IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.1681/2007

In the matter between:

SIPHO MAKHABANE		**Applicant**
And		
THE WEEKEND OBSERVER (PTY) LTD	**1st**	**Defendant**
MUSA NDLANGAMANDLA	**2nd**	**Defendant**
PHINDA ZWANE	**3rd**	**Defendant**

Neutral citation: ***Sipho Makhabane v The Weekend Observer (Pty) Ltd. & 2 Others (1681/2007) [2017] SZHC 233 (*****10th November 2017*****)***

Coram: **M. Dlamini J.**

Heard: **20 October 2017**

Delivered: **10th November 2017**

Civil law – ***actio iniuriurum*** **– plaintiff must establish that the article is defamatory of him – burden of proof is on the defendant to establish his defence on a balance of probabilities –**

Constitution - There must be striking of a balance between section 24(2) and section 18(1) of the Constitution –

defence - **fair comment in the public interest – there can be no public interest in a falsehood - Where however, the defendant cannot establish truth of the statement by reason that it is difficult or disproportionately expensive to do so, the law permits a defendant to publish a false statement but must establish on a balance of probabilities that it was reasonable to do so under the circumstances.**

Assessment of damages - ***amende honorable*** **– awarding plaintiff with monetory compensation does not reconcile parties – a remedy resonates with the culture of African renaissance (*ubuntu*)**

- **apology - failure to do so might result in aggravated damages.**
- **plaintiff succeeds – first defendant to pay E300,000 and costs of suit.**

Summary: The plaintiff's cause of action is based on a publication made by defendants and described by plaintiff as defamatory of him. The defendants have pleaded that the publication was a fair comment in the public interest, following a public statement made by plaintiff. Defendants have also raised that they were exercising their constitutional right to freedom of expression and that it was reasonable in the circumstances to do so.

The parties

[1] The plaintiff (Makhabane) is defined as an adult businessman. He hails from Benoni, South Africa.

[2] The first defendant is a company incorporated and registered in terms of the company laws of the Kingdom.

[3] The second defendant is an adult male Swazi, under the employ of the first defendant, and was at the time of publication, the Chief Editor.

[4] The third defendant was (as he is regrettably deceased) the reporter, responsible for the impugned publication and was employed by first defendant.

The parties' contentions

The plaintiff's

[5] Makhabane has alleged in his amended particulars of claim that the defendants (the Observer) authored and caused to be published an article whose title was: "*Leave God alone*." It further carried the words: "*Rubbish! Get God out of this madness, please! God is nowhere near this charade pregnant with sin! Aseniyekele Somandla nente lemikhuba yenu baketfu*."

[6] Makhabane declared that the publication was that he lied when he claimed that he had paid bail amount for Frans Dlamini following that by the time he arrived in Swaziland, the said Frans Dlamini had been released from custody as his bail money had been paid.

[7] In the result, the Observer's publication conveyed to the ordinary reader of the newspaper that he:

> *"11.1 is not a Christian;*
> *11.2 is a liar and/or cheat and/or dishonest person using the name of God;*
> *11.3 lied that he paid bail for Frans Dlamini yet he did not;*
> *11.4 is engaged in dishonest, disreputable and dishonest activities which are not associated with God."* [1]

[1] see page 3 paras 11.1 – 11.4 of the new book of pleadings

[8] Makhabane then claims the sum of E1 000 000 as compensation for the injury he suffered against his reputation. Liability is viciously contested.

Defendants'

[9] The Observer denied that the article was malicious, defamatory and that it was unlawful or intended to injure plaintiff's good name. They contended that the article was well within the confines of section 24(2)(a), (b) and (c) of the Constitution of Swaziland, Act No.1 of 2005. They proceeded as follows:

> *"4.3.2 the article was a fair comment on the matter of public interest;*
> *4.3.3 the Defendants were not negligent in publishing the article;*
> *4.3.4 the article was published without animus injuriandi;*
> *4.3.5 the Defendants did not publish the article recklessly;*
> *4.3.6 the publication was objectively reasonable, i.e. it was reasonable to publish the article at the time in the manner in which it was published:*
> *4.3.7 the facts commented upon concerned matters of burning public concern.*
>
> *4.4 If it is found that the publication contravened any law, which is denied, the defendants plead that the said law or prohibition is not reasonable justifiable in a democratic society."* [2]

[10] The Observer further deny the innuendo attributed by Makhabane in its paragraphs 11.1 to 11.4 quoted at paragraph 7 herein.

Oral evidence

Makhabane

[11] Makhabane and the Observer led one witness each under oath. Makhabane testified that he was a married man with four children. In 1988, he began his gospel singing career. He progressed until 1999. He became a producer as

[2] see page 8 para 4.3.2 – 4.4 of *n*[1]

well. He produces music for Shongwe and Khuphuka, Ncandweni Christ Ambassadors, Hlengiwe Mhlaba, Israel Mosehla, Tsepiso, Khuzizono and others. His recording company is Big Fish Music Production. He is currently engaged in organizing youth in groups under the banner of Discovery of Talent, Mpumalanga Praise. He is a gospel preacher and a motivational speaker as well. He has widely travelled since 1994. He travelled in the Southern and Eastern Africa sub-regions. In 2016, he went abroad to the United Kingdom and United States of America.

[12] Makhabane's bone of contention with the Observer arose from an article which he said was defamatory of him. He referred the court to the said article. He testified that on Monday, 16th January 2007, he received a call from Nhlanhla Mbingo advising him that Frans Dlamini had been arrested and that a sum of about E15,000 was needed to bail him out of custody. He then transferred the sum of E15,300 to a friend's account in First National Bank. He produced a document reflecting the transfer transaction of the said sum. It was admitted by consent of the Observer and marked as exhibit "A".

[13] It was his further evidence that the sum transferred was then used to pay for Frans Dlamini's bail. Frans Dlamini was released on the following day, Tuesday. He travelled from South Africa to Swaziland on the following day, Wednesday. He, together with Frans Dlamini held a press conference and invited all the major media houses in Swaziland, namely, the Observer, Times of Swaziland, Swazi TV and Channel S. Frans Dlamini tendered an apology to the nation while at the same time extended his gratitude to him for paying his bail amount.

[14] On the 20th January 2007, while relaxing with his family in the comfort of his residence in Johannesburg, he was inundated with calls from his fans. The

first caller enquired from him as to why he was mocking God. He was puzzled by this question. The caller revealed that there was an article by the Observer to the effect that he was not truthful that he had paid bail for Frans Dlamini. He quickly responded by saying that he had indeed paid bail for Frans Dlamini. It was after he was bombarded with further calls from different people, others sympathising while some blaming him for mocking God, that he decided to take the matter serious.

[15] Makhabane travelled to Swaziland and purchased the newspaper. Indeed the story was there together with his photograph. He read the story and was convinced that the callers could not be faulted for their perception about him. He paid particular attention to the wording, the body and last paragraph of the article together with his photograph next to the said article.

[16] He sent a demand to the Observer. The Observer failed to publish an apology and retraction of the article. He instituted the present action proceedings. The Observer again failed to publish an apology and a retraction of its statement. He was therefore demanding a sum of E1,000,000. Makhabane was cross-examined at length. The Observer mainly asserted its defence under cross-examination.

The Observer

[17] Mr. Alec Lushaba (Lushaba) testified under oath on behalf of the Observer. He pointed out that in 2007, at the time of publication of the article under issue, he held fort as an Acting Weekend Editor. He pointed out that the author of the article was third defendant who was then deceased. He referred to the page where the article appeared and clarified that it was a column reserved for editors to analyse the events of the week and present their views.

The editor would write in a flamboyant manner and in such a way as to suit his audience without necessarily deviating from the context.

[18] Defence attorney referred Lushaba to the portion of the article that relate to Makhabane. Lushaba pointed out that prior to the contentious article, Makhabane, in a press conference, had said that when he heard about Frans Dlamini's arrest and that bail money was needed he: " *had to run as fast as he could*." It is these utterances by Makhabane that led the author to analyse the circumstance of the matter and conclude on when Makhabane paid the bail amount for Frans Dlamini as he arrived in Swaziland on Wednesday when France had been released on bail on Tuesday.

[19] On the complaint by Makhabane that the article also stated that he "*claimed*" to have paid bail whereas he actually paid, Lushaba testified that firstly, the author did not, by so stating, question Makhabane's capability of paying but that as the author, he could not vouch that Makhabane paid bail because he did not see him pay, thus the use of the term "*claim*". He was reminded that Makhabane testified that the article referred to him as "*rubbish*". Lushaba testified that the article was addressing Frans' unbecoming behavior, having been charged with fraud of about E500,000.00.

[20] Lushaba disputed that the article was defamatory of Makhabane. He explained that the article displayed Makhabane as being godly in the part he had played by bailing out Frans. He was also cross-examined at length by Makhabane's Counsel who re-emphasised that his client was injured in his reputation.

The law on defamation

[21] Defamation, an *actio iniuriarum* (action for injury) is a Roman remedy intended to protect personality rights such as physical integrity (*corpus*), dignity (*dignitas*) or reputation (*fama*)[3].

[22] **Wessels JA** eloquently authored on defamation:

> *"In its narrow sense and in its special relation to a person's honour, it signifies every act whereby the honour and good reputation of a man is intentionally injured."* [4]

[23] **Burchell** defines defamation as follows:

> *"[T]he unlawful, intentional publication of defamatory matter (by words or conduct) referring to the plaintiff, which causes his reputation to be impaired."* [5]

[24] **Brand JA** states of publication and on types of publication:

> *"Publication" means communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech, the injurious information can also be published through photographs, sketches, cartoons or caricatus."* [6]

[25] From the above definition, the elements to be proved are:

a) the wrongful (unlawful) and
b) intentional

[3] see para 21 of Media 24 Ltd and Others v South African Taxi Securitisan (Pty) Ltd (437/2010) [2011] ZASCA 117; 2011(5) SA 329 (SCA); [2011] 4 ALL SA 9 (SCA) (5 July 2011) and also on question whether trading and non- trading corporations can claim under defamation
[4] see Nationale Pers BPKT v Long 1930 AD 87 at 99
[5] The law of Defamation in South Africa Juta, Cape Town 1985 – page 1035
[6] in Le Roux and Others v Dey (CCT, 45 (10) [2011] ZACC 4; 2011 SA 274 (CC), 2011 (6) BCLR 577 CC; BCLR 446 (CC) (8 March) 2011 at para 86

c) publication of

d) defamatory statement

e) concerning plaintiff.[7]

[26] Writing on the first two elements **O' Reagan J** espoused:

> *"Once a plaintiff established that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional***."** [8]

[27] **Brand JA** held similarly on the elements:

> *"Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the onset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional.***"** **[9]**

[28] **Wessels JA** took a direct approach to the first two elements of defamation as he outlined:

> **"***Before a person can be held liable for any injuria (injury) in its widest sense of wrong, as well as in its narrow sense of contumelia, there must exist an intention to commit a wrong or, as it is usually expressed, there must be an animus injuriandi (intention to injure).* **[10]**

[29] The learned Justice of Appeal proceeded:

> *"It is for the court to judge from all the surrounding circumstances whether this animus injuriandi existed or not: the mere word of the wrongdoer that he had no such intention is not conclusive. It was also a principle of the civil law that if a person intends a wrong if what he did was done animo injuriandi – then he may be liable to a person whom he did not think of at the time he did the wrong."*

[30] He points out further:

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[7] see para 18 of Khumalo & Others v Holomisa [2002] ZACC12; 2002 (81 BCLR 77)
[8] *n*[7]
[9] see *n*[4]
[10] see *n*[2]

"The use of defamatory language about a person or persons is prima facie evidence of an animus injuriandi."

[31] **Hefer JA** expressed a similar view as follows:

"[l]iability for defemation postulates an objective element of unlawfulness and a subjective element of fault (animus injuriandi – the deliberate intention to injure). Although the presence of both elements is presumed once the publication of defamatory material is admitted or proved the plaintiff is required to allege that the defendant acted unlawfully and animo injuriandi." [11]

[32] **Smalberger JA** articulated on the same subject:

"Melius de Villiers the Roman and Roman-Dutch Law of Injuries at 27 notes three essential requisites to establish an action for injuria. They are:

'I. An intention on the part of the offender to produce the effect of his act;
II. An overt act which the person doing it is not legally competent to do; and which at the same time is
III. An aggression upon the right of another, by which aggression the other aggrieved and which constitutes an impairment of the person, dignity or reputation of the other." [12]

[33] The learned Justice emphasised and then cited **Melius de Villiers** as follows**:**

"...it is necessary to establish that there was a wrongful act. Unless there was such an act intention becomes irrelevant as does the question whether subjectively the aggrieved person's dignity was impaired. I do not understand the judgment of ***Jansen JA*** *to suggest that all that is required for a successful action for damages for injuria are words uttered animo injuriandi towards another which offend such person's subjective sensitivities, and in that sense impair his dignitas. If this were so it could lead to the courts being inundated with a multiplicity of trivial actions by hypersensitive persons."* [13]

<u>*Onus*</u>

[34] The *Corpus Juris* reflects:[14]

[11] see page 1202 in National Media Ltd and Others v Bogisi 1998 (4) SA 1196
[12] Delange v Costa 1989 (2) SA 857 at page 860
[13] The Roman and Roman Dutch Law of Injuries at 37 notes
[14] D. 22. 3. 21

> *"Semper necessitas probandi incubit illi qui agit – if one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it."*

[35] The above principle must be read with the principle also laid down in the *Corpus Juris*:[15]

> "*Agere etian is videtur, quit exceptione utitier: nam reus in exceptione actor est – where the person against whom the claim is made is not content with the mere denial of the claim but sets up a special defence, then he is regarded quoad that defence, as being the claimant; for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.*"

[36] In summary the *Corpus Juris* points out that the onus is on the person who alleges something and not on the person who denies it.[16] If for instance, the defendant alleges reasonableness in the publication, the onus is on the defendant to establish it.

[37] The general position of the law in civil matters is postulated in the *Corpus Juris* as referred to by **Hoexter JA** citing **Davis AJA** in **Pillay v Krishna & Another**[17]. **Hoexter JA** then reveals:

> *"Long before this Court's decision in **Pillay v Krishna** (supra) South African Courts had consistently accepted that defended defamation actions tended to yield different issues each of which attracted its own and independent burden of proof. As a typical statement (albeit made in a case dealing with the expression res ipsa loquitur) there may be taken the following passage from the judgment of **Schreiner J** in **Klaassen v Benjamin 1941 TPD 80** at 86:*
>
> *'(T)he plaintiff has to prove the publication of a defamatory statement concerning him, the defendant has to prove that it was published on a privileged occasion, and the plaintiff has to prove that the occasion was abused.'"* [18]

[15] D. 44.1.1
[16] see also Campel v Spottiswoode (1863) EgR 405; (1863) 3 B & S 769 at 777 by Cockburn CJ 22.3.10
[17] see Pillay v Krishna & Another 1946 AD SA 946 at 951–2
[18] Neethling v The Weekly Mail and Others 1994 (1) SA 708

[38] The learned Justice then clarified:

> *"A careful examination of that judgment, so I consider, points rather to the conclusion that in truth the learned Chief Justice proceeded upon the assumption that a defendant invoking privilege is burdened with a full onus and is required to refute the presumption of unlawfulness by proof on a balance of probabilities."*

> *"Finally, it should be borne in mind, I think, that, although both the presumption of animus injuriandi and the presumption of unlawfulness arise from the happening of the same event (the publication of matter defamatory of the plaintiff), these two presumptions are essentially different in character. The presumption of animus injuriandi relates to the defendant's subjective state of mind (a deliberate intention to inflict injury) whereas the presumption of unlawfulness relates to objective matters of fact and law."*[19]

[39] He then reasoned:

> "*That there is a full onus on a defendant raising a defence of qualified privilege seems to me to follow from an application of those principles enunciated in* ***Pillay v Krishna*** *(supra) to which attention has already been called. The defence of privilege involves entirely new factual allegations unrelated to the plaintiff's cause of action."*

[40] **Brand AJ** upholding the same position articulated:

> *"Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence."*[20]

Defences

[41] There are a number of defences in law available to a defendant who is facing a defamatory suit. **Smalberger JA** wisely noted:

[19] at 765 *n*[18]
[20] *n*[6] para 85

"[A]n act done in the exercise of a right is not a wrongful act, and can therefore not constitute an injuria." [21]

[42] The honourable Justice then postulates:

"*Honest criticism is such an act."*[22]

[43] He had earlier stated:

"*A person must be prepared to tolerate legitimate criticism, that is, criticism which is fair and honest. Whether in given circumstances criticism may be regarded as legitimate must depend upon, inter alia, the relationship of the parties involved and the nature of the affairs they engage in businessmen who engage in competition (like politicians who take part in public life) expose themselves to, and must expect, a greater degree of criticism than the average private individual."*

[44] **O'Regan** expatiated on the defences available under *actio injuriarum:*

"A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public interest; that the publication constituted fair comment and that the publication, was made on a privileged occasion."

[45] She proceeded:

"*Most recently, a further defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in* ***National Media Ltd and Others v Bogoshi****.*[23]*"*

[46] **Hefer JA** had propounded:

"[T]he publication in the press of false defamatory statement of fact will be regarded as lawful if, in all the circumstance of the case, it is found to be reasonable; but it emphasises what I regard as crucial, namely that protection is only afforded to the publication of material in which the public has an interest (that

[21] *n*[12] at page 862
[22] *n*[12]
[23] *n*[7]

> *is, which it is in the public interest to make known as distinct from material which is interesting to the public* - ***Finacial Mail (Pty) Ltd and Others v Safe Holdings Ltd and Another****)"* [24]

Approach

[47] From the above and a host of other authorities,[25] it is clear that the determination on whether there was intention to injure the dignity or reputation of Makhabane calls upon the court to enquire on the intention of the defendant during the publication, that is, What was in the mind of the plaintiff? However, as it was so stated by **Brian CJ**, "*The thought of man is not triable for the devil himself knoweth not the thought of man*,"[26] the trier of fact is guided by the circumstances of each case in assessing whether the defendant intended to bring plaintiff into disrepute by the communication. This test is subjective.

[48] On the question of whether the defendants' publication was unlawful is an objective test – a question based on the standard of a reasonable man. It involves a question of fact and law.

[49] Writing on the objective test to ascertain wrongfulness, **Smalberger JA**[27] stated:

> *"It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful."*[28]

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[24] *n*[7] at page 1212
[25] The King v Leo Ndvuna Dlamini (12/2013) [2013] SZHC 218 (18 October 2013); Ngwenya v Swaziland Posts & Telecommunications Corporation and Another (2015/98 [2009] SZHC 130 (9 April 2009); The Edotor, The Times of Swaziland & Another v Albert Shabangu (Civil Appeal Case No. 30/2006); African Echo (Pty) Ltd and Two Others v Inkhosatana Gelane Simelane Supreme Court Case No.48/2013
[26] Saambou – National Bouvereniging v Friedman 1979 (3) SA 978 at 994
[27] De lange v Costa 1989 (2) SA 857 at 862
[28] *n*[27] page 862E-F of

Determination

Issue

[50] The question before me is whether the impugned publication is defamatory of Makhabane. However, that is not the end of the matter. There is a second leg to the determination provided the statement is found to be *prima facie* defamatory and it is whether the Observer has on a balance of probability established a defence which renders the defamatory statement justifiable in law thereby defeating the cause of action against it. As pointed out from the various authorities above, it is a double prone approach determination exercise.

Common cause

[51] It is common cause that Frans Dlamini was arrested on 16th January 2007. On the 17th January 2007, Frans Dlamini was released on bail. On the 18th January 2007 Frans Dlamini together with Makhabane held a press conference where Frans Dlamini tendered an apology to the nation or presumably to his music lovers. He also thanked Makhabane for paying his bail amount. Makhabane also addressed the conference by pointing out that as soon as he learnt of Frans Dlamini's arrest, and that money was required for his bail, "*he had to run as fast as he could to save the day*."

Evidence

[52] Establishing unlawfulness and *animus injuriandi*, Makhabane testified under oath that on a Monday, he received a call from one of his artists, Nhlanhla Mbingo advising him that Frans Dlamini had been arrested and that he had been granted bail to the amount of E15,000. He then set out to make means to pay the said bail sum. He requested a friend to allow him to transfer the sum

of E15,300 inclusive of bank charges to his account. His friend agreed. This money was subsequently withdrawn and deposited as bail amount to the Government's coffers. Makhabane then submitted various documents establishing a transfer into a First National Bank account in Swaziland, withdrawal of the said sum and payment of bail receipt. He applied to hand to court all such documents. They were admitted without any opposition and collectively marked as exhibit A.

[53] He then turned to the publication by the Observer and demonstrated to the court that it was defamatory of him. He referred to the heading, every paragraph of the article and the photograph depicting himself in the article.

Is the impugned article defamatory of the plaintiff?

[54] In its *viva voce* evidence the Observer disputed that the statement was derogatory of the plaintiff's reputation. If anything, the evidence by Lushaba went, the publication hailed Makhabane for doing well by bailing out Frans Dlamini. It is imperative that I consider whether the publication is defamatory *per se* of Makhabane before I turn to the defence.

[55] The first port of call is to read the words used in the article and understand them in their literal sense or day to day meaning in terms of the golden rule of interpretation. If however, the words are capable of a secondary meaning (innuendo) the question becomes; What meaning would an ordinary newspaper reader attribute to the words?

[56] **Tindall JA** pointed out that by ordinary newspaper reader, it meant "*a reasonable reader of average intelligence and education*".[29] It certainly does

[29] Boisner v Trigger 1945 AD 22 at 35

not refer to "*an astute lawyer or super critical reader*" as per **Wessels J.**[30] Critically important in assigning the meaning to words of the article is that the entire article must be read in context. The background information must be considered as well for the reason that an ordinary reader of the newspaper would read the newspaper although not with an eye of an eagle (that is, paying much attention to every minute details in a story) but at an average glance or scan. He would also read the newspaper not consistently everyday but at average rate as well.

[57] Enough of the law! The article in issue reads:

> "***Leave God alone, please***!
> *Enough of football for now. This year God will show every Swazi that these so-called modern Christians are far from being what they want us to believe. [1]*
>
> *Firstly, it was Ncandweni Christ Ambassadors. They fed us with a lot of drivel instead of telling us the truth that there was a lot wrong going on inside the group. [2]*
>
> *Timothy Myeni had said he had received a message from God and blaah..blaah..blaah. [3]*
>
> *We knew that he was pulling some stunts. Then this latest Frans Dlamini scandal. This is hogwash! [4]*
>
> *Why are we taken for a ride? For example, one Sipho 'Big Fish' Makhabane claims to have paid Dlamini's bail. There is a lot fishy there. [5]*
> *When did he send the money to Swaziland because by the time he arrived here Dlamini was already out of prison? [6]*
>
> *Then we have Dlamini calling a press conference saying he was apologising. I think the apology was too early. What if he loses the case and goes to jail?[7]*
>
> *Then he claims to have had a vision while at Sidwashini prison and that he composed a song through that vision from God! [8]*
> *Rubbish! Get God out of this madness please! God is nowhere near this charade pregnant with sin![9]*

[30] in Johnson v Rand Daily Mails 1928 AD 190

Aseniyekele Somandla nente lemikhuba yeni baketfu!!"[10]

Golden cannon

[58] "*Leave God alone, please! Simpliciter* the title means, do not involve God. "*Please!"* with exclamation mark is an emphatic plea or command.

[59] The opening paragraph reads: "*This year, God will show every Swazi that these so called modern Christians are far from being what they want us to believe*" in short means nowadays Christians are (if one may borrow from President Donald Trump's vocabulary when declining to entertain questions from some international media) "*fake*" and God will demonstrate that soon.

[60] This sentence prompts one to read on in order to understand who these nowadays Christians who are fake are and how they are fake. The second paragraph categorically directs the reader to Ncandweni as the first. How are they fake? The article informs: "*They fed us with a lot of drivel instead of telling us the truth ...*"

[61] The third paragraph mentions Timothy Myeni who had said he received a message from God and blaah..blaah..blaah! The author did not want to get into the details of the message by the use of "*blaah..blaah..blaah!*" The ordinary reader is left to recall previous publications on Timothy Myeni, in other words.

[62] The last and latest is the Frans Dlamini saga. The author put it plainly now on fake. He says the Frans Dlamini saga "*is a hogwash!*" This in its daily meaning translates into something meant to bluff or fool others by reason that it is not genuine, real or true. The immediate sentence "*why are we being*

taken for a ride?" clearly demonstrates that we are being fooled – it emphasises the "*hogwash!*" behaviour by Frans Dlamini. The writer does not end by pausing the question, "*why are we being taken for a ride?"* He demonstrates how "*we*" are taken for a ride. He explains as follows:

> "*For example, one Sipho 'Big Fish' Makhabane claims to have paid Dlamini's bail."*

[63] The next sentence following immediately is:

"*There is a lot fishy there*." Where? The answer is, in Makhabane paying bail for Frans Dlamini. The publication does not end there. It expatiates to the reader why such, that is, claim for paying bail, is "*a lot fishy!"* by pausing a question which cast doubt on Makhabane's claim of paying bail:

> "*When did he send the money to Swaziland because by the time he arrived here Dlamini was already out of prison*."

[64] The article reverts to Frans Dlamini and give instances of dubious behavior. The article sums up the behavior of all the persons mentioned therein who are not true Christians as follows: "*Rubbish!"*

[65] The exclamation mark means the writer is shouting "*Nonsense!*" He then writes: "*Get God out of this madness, please*!" This is once again a plea to exclude God as it was pleaded in the title of the article: "*God is nowhere near this charade pregnant with sin.*"

[66] The sentence "*God is nowhere near this charade pregnant with sin*," fortifies the writer's idea that, "*this year God will show every Swazi that these so called modern Christians are far from being what they want us to believe.*"

The writer decided to seal his article by writing in vernacular – "*Aseniyekele Somandla nente lemikhuba yenu baketfu*." This is a repetition of: *"Get God out of this madness"* with few added word, again a repetition of "*continue with "your charade pregnant with sin.*"

[67] Summing up the article with regard to Makhabane, it is my considered view that an ordinary reader reading the title of the article, together with the first paragraph and the entire article with reference to paragraph 6 and the last three paragraphs would understand that Makhabane is one of those so-called modern Christians who are faking as a Christian.

[68] This perception about Makhabane would be fortified by the photograph of Makhabane depicted by the author immediately under the last paragraph of the article. Below the photograph there is the inscription, "*Sipho Makhabane*" He is depicted as carrying a mark with his left hand, with his right hand pointing to heaven and with his mouth opened.

[69] In the analysis, the publication is *prima facie* defamatory of Makhabane in its *simpliciter* reading and without any imputation of an innuendo. It remains for me to determine if it is unlawful. In this exercise, I am guided by the defences raised.

Defence

[70] I have already pointed out that the Observer has urged this court to read the article in its context with a view to holding that the article was a fair comment made in the public interest. The Observer has further pleaded its constitutional right to freedom of speech under section 24(2)(a), (b) and (c) of the Constitution of Swaziland, Act No.1 of 2005.

Section 24 (2)(a), (b) and (c) of the Constitution (the section). reads:

> *"A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say:*
>
> *(a) freedom to hold opinions without interference;*
> *(b) freedom to receive ideas and information without interference;*
>
> *(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)."*

[71] **O' Regan,** after quoting a similar provision from the Constitution of South Africa, eloquently propounded:

> *"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16."* [31]

[72] She then stated immediately thereafter:

[31] in Fred Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) at para 24

> *"However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality*".[32]

[73] The learned Justice then quoted **Corbett CJ** as follows:

> *"I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory."[33]*

[74] She concluded:

> *"The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other*."[34]

[75] It appears to me that the approach to the striking of a balance between freedom of press and right to dignity is to determine the circumstance of each case holistically. In the present case, the Observer has asserted that it based

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[32] *n[26b]* para 26
[33] *n[26]* para 28
[34] at para 28 of *n[26]*

its publication on a previous article published during the week on the 18th January 2007. This article read:

> "*Sipho Makhabane, the South African gospel musician became a friend in-deed to his disgraced counterpart and member of the Royal Swaziland Police Force Frans Dlamini when he paid the E15 000.00 bail for him.*
>
> *Makhabane said he was contacted by people closely related to Dlamini who informed him of his arrest for allegedly defrauding government of over E500 000.00.*
> *"When I was informed I was confused and hurt because Dlamini is my brother. I was then informed that bail was needed and had to run as fast as I could to save the day" he said.*
>
> *He said he was of the view that a member of the family who had erred did not deserve scorn, but should be calmly welcomed and assisted.*"

[76] The Observer expatiated that Makhabane in the press conference held with the major media houses in the country uttered:

> "*I was then informed that bail money was needed and had to run as fast as I could to save the day."*

[77] This statement by Makhabane prompted the author to enquire on when did Makhabane "*run to save the day*" when in actual fact by the time he reached Swaziland, Frans Dlamini was already released on bail. I must point out from the onset that the author was justified in the circumstance of the matter to pause the question as he did in his publication under issue at para 6:

> *"When did he send the money to Swaziland because by the time he arrived here Dlamini was already out of prison."*

[78] As an analytical writer, there was nothing wrong or unlawful with the above question. Makhabane advanced in court that the author misunderstood him. He took the word "*run*" to mean literally "*run.*" Yet the run meant transfer

of money through electronic means. However, a person who is not privy to the circumstance of the manner in which bail was paid, would have understood "*run"* in its literal sense. On the other hand, a person who is privy would have understood it from Makhabane's perspective. Now putting the two positions into the scales of justice would strike a balance. The position of the law where the scales of justice strike an equilibrium is that the matter should be decided in favour of defendant. In this regard, the comment was fair.

[79] However, I must hasten to point out that had the publication ended by pointing out the doubtful circumstance as demonstrated in the question by the author, this would align with right of freedom of speech provided under the section 24 of the Constitution.

[80] I appreciate that Makhabane lamented that the writer of the publication ought to have called him to verify the circumstances under which he had to "*run as fast as he could*". I do not think so. His duty was to do a critical review of the weekly publication. Business efficacy would be defeated if he were to call every individual, especially who on their own volition gather the press and decided to make incomplete statements. *"...one 'Big Fish' Makhabane claims to have paid Dlamini's bail. When did he send the money to Swaziland because by the time he arrived here, Dlamini was already out of prison*" would not only have been within the confines of section 24 but a fair comment in the public interest.

[81] However, as demonstrated in the publication, the Observer's article does not only read:

"One 'Big Fish' Makhabane claims to have paid Dlamini's bail. When did he send the money to Swaziland because by the time he arrived here Dlamini was already out of prison."

[82] The author went overboard and made assertive position on Makhabane. In other words, the Observer's woes emanate from a cursory reading of the article. The title "*Leave God alone, please!"* together with Makhabane's photograph prompts one to read the article to find out why Makhabane is commanded[35] to leave God alone. The answer lies in para 5 of the article, *viz*. he "*claims to have paid bail*" for Frans Dlamini whereas Frans was released on bail before he came to Swaziland. In these words the author fails to leave the matter to its audience to judge for itself. He indirectly informs them that Makhabane falls in the category of "*these so called modern Christians*" who "*are far from being what they want us to believe*."

[83] The statement "*This is hogwash*" does not only refer to Ncandweni and Timothy Myeni but Makhabane as well. The closing paragraphs; "*Rubbish! Get God out of this madness please! God is nowhere near this charade pregnant with sin! Aseniyekele Somandla nenta lemikhuba yenu baketfu*" cannot be read at the exclusion of Makhabane.

[84] In the above, the defence under section 24 cannot avail the Observer. Makhabane's dignity is to be "*inviolable*" as per section 18 (1) of our Constitution. In the analysis the title, read together with the introductory portion, paras 5, 6, 9, 10 and the photograph of Makhabane tilts the scales of justice in favour of section 18(1) as against section 24(2)(a), (b) and (c) of the Constitution.

Fair comment in the public interest and reasonable circumstance

[35] as the exclamation mark qualifying "please" suggests that this is not just a plea.

[85] Much time was spent on behalf of Makhabane on proving that he did pay bail for Frans Dlamini. This was unnecessary because it is not one of the elements of defamation to establish untruthfulness of the publication. It would have been sufficient for Makhabane on the witness stand to assert that he did pay bail for Frans Dlamini by means of electronic transfers. The number of documents handed to court as exhibit A were unnecessary. On the contrary, a defendant who raises the defence of fair comment in the public interest is burden with the onus of proving that the publication was true.

[86] **O'Regan** expressed this position of the law as follows:

> *"However, the common law delict of defamation does not disregard truth entirely. It remains relevant to the establishment of one of the defences going to unlawfulness, that is, truth in the public benefit. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit. The burden of proving truth thus falls on the defendant*."[36]

[87] The rationale behind this position of the law is that there can be no public interest on falsehood. Where however, the defendant cannot establish truth of the statement by reason that it is difficult to do so or disproportionately expensive, the law permits a defendant to publish a false statement but must establish on a balance of probabilities that it was reasonable to do so under the circumstances of the case.

[88] In the case at hand, the defendant has pleaded both fair comment in the public interest and reasonable circumstance

[36] *n*[31] at para 37

warranting publication.[37] Turning again to the article by the Observer, the poser at paragraph 6 would have been a fair comment in the public interest by reason that Makhabane having assembled the press decided to make an incomplete statement. What is of course incorrect is that Makhabane is not a true Christian. The defence on fair comment in the public interest stands to fail.

[89] Similarly the defence on reasonable circumstances permitting the publication must fail for the same reason that Makhabane is in the same category of "*so-called modern Christians (who) are far from being what they want us to believe*;" his claims of paying bail to be classified as "*lot fishy there*"; he should also "*Get God out of this madness*" as "*God is nowhere near this charade pregnant with sin.*" He should leave God and continue with his charade (absurd pretence) pregnant with sin. To crown the defamatory publication, Makhabane's photograph with his full names below is pitched on the article below with a heading, "*Leave God alone, please!*" The evidence before me does not support the Observer's defences. I must find for Makhabane.

Assessment of damages

[90] The *actio injuriurum* provides as a remedy to assuage vexatious violation of personal rights. There has been a considerable debate on whether Roman Dutch jurisdictions should apply a form of remedy found in Roman Dutch law referred to as *amende honorable* **Mellius de Villiers** stated on this remedy:

[37] see *n*[2]

> *"In the systems of jurisprudence founded on Roman law a legal remedy has been introduced which was entirely unknown to the Romans, known as the amende honorable . . . . This remedy took two forms. In the first place, there is the palinodia, recantatio or retractio, that is, a declaration by the person who uttered or published the defamatory words or expressions concerning another, to the effect that he withdraws such words or expressions as being untrue; and it is applied when such words or expressions are in fact untrue. In the second place there is the deprecatioor apology, which is an acknowledgment by the person who uttered or published concerning another anything which if untrue would be defamatory, or who committed a real injury, that he has done wrong and a prayer that he may be forgiven."*[38]

[91] In **Young v Shaik**[39] the defendant apologised unreservedly to the plaintiff and tendered costs of suit. During submissions, the defendant challenged the plaintiff's prayer for damages and contended that it ought to be satisfied with the apology in its plea. The court rejected such submission and held that it did not serve justice. It pointed out that when the publication was made, defendant had not shown any compunction and was indifferent to any financial harm to the plaintiff caused by its false accusation.

[92] Proponents of the *amende honorable* point out that awarding the plaintiff with monetary compensation does not reconcile the parties. *Amende honorable* as a remedy resonates with the culture of African renaissance (*ubuntu*). Let me not delve on this subject following that the apology remedy was not raised on behalf of defendant. In fact the Observer pointed out that Makhabane never requested it to publish an apology. He simply served a letter of demand for damages suffered,

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[38] in Dikoko v Mokhatla (CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006) at para 63

[39] in Young v Shaik 2004 (3) SA

failing which legal suit was to be instituted. The Observer also did not indicate whether in the event the publication was found to be defamatory it was willing to tender a public apology and retraction of the article.

[93] In assessing damages, the proposition by **Mokgora J** is apposite:

> *"When assessing damages for defamation, courts have in the past considered a range of factors arising from the circumstances and facts of the case: the nature and gravity of the defamatory words; falseness of the statement; malice on the part of the defendant; rank or social status of the parties; the absence or nature of an apology; the nature and extent of the publication and the general conduct of the defendant.[71] The court must therefore have regard to all the circumstances of a case where the assessment is always context specific. The list is non-exhaustive.[72] Although earlier cases of a similar nature give guidance, they must always be applied with the necessary circumspection."*[40]

Quantum of damages

[94] Makhabane contended in his amended particulars of claim:

> *"Plaintiff has been injured in his good name and reputation and has sustained damages thereby in an amount of E1 000 000."*

[95] Makhabane also testified that he is a public figure who has travelled in the Southern–Eastern sub-regions of Africa. He also travelled abroad. He is a motivational speaker and involved with the youth.

[96] I accept that he is a public figure and he was at the time of publication known in the country and elsewhere. However, I consider that at the time of the publication (2007) the Observer was only published locally. Makhabane himself

[40] *n*[37] para 71

supported this position in his evidence in chief that when he received numerous calls on the article, he decided to travel to Swaziland to purchase the newspaper. Had it been accessible in the internet, he would not have travelled from Johannesburg to Swaziland to purchase it. In this circumstance therefore, it is only the audience in Swaziland that must be reasonably considered to have read the article. I consider further that although he is a public figure, well known in Swaziland by the time of the publication, and his photograph was attached to the publication, he was not known as a motivational speaker then as he testified that it was only recently that he was involved with the youth. He was, however, known as a Christian musician. The evidence before me however, is silent on how Makhabane's music business was affected in order to assist in the computation of the *quantum*. I further consider that although the publication was not in the front page, it was at the sports section which is widely read in this country.

[97] I also consider the sting of the article. The words "*rubbish, madness, charade pregnant with sin*" are not only obnoxious but aggressive. I further consider that the Observer was prompted to write the article from Makhabane's incomplete statement. It is Makhabane who invited it to the conference. I consider that it is not as if the entire article is devoid of reasonableness, as I pointed out at paras 76-80 herein. It was reasonable for the Observer to pose, "*when did Makhabane send the money because by the time he arrived in Swaziland, Frans Dlamini was already out of prison,*" when juxtapose to

the statement by Makhabane "*I was then informed that bail money was needed and had to run as fast as I could to save the day*!"

[98] I consider in the Observer's favour that when the publication was made, the author was discharging his function of critically analyzing publications of that week and it was unnecessary to consult Makhabane. However, this does not detract from the finding that the author overstepped his boundaries by adding statements which are damning to the reputation of Makhabane. He ought to have known when to stop his pen.

[99] I take into account also that there was no apology or retraction of the defamatory portion of the article thereafter. Makhabane was not duty bound to request an apology or retraction of the publication. The Observer ought to have published an apology and retraction as soon as its attention was drawn on the *injurious* nature of the publication. If they were not certain as to whether the publication was defamatory or not, it would have been better for them to err on the correct side of the law as the legal parlance goes, but indicate that their rights are reserved on the question of defamatory characteristics of the publication. It ought to have known that its failure to do so might result in aggravated damages, should the court find against it.

Laxity

[100] On the 25th August 2017, when the Observer closed its defence, the parties suggested dates for filing of their written submissions. Plaintiff undertook to file not later than the 15th September 2017 while defendant on 29th September 2017. Plaintiff did file however, on 21st September 2017. Defendant did not file on 29th September 2017. However, on 11th October 2017 the parties came to my Chambers with the plaintiff urging the court to compel defendant to file. Defendant asked for a week's indulgence and the court granted an extension to 20th October 2017. Surprisingly, up to the date of this judgment, defendant failed to file its written submissions. The predicament of the court is that in both its plea and *viva voce* evidence, the defendant did not raise any issue with the *quantum* claimed, nor did it indicate any circumstances to be regarded in its favour when computing the *quantum* of damages. This conduct by the defence is worthy of the court's disapproval.

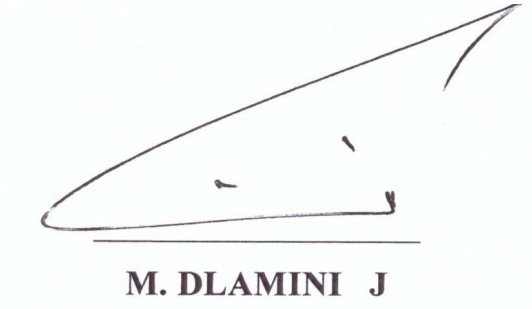
Orders

[101] I have, under assessment of damages, indicated the circumstances to be considered in assessing damages. In the result, I award Makhabane the sum of E300,000.

[102] In the analysis, the following orders are entered:

1. The plaintiff's cause of action succeeds;
2. The defendant is ordered to pay plaintiff:
   2.1 the sum of E300,000 as compensation for his injured reputation;

2.2 costs of suit.



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