referred to above which were written in bold print on the first page of a Newspaper called "The Swazi News."

[2] It is common cause that the Newspaper concerned is owned by the First Defendant, the Publisher, with the second and third Defendants being the Editor and Reporter of it, respectively who were both Employees of the First Defendant at the time of the Publication complained of.

[3] The first page of the Swazi News of the 9th May 2009 bears the words, "Mr. Mahlangu's shocker" above the bold words "**I am Gelane's Father**" below which are written the following sentences:-

- This man tells us Gelane is a Mahlangu, not a Simelane as the nation knows.
- He also claims Gelane deserted him and does not care about him.
- Ludzidzini Committee has been told about this.

Next to the Bold Headlines referred to above is a photograph allegedly belonging to the person who claimed to have fathered the Plaintiff, one Ambrose Mahlangu, who looks old and frail.

[4] At page 2 of the Newspaper concerned there are three articles on the same story which bear the following titles or headings:-

- Senate President Gelane is my child.
- My daughter deserted me –Father.
- …this means Gelane could be acting illegally.

[5] Under the first title or heading on page 2 referred to above, which from the boldness of the print as distinguished from the other two, suggests it is the main story, there is written the following paragraph in big eye – catching words as an extract from the story:-

> *"…the revelation by Mahlangu will definitely come as shocking news to Kontshingila residents, where Gelane is Acting Chief. The area is dominated by the Simelane clan that has been ruled by Gelane for a long time as chief albeit on an acting basis.*

[6] The opening sentence of this article, which I have referred to as the main one, reads as follows:- "Mbabane – Gelane is my daughter. The quote sounds innocent but when you take a closer look at it you will realize that it has the potential of changing the fortunes (for the worst) of one of the country (sic) iron ladies, Senate President Gelane Zwane."

[7] In the article tittled “My daughter deserted me –Father,” it is stated that, “Gelane knows her real father is out there and where he is employed but has decided to stay away from him.”

[8] The article tittled “…this means Gelane could be acting illegally,” has the following opening words stated;

> “If Ambrose Mahlangu’s shocking revelation is anything to go by, then Senate President Gelane Zwane is not the rightful person to act or be appointed as chief of Kontshingila.”

[9] A reference was also made to certain allegations attributed to the Former and Late Ludzidzini Governer Jim Gama to the following effect:- “the area should be under the guidance of a person originally born as a Simelane.”

[10] The following is also stated in this article; “When the Swazi News visited Kontshingila this week, some residents sounded shocked that Gelane could be a Mahlangu.”

[11] On the last paragraph of page 2, of the Swazi News concerned, the following statements were made in the article:- “They (Simelane’s) have always known her as a Simelane thus her rise to the position she has held as acting chief.”

[12] The main article also stated the following which is for reasons that will follow crucial. “Although I never took her (Dorah Dube) as my wife,

but I paid the necessary customary dues to the Dube family and they know it."

[13] On the 16th May 2009 there was published other follow up articles of and concerning the Plaintiff's identity –that is whether she was a Simelane or a Mahlangu. Three such articles were published under the headings:-

> Gelane removed as chief
> …New chief to be unveiled today to all residents down South
> …Gelane refuses to speak to us.

[14] The thrust of the main article on this publication or issue was that the Plaintiff had since been deposed as acting chief of Kontshingila with someone else, one Langa Simelane being appointed in her stead. Of note in this article is a sentence written in bold print below the picture of Mahlangu and that of the previous article of the 9th May 2009 which reads as follows:-

> *"Impact – our story in last week's edition has prompted the Simelane clan to enforce changes within their Chiefdom at Kontshingila."*

[15] In other words the alleged deposition of the Plaintiff as an acting chief was attributed by the Defendants themselves to their revelation in their said Newspaper that Gelane was not a Simelane but a Mahlangu which has led to the installation of Chief Langa Simelane. Otherwise other

follow–up articles were published in both the Times Sunday and the Times of Swaziland respectively dated the 17th and 18th May 2009 which are both owned by 1st Defendant. Of significance is that on the publication of the 18th May 2009, the Defendant's Newspaper interviewed one Jane Dube who refuted that Gelane was not a Simelane, maintaining that she was and had always been a Simelane. The said Jane Dube was described as a sister to Gelane's mother, Dorah Dube.

[16] The Plaintiff had seen all the above articles when on the 3rd June 2009, she instituted summons claiming to have been defamed by the said articles, particularly that of the 9th May 2009 referred to above, which alleged as stated above, words to the effect that she was not a Simelane but a Mahlangu born of one Ambrose Mahlangu, who she was not taking care of despite knowing he was her father who was there and that she was holding on to the acting chief's position illegally.

[17] At paragraph 9 of the Plaintiff's particulars of claim the Plaintiff stated that:-

> *"The said words (I am Gelane's father" –as published in the initial article) in the context of the article are wrongful and defamatory of Plaintiff in that they were intended and were understood by the readers of the Newspaper to mean that Plaintiff was an imposter who has usurped the chieftaincy of Kontshingila when she is not entitled to so act by virtue of the fact that she is not a Simelane."*

[18] In their plea, the Defendants denied that their article was wrongful and defamatory of the Plaintiff and pleaded that same was in essence true and that it was to the benefit of the public. In the alternative the Defendants averred that the publication of the article concerned was not unlawful because the Defendants were not aware of the falsity of any averments in the articles as they relied on a claim by one Ambrose Mahlangu. It was averred further in the said plea, that publication of the article concerned was not reckless as the facts relied upon by the Defendants in their publication and in their context were the contents of an interview the Defendant's Reporter had had with Ambrose Mahlangu, and they were not negligent in publishing same. They contended that attempts were made without success to contact the Plaintiff for her comments on Mahlangu's claims. It was alleged Plaintiff had neither answered her cellphone nor did she return messages left with her secretary.

[19] It was contended further that the publication was objectively reasonable and that the articles concerned were published without *animus injuriandi*.

[20] On the damages claimed, the Defendant contended per their plea that the amounts claimed were excessive and contended further that costs at attorney client scale had to be awarded against the Plaintiff even if she were to succeed owing to her having allegedly claimed excessive damages in the first place.

[21] Defamation is in law the unlawful intentional publication of a defamatory matter (by words or conduct) referring to the Plaintiff which causes his reputation to be impaired. The case of The Editor, ***The Times of Swaziland and Another vs Albert Shabangu Civil Appeal Case No. 30/2006*** unreported and at page 10, where an extract from Burchell's, ***The Law of Defamation in South Africa at page 35*** is quoted, is instructive in this regard.

[22] The starting point is to ascertain whether or not the articles complained of are defamatory of the Plaintiff. I can safely say that my task has been made easier in this regard by the parties who clearly appear to be in agreement that the articles concerned are defamatory. I say this because whereas the Plaintiff averred the contents of the said articles were defamatory both in her papers and during the trial in Court, the Defendants did not dispute in both their pleadings and in their evidence that that was the case. Instead as I understood it, the latter's case was simply to deny that the words were per se defamatory, contending that the defamatory words in question were in the form of an *innuendo*. Because of this, the Defendants contended that the Plaintiff could not succeed because she was confined to the meaning she pleaded was attached to the articles concerned and could not ascribe any other meaning thereto. It was argued that in Court and during the submissions the meaning ascribed to the words was a different one from the one pleaded. This it was contended called for the dismissal of the proceedings. Reference in this regard was made to the case of ***Marais v Steyn and Another 1975 (3) SA 479 (T) at 486*** and that of ***Demmers v Wylie and Others 1978 (4) SA 619 D at 622***.

[23] I agree that this signifies the position of our law that where an *innuendo* is relied upon the Plaintiff is held to the meaning of the words as pleaded by him as was confirmed in ***The Editor, The Times of Swaziland vs Albert Shabangu case (supra)***. This however is not the case where the words are merely given their natural meaning, in other words they being per se defamatory.

[24] As in paragraph 9 of its particulars of claim the Plaintiff had ascribed a specific meaning to the articles complained of, which was that they were intended and understood by readers to mean that "Plaintiff was an imposter who had usurped the chieftaincy of Kontshingila when she was not entitled to do so by virtue of the fact that she was not a Simelane," she was then allegedly not entitled to ascribe any other meaning to the words in question because what she had pleaded was the effect that the words amounted to an *innuendo* or had a particular "sting" to which she was therefore confined, the contention on behalf of the Defendants went.

[25] The Plaintiff had, as alleged by Defence Counsel, failed to prove the facts which supported the said *innuendo*, which necessitated a dismissal of the Plaintiff's claim.

[26] The first question is what is in realty the basis of Plaintiff's case? Is it being alleged per the pleadings that the words are per se defamatory or is it being alleged that they amount to an innuendo or is a specific sting being relied upon? For the distinction between words that are per se

defamatory and those that allegedly amount to an *innuendo* and those having a specific sting see the case of ***The Editor, The Times of Swaziland and African Echo (PTY) LTD vs Albert Shabangu Civil Appeal Case No. 30/2006***. The position is otherwise settled that if I were to find that the words in question are per se defamatory, I would be justified to find in favour of the Plaintiff unless there were raised the lawfully cognisable defences. This was put as follows in ***The Editor, The Times of Swaziland and Another vs Albert Shabangu, Civil Appeal Supra at page 4***:-

> *"In terms of our Law, where the words complained of are admitted and they are per se defamatory, the Court is justified to find in favour of the Plaintiff. However, the defendants have an array of defences opened to them. If they are successful, defendants would not be liable even though the words are per se defamatory."*

[27] Citing the following passage from the Judgment of Corbett CJ in ***Argus Printing and Publishing Co. LTD v Eselen's Estate 1994 (2) SA 1 (A) at 20 E-G***, the Court, in ***The Editor Times of Swaziland and another vs Albert Shabangu*** (supra) case, observed the different approaches in matters based on an *innuendo* and those based on the words being per se defamatory:-

> *"In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In*

determining this natural and ordinary meaning the Court must take into account not only what the words expressly say, but also what they imply."

[28] Later on in the same ***Albert Shabangu Judgment (supra), at page 13***, the Court stated the following which brings about the "sting" of the words complained of as a separate dimension from that of the words either being per se defamatory or amounting to an *innuendo*:-

"In other words, as the Respondent cannot rely on what I have assumed to be an innuendo properly so –called, the Respondent is left to rely on the language of the article to justify the "sting"…"(emphasis are mine).

[29] In his submissions Mr. Jele for the Plaintiff contended that words used in the articles were in their natural and ordinary meaning defamatory and he went on to state that they were understood by reasonable readers of ordinary intelligence to convey a meaning defamatory of the Plaintiff. He stated that their natural meaning either expressly or impliedly stated was that the Plaintiff was a Mahlangu and not a Simelane; that she had always known that she was a Mahlangu and not a Simelane yet she persisted with the notion she was a Simelane; that she had intentionally concealed her true identity both to the people of Kontshingila, the Country's Authorities and the nation at large; that she misrepresented her true identity so that she could be appointed a senator and eventually Senate President in the house of Senate; She assumed and continued to hold the position of acting chief of Kontshingila

wrongfully and unlawfully because she knew she was not a Simelane; She was an irresponsible person who failed to acknowledge and support her true father, notwithstanding the fact that she was aware of his true identity and that she was, for the foregoing reasons, not a fit and proper person to hold the positions of Kontshingila Acting Chief and that of Senate President.

[30] In attributing the above meanings to the articles published by the Defendants the Plaintiff submitted through counsel, that those meanings were the natural ones capable of being drawn by a reader of ordinary intelligence. As stated in the ***Argus Panting and Publishing Co. LTD v Esselen's*** (supra) except referred to above, in ascertaining the natural and ordinary meaning the "Court must take account of not only what the words expressly say, but also what they imply." The contention by Mr. Jele was that the meanings referred to above and attributed to the articles were either the express or implied ones depending on the context or circumstances of each contention. Reference was also made to what was stated in the following words in ***Independent Newspaper Holdings Ltd and Others v Walleed Sullieman Supreme Court of Appeal of South Africa Case No. 49/2003; at paragraph 19*** of the Judgment:-

> *"In any defamation suit the logical starting point is what the words complained of mean, more particularly,* ***whether they convey the defamatory meaning which the plaintiff seeks to place upon them****. In answering that question a court discards its judicial robes and the professional habit of analyzing and*

interpreting statutes and contract in accordance with long established principles. Instead it dons the garb and adopts the mindset of the reasonable lay citizen and interprets the words, and draws the inferences which they suggest, as such a person would do. It follows that meticulous attention to detail, alertness to and awareness of the subtle nuances in meaning of words, a full appreciation of the influence of context, and a reluctance to draw inference when they are not soundly based and fully justifiable and amount to no more than speculation cannot be expected."

[31] The question at this stage and in the words of the ***Argus Printing and Publishing Co. LTD v Esselen Case*** (supra), is whether the meaning attributed to the articles by the Plaintiff is the one they expressly say or imply. If it is either of the two, then the answer should be in the affirmative meaning that in such a case they would be per se defamatory. In the words of the ***Independent Newspaper Holdings Ltd vs Walleed Sullieman*** (supra) referred to above the question is whether the words convey the defamatory meaning which the Plaintiff seeks to place upon them from the position or perspective of a reasonable lay citizen.

[32] My considered view is that the meaning attributed to the articles by the Plaintiff is the natural one and is either express or implied by the words in question. Put differently, the articles convey the defamatory meaning which the Plaintiff seeks to place upon them, which is their natural meeting. This means that the articles are per se defamatory of the

Plaintiff and no innuendo is relied upon as a basis for the defamation just as I do not think that there is a reliance upon a specific sting by the Plaintiff to contend she was defamed. For the removal of doubt I must say I agree with the meanings attributed to the words in question by Mr. Jele at paragraph 28 herein above and I also find those meanings to be the natural ones to draw from the words used.

[33] Having concluded in the manner I have, I disagree with Mr. Flyn that the Plaintiff was in her submission no longer relying on the natural meaning she had attributed to her words in her pleadings. She may have said that the words meant that she was an imposter who had allegedly usurped the chieftaincy of Kontshingila when she was not entitled to by virtue of the fact that she was not a Simelane. But that did not in my view suggest that she was pleading an innuendo. I am convinced she was merely stating the natural meaning of the said articles as would be understood by a reasonable lay citizen as stated in the ***Independent Newspaper Holdings Ltd v Walleed Sullieman*** except referred in paragraph 29 above.

[34] In any event I, do not think that those specific meanings attributed to the articles and referred to at paragraph 31 above, mean anything different from what is said in the foregoing paragraphs when considering the implied meaning of an “imposter” and a “usurper”, in the context of the articles concerned.

[35] Even if the Plaintiff was relying on an innuendo, assuming I am wrong in my conclusion that the articles were per se defamatory, I do not think

that it can realistically be said that the Plaintiff has deviated from the pleaded meaning and therefore that the claim should be dismissed on that ground. It seems to me that a reasonable reader would be justified to understand the articles to be saying that the Plaintiff was an imposter, whose definition according to the Compact Oxford English Dictionary (Revised) Third Edition, 2008, "is a person who pretends to be someone else in order to deceive or defraud others." When considering the statement to the effect "Gelane knows her real father is out there and where he is employed but has decided to stay away from him, I cannot say much about the reasons behind her deserting me" and also the statement that, "She does not want to associate herself with me may be because I have nothing to offer her compared to what the Simelane's do." These words can indeed be understood by reasonable readers to mean that she was pretending to be who she was not in order to deceive them and perhaps even the nation at large and its authorities. It therefore would not be correct to suggest that she was proving a different case from the one pleaded or that she was now relying on a different meaning to the one attached to the pleadings in the context of the matter.

[36] I also have no doubt that another reasonable reader would be justified to conclude that the Plaintiff was a usurper when considering the statements in the articles to the effect that "this means Gelane could be acting illegally together with the statement; "According to Jim Gama, the area should be under the guidance of a person originally born as a Simelane." According to the Compact Oxford English Dictionary Revised Third Edition, 2008, a usurper is a person who "seizes articles over a person's position or power illegally or by force."

I need to mention that in terms of the Swazi Culture or way of life, something I take judicial notice of, it is downright defamatory to publicly refer to someone as being born of a different surname than the one he knows himself or he is known of. Such a person is called a livezandlebe, (a bastard) which is a derogatory term to effectively mean such a person has no rights where he has always known himself to be from. Such publication is therefore defamatory per se, which eliminates considerations of an *innuendo* as contended.

[37] Having ascertained and/or concluded that the articles concerned were defamatory of the Plaintiff, do the defences raised avail the Defendants? A glimpse, of the defences raised was emphasized by Mr. Flyn at the commencement of the matter in answer to a question I had posed to him on what their defence in the matter really was – that is, were they contending (as Defendants) that Plaintiff was a Mahlangu and not a Simelane or were they saying that they published what they were told by a person who claimed to be Ambrose Mahlangu and that he was her father?

[38] His answer was unhesitatingly that they are contending and shall bring evidence to prove that she was a Mahlangu and not a Simelane. He went on, it was only in the event of their contention aforesaid not succeeding that they would claim they published what they were told by a man (Ambrose Mahlangu) that she was a Mahlangu and he was her father and that they were not negligent in publishing same. As early as at the commencement of the proceedings was the stage set unequivocally on the case the Defendants were meant to advance,

which was to take it upon themselves to prove that the Plaintiff was inter alia not a Simelane but a Mahlangu.

[39] Of course the assertions by Mr. Flyn, were only emphasizing on the case as pleaded in the pleadings –the plea in which the defences advanced were that the article in question was in essence true and that the publication was in the interest of the Public. It was also pleaded that the Defendants relied on a claim by a Mr. Mahlangu and that they did not publish the article recklessly or unreasonably.

[40] The question to answer at this stage is, was the article true, in the public interest and reasonable? In an attempt to answer this question Mr. Jele for the Plaintiff referred me to an excerpt from an Australian case of ***Lange vs Australian Broadcasting Corporation (1997) 189 CLR 520***; which was cited with approval in the South African case of ***National Media Ltd and Others vs Bogoshi 1998 (4) SA 1196 (SCA),*** where the following position is stated:-

> *"Whether the making of a Publication was reasonable must depend upon the circumstances of the case. But as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant has reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the*

defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the Plaintiff an opportunity to respond." (emphases are mine).

[41] In ascertaining whether the publication was true, one must consider as stated in the foregoing paragraph, whether the Plaintiff did have reasonable grounds for believing that same was true and whether proper available steps were taken to ascertain the accuracy of the claims by Mr. Mahlangu that the Plaintiff was his daughter. Furthermore, a response must have been sought from the Plaintiff and published which is not the case in this matter.

[42] According to the facts of the mater the Defendants Reporter, Mabandla Bhembe claims to have been told by Mr. Mahlangu that the Plaintiff was his daughter. In fact the said Mr. Mahlangu did not of his own free will set out looking for the Reporter or the Editor of the Newspaper concerned to inform him that he was the father to the Plaintiff. Instead he was sought after by Mabandla Bhembe after he himself was told by his Editor that Mahlangu claimed to have fathered Gelane. It is not revealed how the Editor had himself got to know about the allegation except that it transpired it had come out from some Simelane's. Clearly the story called for caution before publication when considering that to the Newspaper's own knowledge and the nation at large Gelane, who by now was an elderly person occupying high profile positions in the country as both Senate President and as an Acting Chief of

Kontshingila, had always been known as a Simelane at that stage. Furthermore the allegations she was a Mahlangu, came about at a time when she was involved in a widely published chieftaincy dispute with some Simelanes who did not approve of her being an acting chief. In such circumstances there would be no reason able grounds to believe such a prominent figure and at that age has a different surname than the one she is known by.

[43] They got the confirmation from Mr. Mahlangu who does not give a sound explanation on why he had had to conceal such vital information all these years only to come up now when he was himself old and frail with the Plaintiff having reached the age she has considering her being born in 1952, according to the evidence. Furthermore Mahlangu's claim was itself based on very stretchy circumstantial evidence in circumstances where he claims to have been staying in Johannesburg at the time of her being conceived and eventually born. He did not know when (date, month and year) of her birth, which would be very strange and improbable for a father who had always known about her being his daughter. This cannot in my view be indicative of the Defendants having reasonable grounds that what they were to publish was true. This is compounded by the fact that Mr. Mahlangu did not seem to know anything about Dorah Dube's life after the birth of David Mahlangu, a state of affairs one would not expect of a girl friend with whom he has a children.

[44] Indeed when Mr. Mahlangu eventually gave evidence in Court, and after starting on a confident basis that the Plaintiff was his daughter,

cracked and faltered under cross –examination and started saying he would demand that she goes with him for DNA test (egezini) as he put it so that he himself could be satisfied that she was not his daughter. Clearly the said Mahlangu was unsure if the Plaintiff was indeed his daughter and wanted to use this Court to compel her to confirm or dispel his suspicions she was. Had the Newspaper taken reasonably proper steps to ascertain accuracy of the allegations they would have noted same was not true or was not safe to publish as it could not be confirmed. In ***Khumalo and others vs Holomisa 2002 (5) SA 401 (CC)*** the following which underscores the importance of ascertaining the facts and truthfulness of a matter before publication, was stated at paragraph 39:-

> *"The difficulty of providing the truth or otherwise of defamatory statements and Common Law rule which lets the risk of the failure to establish truth lies on defendants, in the absence of a defence of reasonable publication, does causing a "chilling effect" in the publication of information. A publisher will think twice before publishing a defamatory statement where it may be difficult or impossible to prove the truth of that statement and where it may be difficult or impossible to prove the truth of that statement and where no other defence to defamation would be available."*
>
> The court went on to cite a quote from English case of Derby Shire Country Council v Times Newspapers, 1993 I All E. R. 1011 (HL) at page 1018 which stated the following:-

> *"What has been described as the "chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts that would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."*

[45] I was clearly not prepared to order the DNA test as urged by Mr. Mahlangu. Firstly I was not dealing with a paternity matter where Mr. Mahlangu had instituted these proceedings seeking an order that the Plaintiff be compelled to submit to a DNA test or exercise for him to prove he was her father or the other way round. Instead the proceedings are brought to Court because Mr. Mahlangu is alleged (which he confirms) to have boldly said that the Plaintiff is his daughter and not that she could be his daughter which would be a different case altogether. Clearly if the Plaintiff had the audacity to publicly and boldly claim in 2009 that someone, who in terms of her birth certificate was born in 1952, was his daughter, he surely should as at that stage have had all the evidence proving that. This became all the more so when the said Mr. Mahlangu could himself not even attest that he had at some stage in their long lives confronted the said Gelane about his being her father at some point since her birth. The publication of the allegations, taken together with the language used and the sensationalization that attached thereto, was clearly calculated to

embarrass the Plaintiff if one considers the uncertainty expressed by Mr. Mahlangu in Court.

[46] It was established in evidence that in terms of Swazi Law and Custom, certain rituals consistant with the Simelanes, were performed on the Plaintiff after her birth by the same Simelanes who went on to pay lobola for her mother which also included the necessary fines. Otherwise, Mr. Mahlangu does not even know if on his part the customary fines were paid vis –a –vis the Plaintiff including whether the customary rituals were performed at her birth. He contented himself with saying he left all that to his sister which is improbable. The sister in question was not called as a witness. Mr. Mahlangu's version is therefore improbable when considering that he had always had all the access to Gelane's half brother David born of his relationship with Dorah Dube, Gelane's mother, begging the question what would have stopped him from having such access to Gelane for over fifty years if he was her father.

[47] The Defendants had not bothered ascertaining from the Dube's who were there as to the accuracy of Mr. Mahlangu's allegations which was an available avenue consistant with Swazi culture that more about such children as they alleged Plaintiff was, would be found from their maternal side. They also had not ascertained from or confronted Gelane herself about the information. Indeed it was stated in the above cited excerpt from the Bogoshi case that it can never be reasonable to publish defamatory material about a person if that person had not been confronted with those allegations for his/her side to be published as

well. I cannot say that the attempts allegedly taken by Mabandla Bhembe before publishing the story were reasonable. He in his own words had not divulged to the Plaintiff through any form of information why he wanted her. He had, he said, failed to meet her on two occasions including failing to reach her over her cellphone. He had not even prepared any questionnaire for her to comment at least after having noted she could not be reached. I have therefore come to the conclusion that the allegations in questions have no scintilla of truth in them and were only made to be sensational whilst embarrassing the Plaintiff in the process and I have no hesitation in concluding that they are indicative of malice on the Defendants part.

[48] The next consideration is whether the defence of the publication having been made in the public interest can avail the Defendants.

[49] It became clear during the trial of the matter that there was no truth in the contentions made forming the gravamen of this action. There was shown to be for instance, no truth in the contention that the Plaintiff was a dishonest person who deliberately concealed her true identity just as there was none in the contention that she was misleading the authorities of the nation as well as that she knowingly failed to acknowledge a surviving parent and lastly over the contention that she was not a Simelane but was a Mahlangu. The evidence led did not establish this at all. The closest to establishing was a suspicion by Mr. Mahlangu that the Plaintiff could be his child. The basis for this suspicion are not sound. In any event the publication was not about a suspicion as it was unequivocal in its terms that the Plaintiff is Mr.

Mahlangu's daughter, who was an imposter as acting chief and was ignoring her own father, just because unlike the Simelane's he had nothing to offer her.

[50] The position is settled that truth as a defence would avail the Defendants where it is shown that the publication was in the public interest. According to Burchell J. M.'s ***The Law of Defamation in South Africa, 1985 Publication, Juta and Company at page 207***:-

> *"The South African Case Law does not adopt De Villier's interpretation, but rather takes the view that the general rule is that truth alone is no defence –the publication must also be for the public benefit. Truth alone may, however, be pleaded in mitigation of damages."*

[51] It is argued that the matter was, owing to the fact that the Plaintiff was a public figure in so far as she was both an acting chief and Senate President in Parliament, one of public interest which necessitated the publication of the allegations concerned against her.

[52] Having come to the conclusion that the said allegations were untrue and were defamatory, it cannot avail one to say their publication was in order simply because the Plaintiff was a public figure. At page 1212 of the South African case of ***National Media Ltd and Others vs Bogoshi 1998 (4) SA 1196 (SCA)*** (the Bogoshi Judgment) the position was put in the following words:-

"In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of Political discussion, and that the tone in which a Newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also feature prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.

Ultimately there can be no justification for the publication of untruths and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before the defamatory matter is published in a Newspaper."

[53] In ***Independent Newspapers Holdings LTD vs Walleed Suliman Supreme Court of Appeal of South Africa Case No. 49/2003***, the Supreme Court referred to the following:-

"False and injurious statements cannot enhance self development. Nor can it be said they lead to healthy participation in the affairs of the community, indeed they are detrimental to the advancement of these values and harmful to the interest of a free and democratic society."

[54] Having found that the publications by the Defendants comprised untruths, it cannot be said that they are in the public interest. That they may have been interesting to the public does not mean that they were in the public interest as was stated in the ***Independent Newspapers Holdings LTD vs Walleed Suliman*** (supra) where the position was expressed as follows at paragraph 42:-

> "*It is true that what is interesting to the public is not necessarily the same as what is in the public interest for the public to know…*"

[55] I am therefore of the view that the defence raised by the Defendants cannot avail them. In the circumstances the Defendants cannot avoid liability for the publication of defamatory material of and concerning the Plaintiff.

[56] It was submitted by Mr. Flyn that in the event the Court was to find the Defendants liable to the Plaintiff it should order that she be compensated through the payment of nominal damages considering that the allegations merely emphasized what was already known and secondly in view of the Plaintiff having allegedly claimed excessive damages. According to Mr. Flyn, damages defamation matters should not even exceed E50 000.00 as he said was stated in ***The Editor Times of Swaziland and Others vs Albert Heshange Shabangu Appeal Case No. 30/2006***. Whatever the facts in the said matter, it cannot be true that it was setting a rule of particularly where it is clear the publication was malicious and was a result of the Defendants having taken sides in an

existing dispute. Furtherstill I am convinced that cannot be the case where it becomes clear that the Defendants, because of their financial standing calculated the pros and cons of publishing the article based on what they considered to be the extent of their risk. There should not be a doubt that the damages should be meaningful with the victims and potential victims being assured of their rights to dignity and reputation being protected as well. Certainly if this has not been the case, perhaps the time has come for the media to have greater responsibilities in their publication.

[57] I do not agree, firstly that the matter of the Plaintiff allegedly being a Mahlangu, was already a matter in the public domain as alleged. In fact that is against the contents of the publication themselves where the Defendants stated that the contents of their publication or their revelation was going to shock the nation which had always known the Plaintiff to be a Simelane and further that their "revelation" as they chose to call it was going to turn the fortunes of one of the iron ladies in Swaziland, in the Plaintiff, for the worst. Clearly all these paraphrases are not consistant with a matter that was already in the public domain. It shall be remembered that they also stated in a follow–up article that their revelation or publication had had the impact of forcing the Simelanes to bring about changes within their area as they removed Gelane from the Acting position. In fact this comment of theirs encapsuled the very purpose of the Defendants' article.

[58] The evidence of Malangeni Simelane to the effect that they had always known Gelane to be a Mahlangu as opposed to a Simelane, is not only

improbable but is devoid of truth. It is unfathomable that if they, as the Simelane's, had always known her to be a Mahlangu they would have appointed her to act as a chief in the first place or put differently it is unfathomable they would not have brought that to the fore much sooner or after her having assumed the role of Acting Chief. In any event his evidence is contradictory in that later, he testified that they got to hear about her not being a Simelane at a meeting with the Regional Administrator and later that they learnt of it in a meeting with the Ludzidzini Governor, the late Jim Gama and later that they had always known about her being a Mahlangu as she arrived at Kontshingila with her mother. It is a fact that they only started looking for Mr. Mahlangu from the meeting with Jim Gama which was only attended by the Simelanes, which is indicative that if it ever was made, it would have been on that day. In any event, Mr. Malangeni Simelane's evidence is exposed of being untruthful by his admission under cross–examination that sometime back and during the Plaintiff's youthful years she had umcwasho rites being conferred on her as an Inkhosatana, (Senior Chief's daughter of the Simelane). This would not have been done if she was known not to be a Simelane as Malangeni Simelane now wants this Court to believe.

[59] I furthermore cannot agree that the damages claimed are excessive when considering the nature extent and tone of the allegations including the deliberateness involved and insistence to publish it on the part of the Defendants. I agree with the Plaintiff that the publication concerned brought about greater unrest in the area. In fact recent events in the area as published in the media are indicative of this.

[60] Clearly the general rule stated in the ***African Echo (PTY) LTD and Others vs Albert Heshane Shabangu*** Case was by no means a rule of Thumb to say that at all times Plaintiffs in defamation matters would or should be paid nominal damages despite the circumstances of the matter at hand. It has been stated that where a Defendant in a defamation case makes an attack without verifying his facts and is not prepared or able to justify them he should incur liability for substantial damages. I therefore do not agree that even where there is malice in a given case, the Defendant in a given case should have his damages confined to E50 000.00 as was stated by Mr. Flyn. To find otherwise would suggest that the right of the media to publish material, even defamatory ones about members of the public should run superior to all the other constitutionally safe guarded rights like the one to individual dignity enshrined in the Constitution which is not and cannot be the case in our law.

[61] I agree and subscribe to the principle that where malice has been found to be in existence the damages have to be reflectively high. I have found that in the present matter the Defendants deliberately failed to investigate the propriety of their allegations when considering their failure to engage the Plaintiff first and also when they failed to engage the Dubes who are the maternal parents of the Plaintiff. I say this because of what was stated in ***Chinamasa vs Jongwe Printing and Publishing Co. (PTY) LTD and Another 1994 (1) ZLR 133 (A) at 167 -168*** where Barlet J stated the following:-

"…that failure to investigate or to get comment from the person who is the subject of a story is indicative of malice."

Clearly in the matter at hand, other than the fact that Defendants had clearly taken sides in the dispute of the Simelanes and felt they had to advance the side they had chosen, no sound explanation has been given why they published the articles before getting the Plaintiff's side nor even before properly verifying the truthfulness of the allegations concerned.

[62] In this matter I have no hesitation that the Defendant took sides in a long established chieftaincy dispute and therefore put aside all the considerations it needed to take in order to advance the side it had chosen. It should have known however that as it did so it was taking a risk. From the suggestion of the damages in the sum of E50 000.00 by Mr. Flyn, I have no hesitation in concluding that it was fuelled to do what it did because of its belief that it would in any event be made to pay no more than the amount in question. Such thinking must come to an end. The media is a powerful tool which can be used to build or destroy innocent people and they cannot be allowed to get away lightly where they were not only deliberate but downright malicious in their publication.

[63] Furtherstill I have to consider the nature of the defamatory statements; the extent of the publication, the reputation and character of the Plaintiff as well as the motive and conduct of the Defendant. The Plaintiff was otherwise labelled as a dishonest person who would

conceal her true identity so as to secure an appointment as a chief and as a Senate President. She was also one who conceals her true identity in order to associate herself with the Simelane's where there was going to be something for her to benefit. Clearly these allegations once shown to be untrue cannot in my view attract the usual nominal damages.

[64] The publication was sensationalized and was widely distributed throughout the country and even on internet. On the other hand the Plaintiff is an Acting Chief and as such a recognized traditional structure –She is responsible for a wide community which according to the Defendants' own assertions in the Newspapers was peaceful until after their publication which enforced changes. The Plaintiff's standing is also high because of her position as Senate President.

[65] It was submitted that the highest ever award was in the case of ***The Editor, The Times of Swaziland and Others vs Martin Akker Supreme Court Case No. 44/2009*** where a sum of E100 000.00 was awarded as damages. Whilst that may be the case, I am of view that the said case ought to be distinguished from the present one. Mr. Akker was a Deputy Sheriff yet in this case the Plaintiff is the Acting Chief responsible for a wide community and is also Senate President. The extent and effect of the publications was more scathing in the present matter than it was in the Martin Akker one. I have to consider as well the periods between the two and the devaluation in currency. Furtherstill I must consider that the publication of the offending material in the Martin Akker matter was not shown to be as sustained and serialized as this one was. This matter is also different when

considering that the negative effect in the Akker matter was not shown as having been felt immediately and in reality as was the case herein where according to the Defendants' own story it caused the Simelanes to enforce changes by allegedly or supposedly removing the Plaintiff from her acting position.

[66] Having considered all the circumstances of the matter, its seriousness and its effect on the Plaintiff, I am convinced that damages in the sum of Five Hundred and Fifty Thousand Emalangeni (E 550 000.00) will be an appropriate award to make and I accordingly award Plaintiff the said amount as damages together with interest at 9% per annum from date of judgment to date of payment as well as the costs of suit.

Delivered in open court on this the …..day of December 2013.

N. J. HLOPHE
JUDGE OF THE HIGH COURT

For the Plaintiff: Mr. Z. D. Jele

For the Defendant: Mr. P. Flyn