

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**SIKELELA DLAMINI**

Applicant

And

**THE EDITOR OF THE NATION AND ANOTHER**

Respondents

Civil Case No. 2534/2007

Coram

S.B. MAPHALALA - J

For the Applicant

MR. W. MKHATSHWA

For the Respondents

IN ABSENTIA

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JUDGMENT

1<sup>st</sup> February 2008

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[1] On the 3<sup>rd</sup> August 2007, Plaintiff was granted judgment by default of the Defendants and the court then allowed Plaintiff leave to lead *viva voce* evidence on the *quantum* of damages. Indeed, on the 4<sup>th</sup> September 2007, the court heard the evidence of the Plaintiff on oath on the question of the *quantum* of damages. The Plaintiff has filed a combined summons seeking a sum of E2, 500, 000-00 and costs of suit for damages for defamation of character where the 1<sup>st</sup> and 2<sup>nd</sup> Defendant published an article in its June

2007 edition various maliciously defamatory allegations as found in annexures “A”, “B”, “C” and “D” of the said magazine.

[2] On the 16<sup>th</sup> July 2007, at 11:40 hours at 3<sup>rd</sup> Floor, Mbabane House, being the place of employment for the 1<sup>st</sup> Defendant he was properly served with the combined summons in this matter where the Deputy Sheriff Mr. Menzi Dlamini handed a copy to Bheki Makhubu personally, at the same time exhibiting the original contents thereof under the provision of Rule 4 (2) Act No. 20 of 1954. I must say, this state of affairs is unfortunate in that the court is not aware of any defence by the Defendants such as fair comment, justification (i.e. truth and public benefit) and privilege against the said action.

[3] In regard to the scope of the sub-rule I refer to the textbook by *Nathan, Barnett and Brink*, “*Uniform Rules of Court*” *Juta*, 3<sup>rd</sup> Edition at page 114 and the cases cited thereat.

[4] For purposes of this judgment and also to outline the various portions of the magazine which constitute defamation in this case it is imperative herein to refer to those excerpts at this stage, thusly;

[5] In annexure “A” in the article captioned “**Speaking my mind**” the following is found in the ninth paragraph:

“As for that Sikelela, I was not sure, while reading the report, whether to laugh or cry as his behaviour. I have never seen such an unmitigated fool. At one time,

the man wanted to sit in the Drugs Advisor Committee”.

[6] Further in annexure “A” in the last paragraph the following is said:

“Throughout my time as a journalist I have been warned that it is dangerous to label someone as corrupt. I will make an exception here and say Lutfo, Marwick and Sikelela are corrupt. Very corrupt. Now, gentlemen, sue me”.

[7] In annexure “C” in the third paragraph of page 22 of the magazine the following is found:

“In an industry where medication sourced for as little as E50 could be sold to Government for over a whopping E3, 000-00 creating instant millionaires out of otherwise losers and nobodies, Khumalo and Lutfo’s action only dwarfed by the conduct of the Under Secretary in the Ministry of Health and Social Welfare, Sikelela Dlamini.

Here is a man who pulled all the stops for a certain company he once claimed to be lincusa. For to be awarded the tender for the supply of drugs to Government”.

[8] In annexure “D” being page 24 of the magazine the following is found in paragraphs 8, 9 and 11 as follows:

“It was the Under Secretary Sikelela who was more brazen in his conduct and brooked no opposition from the Drug Advisory Technical Committee which had been set up to screen potential supplies of drugs to Government”.

[9] Further on in paragraph 10 the following appears:

“ So brazen was Sikelela in his conduct that, according to Sibiyi at a meeting in the Ministry he attached the drug advisory Committee before going on to suggest

that someone from his office should sit in this committee and take charge of the committees task in adjudication of tenders”.

[10] Furthermore in paragraph 22 of page 24 more is said by the Respondents ending with the following: **“what the enquiry neglected to add was that these men are beneath contempt”**.

[11] As I stated above that Defendants have not defended this action and I subsequently heard *viva voce* evidence of the Plaintiff on the measure of damages where he told the court that he is employed by the Swaziland Government as Under Secretary in the Ministry of Health and Social Welfare, Justice Building, Usuthu Link Road, Mbabane in the District of Hhohho, Swaziland. The 1<sup>st</sup> Defendant is Editor of the Nation cited in his capacity as such. The 2<sup>nd</sup> Defendant is Swaziland Independent Publishers (Pty) Limited a company duly registered with limited liability licensed to publish under the style the Nation.

[12] According to the Plaintiff in its June 2007 monthly edition, the 1<sup>st</sup> Defendant or both Defendants caused to be printed and published various maliciously defamatory allegations both in their additional commentary at page 7 and in their cover story at pages 22, 23 and 24. He testified that the said publication is a magazine distributed and widely read by the general public in Swaziland and the SADC sub-region and on the internet. He further stated that these words, in the context of the article are wrongful, malicious and defamatory of and concerning the Plaintiff. He further

deposed what he already said in his combined summons in paragraph 10.1, 10.2 11, 12 and 13 thereof. In the said paragraphs the following is averred:

10. The said allegations were intended to mean and were understood to mean;
  - 10.1 That the Plaintiff is very corrupt, immoral, of reprehensive demeanor not worthy of public confidence, and wrongfully, unlawfully, furtively and clandestinely abused his position to gain personal economic gain. And this, by attempting to influence the outcome of Tender no. 2 and thereafter, it is alleged Plaintiff influenced non approval of the said tender, by the drug Advisory Committee and the Tender Board.

10.2 Alternatively, stating that by his conduct Plaintiff knowingly and dishonestly attempted to award the said tender to a particular bidder by attempting to sit in the Drug Advisory Committee and take charge of this committee's task in the adjudication of tenders.

[13] He testified further that by virtue of the said defamation he was greatly injured in his good name and reputation generally. His good name and reputation as a senior administrative official in the Government of the Kingdom of Swaziland was injured and he suffered damages in the sum of E2, 5000,000-00.

[14] In arguments before me Counsel for the Plaintiff referred the court to a plethora of decided cases on the subject in the Republic of South Africa and local decisions on the *quantum* of damages.

[15] The first case relied upon by the Plaintiff is the leading South African decision in the matter of *Buthlezi vs Porter 1975 (1) S.A. 608* at page 615 to 616. The second decision relied upon is also a South African celebrated case in the matter of *Jefta vs Williams 1981 (3) S.A. 678* at page 684. The court was also referred to the South African case of *S.A. Associated*

*Newspapers vs Samuels 1980 (1) S.A.* at page 43 on the position and status of a Plaintiff.

[16] Closer home, the court was referred to the local decision in the matter of *Lindifa Mamba vs Vusi Ginindza – High Court Case No. 1354/2000*.

[17] According to the learned author *Kelsey Stuart's Newspapersman's Guide to the Law, Fifth Edition, Butterworths* at page 67 some of the factors which may be taken into account in assessing the amount of damages to be awarded are:

- (a) The conduct of the Defendant from the time of publication until judgment.
- (b) The manner of publication and the area and extent of dissemination.
- (c) The character of the defamatory words, their falseness and the malice displayed by the Defendant.
- (d) The rank and position of the parties in society and any special relationship which existed between them.
- (e) The persons to whom the defamatory words were published.
- (f) The place, time and mode of publication.
- (g) The continuance of the circulation of the defamatory words.
- (h) The tardiness, inadequacy or absence of apology.
- (i) Publication intended or authorized.
- (j) The time of publication of the apology and the prominence of its publication.
- (k) Whether the defamer first employed the defamatory words or whether he simply repeated the defamatory words of another.
- (l) The character of the person defamed.
- (m) The responsibility which the Plaintiff may have to bear for bringing about the publication of the defamatory matter.

- (n) Absence or presence of actual ill-will towards the person defamed on the part of the defamer.
- (o) Any undue delay by the Plaintiff in bringing his action.
- (p) Whether the matter published was true, even if it was not published for the benefit of the public.
- (q) Any prolonged or obstinate failure by the defamer to do anything to assuage the hurt of the person defamed.
- (r) Whether the attack injured the defamed person in the way of his business or profession.
  - (s) A decrease in the value of money.
  - (t) The fact that robust language is common in political discussions.
- (u) The conduct of the Defendant in conducting his defence (e.g. did he seek to attack the Plaintiff's character; did he dispute his evidence unduly or did he seek to discredit his witness?).

[18] This list is not, of course, exhaustive. For a useful survey of the principles applied in assessing damages for defamation, refer to *Kuper* "A survey of principles on which damages are awarded for defamation" (1996) 83 *S.A.L.J* at page 477.

[19] I refer to the local decision in the matter of *Lindifa Mamba and another vs Vusi Ginindza (supra)* where the court outlined the general factors to be taken into account when assessing the *quantum* of damages as follows:

- (a) Character, status and regard of plaintiff,
- b) Nature and extent of publication,
- c) Nature of imputation (serious or not),
- d) Probable consequences of imputation,
- e) Partial justification,

- f) Retraction or apology and
- g) Comparable awards and declining value of money.

[20] I shall proceed to determine the *quantum* of damages in this case following the above cited format in *Lindifa Mamba (supra)* thusly:

a) **Character, status and regard of Plaintiff.**

[21] Plaintiff is a trusted civil servant occupying a very important position in the civil service as Under Secretary with an untarnished reputation prior to the defamatory statements by the Defendant.

b) **Nature and extent of publication.**

[22] The defamatory articles mentioned above appeared in this country's leading magazine with a very large circulation in the country and these statements were given wide publicity in the country and in the internet.

(c) **Nature of the imputation (serious or not).**

[23] The defamatory statements by the Respondent were of a very serious nature in that Plaintiff is an Under Secretary in the Ministry of Health which is a very important Ministry in this country dealing with matters of health of the people in this country. The names of the people working under this sensitive Ministry should not be taken in vain.



**(d) Probable consequences of imputation.**

[24] It would appear to me on the facts of the matter that there is no justification whatsoever, for the defamation. On the contrary, the Defendant's conduct is particularly objectionable when it is taken into account that the media should always uphold the principles governing matters of health of the nation rather than break it.

**(e) Retraction or apology.**

[25] In the present case there is neither a retraction nor an apology from the Defendant. It appears also from the statements I have outlined earlier on in this judgment that Defendant had issued a dare to the Plaintiff to sue the magazine. I must say this conduct is highly objectionable under any circumstance.

**(f) Comparable awards and declining value of money.**

[26] In this regard I find the words of Williamson AJ in the South African case of *Buthelezi vs Porter and others 1975 (4) S.A. 608 at 618* to be apposite where he said:

“A defamation which succeeds in its purpose of ruining a man should attract a higher award than one which fails in such purpose”.

[27] I have compared past awards in the cases of *Micah Celucolo Mavuso vs Sabelo Mamba and others – Civil Case No. 1003/1999 (unreported)*, *Lindifa Mamba (supra)*, and *Qondile Ndlovu vs Nonhlanhla Buchham – Civil*

*Case No. 4264/2006 (unreported)*. The award in the present case should fall within the range awarded in these cases.

[28] Before issuing a final judgment in this matter I wish to mention *en passant* what was said by a respected Chief Justice of South Africa, Corbett CJ, in the case of *Argus Printing and Publishing Co. Ltd and others vs Esselen's Estate 1994 (2) S.A. 1 (A) at 23 H – J* 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 emphasized the word “unlawfully” for, 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 (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory. (see generally the *Inkatha* case *supra* at 588 G – 590F). The resultant balance gives due recognition and protection, in my view, to freedom of expression”.

[29] Having considered the above-cited principles and having compared past awards in the cases I have cited in paragraph [27] *supra* I have come to the considered view that on the facts of the present case a proper award of damages would be a sum of E120, 000-00 as damages and further that defendants pay cost of the action, and so it is ordered.

**S.B. MAPHALALA**  
**JUDGE**