

IN THE HIGH COURT OF LESOTHO

In the matter of .

'MAMPOETSENG SELLO

Plaintiff

V

PON TSA MATSELA
'MAPON TSA MATSELA
MASIASIANE MAKHATE

1st Defendant
2nd Defendant
3rd Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 11th day of April, 1986.

Plaintiff in this case claims against the Defendants jointly and severally M10,000, costs of suit, further and/or alternative relief as damages for defamatory words alleged to have been uttered by the Defendants. The words complained of in the declaration to the summons are that on 4th and 7th July, 1981 the 1st Defendant and the other two Defendants respectively said Plaintiff was a witch and/or practiced witchcraft.

In their plea 1st and 2nd Defendants who are husband and wife denied to have uttered the words complained about. The 3rd Defendant died after the summons had been instituted and could not file his plea. The action against him has, therefore, lapsed.

In his evidence 1st Defendant testified that prior to the 4th July, 1981 he and a certain Maluke in the village had not been in the best of terms. His cattle had trespassed into the arable land of Maluke who then threatened that he would do something big. Consequently one of 1st Defendant's cows mysteriously developed a swollen stomach and died. 1st Defendant's son also died in the mines. The families of 1st Defendant and Maluke then accused each other of practising witchcraft. The matter was referred to the chief before whom Maluke confessed

/that

that he was the one bewitching 1st Defendant's family. 2nd Defendant, however insisted that she and Maluke should be referred to "Mohloahloeng" (a kind of head diviner or traditional witchdoctor) who would smell out or establish with some certainty the person who was actually bewitching her family. Accordingly the chief detailed a messenger to take 2nd Defendant and Maluke to "Mohloahloeng". That was before 3rd July, 1981.

On her return from "Mohloahloeng" all that 2nd Defendant reported to 1st Defendant was that "Mohloahloa" had said it would have been better if all the village women had been brought before him. She reported nothing about what "Mohloahloa" had said about Maluke whom they suspected of bewitching their family. 1st Defendant also did not ask 2nd Defendant whether the "Mohloahloa" had said anything about Maluke.

The evidence of 2nd Defendant was slightly different. According to her, it was Maluke who had been complaining that she and 1st Defendant were bewitching his family. They never complained that he was bewitching their family. When they were before the chief, Maluke even apologised for having said 1st and 2nd Defendants were bewitching his family and she (2nd Defendant) was satisfied with the apology. Nonetheless Maluke suggested that he and 2nd Defendant should be referred to "Mohloahloeng" so that it could be determined decisively whether she was not bewitching his family.

I must say I find the evidence of 2nd Defendant that she and 1st Defendant never complained that Maluke was bewitching their family highly improbable. According to

/1st Defendant's

1st Defendant's evidence which was not disputed by 2nd Defendant their family had had a misfortune of losing a son and a cow. They had, therefore, a reason to suspect that their mishap was the result of some one practising witchcraft on their family. The evidence of 1st Defendant that they too accused Maluke of bewitching their family is more probable than that of 2nd Defendant and I am inclined to accept it as the truth.

Again, there seems to be no logic in 2nd Defendant's evidence that after he had made a confession that he was the one practising witchcraft on the family of 1st and 2nd Defendants and tendering an apology therefor Maluke on the same breath, suggested that a "Mohloahloa" should be consulted to smell out whether 2nd Defendant was not the one bewitching his family. If indeed he suggested so then Maluke was clearly not sincere in his apology for having practised witchcraft on a family which was also bewitching his family. There was, therefore, no motive for 2nd Defendant to be satisfied, as she wants this court to believe with the apology of this kind. In the circumstances I find the evidence of 1st Defendant, that it was not Maluke but 2nd Defendant who insisted on the consultation of "Mohloahloa" more probable for she had made no confession and tendered no apology. I am prepared to accept it as the truth. 1st Defendant's evidence that on her return from "Mohloahloa", 2nd Defendant did not report anything about what "Mohloahloa" had said about Maluke nor did he ask her anything about it cannot, however, be the truth. It is only natural that they should have discussed this point for they were, no doubt, anxious to know what the revelations of "Mohloahloa" were about Maluke, the self-confessed witch, who had been practising witchcraft on their

/family

family.

Be that as it may, 2nd Defendant confirmed that she and Maluke were referred to "Mohloahloeng" where they were told that they were not bewitching each other. Two women in the village were in fact the ones practising witchcraft on the family of Maluke. The women shared a fence with 2nd Defendant, one on the upper side and the other on the lower side of her house. They washed with medicine water which they spilt behind Maluke's house so that it might appear as if he were the one practising witchcraft.

2nd Defendant and Maluke then returned home. They went to the chief's place where the messenger who had been detailed to accompany them to "Mohloahloeng" gave a report about their mission.

It is common cause that two women who share a fence with 1st and 2nd Defendants, one on the upper side and the other on the lower side of their house, are respectively the Plaintiff and one 'Makoena.

1st Defendant told the court that their relations with Plaintiff had always been very peaceful and this was confirmed by Plaintiff, however, 1st Defendant himself conceded that shortly before 4th July, 1981, he realised that the relations had deteriorated for Plaintiff would no longer respond to his greetings.

According to Plaintiff on 4th July, 1981, she and Puseletso Leoatle were sitting outside her house when 1st Defendant emerged from his house and started hurling abusive language at her viz. that she always ran to church

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saying she prayed and yet she was a witch praying to her witchcraft, or words to that effect. Plaintiff's evidence in this regard is corroborated by that of Puseletso Leoatle who testified as P.W.3 before this court.

On 5th July, 1981 a chief's messenger summoned Plaintiff to attend a pitso to be held on 7th July, 1981 at the chief's place. On 7th July, 1981, Plaintiff, accompanied by Puseletso Leoatle, accordingly proceeded to the chief's place where there was a large gathering of villagers.

At the pitso the chief's messenger who had accompanied 2nd Defendant and Maluke to "Mohloahloeng" gave his report about their mission. 2nd Defendant confirmed the report and added that the two women who lived on the upper side and on the lower side of her house were respectively the Plaintiff and 'Makoena. Plaintiff then stood up and explained that she was sorry to have been called to the meeting to be connected with witchcraft of which she knew nothing. She tearfully told the gathering that God knew that she was not a witch and had nothing to do with witchcraft. To this 2nd Defendant retorted that it was all that a witch was quick to do, first to invoke the name of God and then shed tears. She added that she, herself was satisfied that Plaintiff was a witch and if any mishap befell her family plaintiff would be held responsible. The gathering burst into laughter when 3rd Defendant remarked that a witch would never admit that she was a witch and even where she was seen actually dropping down from the roof top of a house a witch would say she was merely playing.

/The meeting

The meeting was dismissed by the chief telling Plaintiff to go back home and stop practising her witchcraft. In as far as it is material Plaintiff's evidence, as to what happened at the pitso, was confirmed by Puseletso Leoatle and Moeti Ramakatsa, who also testified as P.W.2 in this case.

1st and 2nd Defendants told the court that on 4th July, 1981 the former was not at home. He had gone to a place called Mount Tabour in the district of Mafeteng. He could not, therefore, have insulted the Plaintiff on that day. This was, however, not put to Plaintiff and Puseletso Leoatle while they were in the witness box. It came as a surprise during the Defendants' case. It seems to me that the fact that 1st Defendant was not at home and had gone to Mount Tabour on the day in question was such an important point in their defence that 1st and 2nd Defendants would not have missed to disclose it to Plaintiff and Puseletso whilst they were in the witness box. Failure to do this leaves me with no doubt in my mind that it is an after-thought on the part of 1st and 2nd Defendants. I have no hesitation therefore in dismissing it as a sheer fabrication and accepting as the truth Plaintiff's evidence, corroborated by that of Puseletso, that on 4th July, 1981 1st Defendant did in fact insult the Plaintiff by calling her a witch who prayed to her witchcraft.

2nd Defendant denied that at the pitso of 7th July, 1981, she and the 3rd Defendant referred to Plaintiff as a witch. Their families have, however not been in good terms for a period of over ten (10) years and Plaintiff

/was

was in the habit of falsely implicating her and 1st Defendant. The reason behind it was that Plaintiff and her children had once cut down her fence. She (2nd Defendant) reported the matter to the chief before whom it was still pending.

It will, however, be recalled that in his evidence 1st Defendant assured the court that until shortly before 4th July, 1981, the relations between his family and that of the Plaintiff had always been cordial and that was confirmed by the Plaintiff herself. Plaintiff's evidence that 2nd and 3rd Defendants called her a witch at the meeting of 7th July, 1981 was also confirmed by Puseletso Leoatle and Moeti Ramakatsa who corroborated Plaintiff's evidence that they too were present at the meeting. 2nd Defendant advanced no convincing reason why Puseletso and Moeti would falsely implicate her and 3rd Defendant in this matter. I am prepared to accept as the truth Plaintiff's story corroborated by that of Puseletso and Moeti that 2nd and 3rd Defendants also called her a witch during the meeting of 7th July, 1981.

From the foregoing it is obvious that the view that I take is that 1st and 2nd Defendants did utter against the Plaintiff the defamatory words complained of in the declaration to the summons. To say Plaintiff is 'a witch or associate her with witchcraft, in the manner the Defendant did, was, in my opinion, defamatory per se. Indeed, the parties themselves did concede, in the minutes of their pre-trial conference, that the words complained of in the declaration to the summons were defamatory per se. That being so, the presumption is that the defamatory words were uttered animo injuriandi.

/There is

There is evidence which I accept that the defamatory words were uttered in the hearing of Puseletso Leoatle and a large gathering of villagers by the 1st and the 2nd Defendants respectively. There can be no doubt, therefore, that there was publication of the defamatory words.

It was contended in argument that if it were found that 2nd Defendant did in fact utter the defamatory words then the occasion was privileged. She could not be said to have acted from an improper motive and, therefore, liable. I am unable to agree. Assuming, for the sake of argument, that the occasion was privileged it must be remembered that in her plea 2nd Defendant never pleaded the defence of privilege. Her plea was a bare denial that she uttered the words complained of in the declaration to the summons. Indeed, 2nd Defendant told the court on oath, that she herself did not personally believe that Plaintiff was a witch or in any way associated with witchcraft. As Schreiner J.A. put it in Basner v Trigger, 1946 A.D. 83 p. 105 .

"..... a person who on a privileged occasion publishes defamatory matter which he knows to be untrue or in the truth of which he does not believe will be held to have acted from some improper motive. For generally, a man can have no legitimate motive for saying what he knows to be false or does not believe to be true."

I am satisfied that the defendants in this case are liable and the only question that remains for the determination of the court is the quantum of damages.

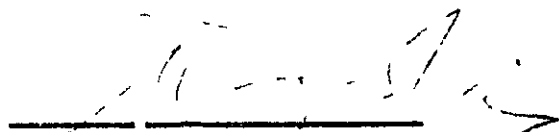
It is common cause that Plaintiff is a widow with a number of children some of whom are already married.

/She is

She is a church goer and a member of the mothers' union, in her church. Defendants themselves concede that Plaintiff is a respectable woman in their community. No doubt by publicly calling her a witch and/or associating her with witchcraft the Defendants have caused Plaintiff grief and loss of reputation for which she is entitled to claim damages.

The quantum of damages is, however, a matter for the discretion of the court. In my opinion, the amount of M10,000 claimed by the Plaintiff is, in the circumstances of this case, somewhat inflated and the justice of the case will be met by awarding her a lump sum of M1,500 for grief and loss of reputation.

Judgment is accordingly entered for the Plaintiff in the amount of M1,500 plus costs as prayed.



J U D G - E.
11th April, 1986.

For Plaintiff : Mr. Pheko
For Defendant : Mr. Maqutu.