

CIV/T/318/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

THERESIA HLAKANESO

PLAINTIFF

V

MICHAEL STRACHAM  
MITCHEL TRADING STORES

1ST DEFENDANT  
2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu.  
on the 15th day of August, 1994.

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Plaintiff's claim is against the Second Defendant  
and its manager the First Defendant.

Plaintiff says she is a female adult spinster who  
resides at Mount Moorosi in the Quthing district. The  
Second Defendant is a company duly incorporated in

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accordance with the laws of Lesotho and carries on business as a supermarket at Mount Moorosi, Quthing.

Plaintiff claims:

1. Payment of the sum of M5,000.00 (five thousand Maloti) damages for unlawful dismissal;
2. Payment of M10,000.00 (ten thousand Maloti) damages for defamation of Plaintiff's character.
3. Interest at the rate of 18% a tempora morae.
4. Costs of suit.
5. Further and or alternative relief."

Summons was served on the 26th June, 1988. Appearance to defend was entered on the 12th July, 1988. By the end of 1988 pleadings were virtually closed and the

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matter was ready for hearing. The matter on the 5th August, 1991 was set down for the 12th November, 1992. It did not proceed. On the 12th November, 1992 the matter could not proceed because of the state of the roll and because the Court advised Plaintiff to amend paragraph 10 of the Declaration.

An amended Declaration was filed by Plaintiff on the 5th December, 1992. The amended Declaration led to the filing of Defendant's amended Plea on the 9th December, 1992. This matter was then set-down for the 17th May, 1994.

Plaintiff gave evidence on her own behalf as PW.1. She says she began to work for Second Defendant on the 5th November, 1987 and was paid weekly until 24th December, 1987 when she was told she would be paid monthly when business resumed after the Christmas break. Her monthly salary would be M150.00 per month.

After the Christmas break she worked for only two months. On the 25th February, 1988, according to Plaintiff, First Defendant summarily dismissed her

claiming she was responsible for the shortage of stock and that she must have been taking M50.00 per day. It is not clear whether this was in goods or in cash. Plaintiff did not handle money. She also says she was not given any money in lieu of notice.

When this accusation of theft was made there were six other people present. Plaintiff says there was no cause for these false allegations. She says people loved and respected her and they did not regard her as a thief. She claims M10000.00 for defamation of character and M5000.00 for unlawful dismissal.

Under cross-examination Plaintiff says she looked for a job for two years and could not get any since jobs are hard to come by. Plaintiff admitted she has children by five different men, some of which she does not remember. She denied cohabiting with Thabiso Dick Monyane. She was indifferent to Thabiso Dick Monyane's wife. She says First Defendant actually pointed at her and called her a thief. She denies she was on probation when she was fired. She says she was employed on permanent terms. She says what was written on the wages register is incorrect

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in so far as it conflicts with what she says. In particular she queries page 44 of the wages register.

Plaintiff clarified what was in the amended claim which erroneously stated she claimed M15000.00 for unlawful dismissal.

Plaintiff next and only witness was PW.2 Dick Thabiso Monyane. He said he lived in Second Defendant's premises near the shop. On the day Plaintiff was dismissed, First Defendant said there was a shortage of stock by about M15,000.00. First Defendant told PW.2 that he had brought him a thief, meaning Plaintiff. Plaintiff was present when the words were said. The other people who were present when the words were said were Majara Letsie, Benedict Leteka, Ramakoale Ramolise, Manthateng, Maphoka and others whose names PW.2 could not remember.

PW.2 was also "fired" the same day but he got all his terminal benefits including notice. PW.2 denies that he cohabits with Plaintiff. PW.2 says what First Defendant said to Plaintiff was shameful.

Under cross-examination PW.2 denied he was the person in charge of the supermarket. PW.2 conceded he was the most senior person in the department in which he worked but denied he was in charge. The salary of PW.2 was M250.00 per month. PW.2 denies that he was given any money belonging to Plaintiff. PW.2 admitted he had known Plaintiff for many years. He denied they cohabited. He disputed the contents of the wages register insofar as they conflicted with his evidence.

Plaintiff applied for an amendment of her Declaration to be in line with her evidence and the summons. This was unopposed.

Defendants closed their case and urged the Court to dismiss Plaintiff's claim with costs. The wages register was handed in to enable the Court to refer to it in determining the merits.

Basically what Defendants are saying is that Plaintiff on the evidence given has not made out a case that calls for an answer from the Defendants.

It is common cause that from the pleadings the onus of proof in this case is on the Plaintiff. The reason being that Plaintiff's allegations regarding the conditions of employment of Plaintiff by the Defendants and termination of that employment was denied by the Defendants. Therefore Plaintiff was obliged to adduce evidence to prove each and every allegation on these issues.

The first task I have is first to determine whether there is any evidence to prove Plaintiff's claim. If there is no evidence then I am obliged to dismiss Plaintiff's claim. If there is evidence on record to prove Plaintiff's claim, then the Court has the next task, which is to decide whether or not such evidence is credible. If the evidence is not credible, Plaintiff's claim has to be dismissed. If Plaintiff is believed his claim succeeds.

Defendants in this case (by closing their case) have invited the Court to determine the issue of credibility without hearing any evidence from the Defendants.

Plaintiff claims damages of M5000.00 for unlawful dismissal.

There is a dispute on whether or not Plaintiff was still on probation. This emerges from the cross-examination of Plaintiff by the Defendants. Plaintiff says she served what amounted to probation between November and December 1987. During this period Plaintiff was paid weekly.

From the 24th December, 1987 Plaintiff was paid monthly like other employees. Therefore in Plaintiff's view she was now permanently employed. The use of the term "permanent" though commonly used in labour relations in this country is misleading. The reason being that in terms of *Section 15 of The Employment Act of 1967* each party could lawfully terminate the employment contract by giving the other one month's notice.

Everything was verbal. We have only the sworn testimony of Plaintiff on the matter but no evidence from the Defendants. The Defendants chose to confine themselves to challenging and testing Plaintiff's evidence



through cross-examination. They also elicited what evidence (in their favour) from Plaintiff through cross-examination. Defendants have also invited me to rely on the wages register that was written by First Defendant to determine whether or not Plaintiff's evidence is true.

I perused the wages register and noted that it was very neatly written. From page 1 up to page 43 the term temporary employment has not been inserted. It is inserted for the first time on page 44 in the second line below the name of Plaintiff. This term temporary employment also appears below the names of Mary Malebanye on page 44. Plaintiff and Mary Malebanye are the only people who share a page in the whole wages register. If First Defendant had given evidence he might have satisfactorily explained why the term temporary employment first began with Plaintiff.

"Temporary Employment" again appears before John at page 46, Rose Masasa on page 47, Angelina on page 48. In the case of Angelina on page 48, the term "permanent" appears opposite wages. The term "permanent" on Angelina's page is only one in the whole wages register.

First Defendant would have been of great assistance in explaining why only Angelina is the only permanent employee whose permanence is acknowledged in writing in the whole wages register.

Without any evidence from First Defendant I find the register not helpful. The temporariness of Plaintiff and others after Plaintiff does not seem to have been written at the time of employment. It could have been written at any time. More details about employees have been written on page 44 than on any other page on the register. The register often omitted particulars of employees including surnames. If only First Defendant had given evidence I might have been persuaded that no information had been added later in the register. I cannot reject evidence that is on record in favour of speculation. I have therefore come to the conclusion that Plaintiff must have been given the impression that she was "permanent".

The only question to determine in relation to the question of unlawful dismissal is whether Plaintiff was paid off by being given payment in lieu of notice. Plaintiff says she was not and on this she is corroborated

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by PW.2 Dick Monyane.

I checked page 44 which shows in front of the word "Notice" a dash which has been on top of it a white liquid paper erasure. In front of the erasure the word "NONE" is written. Where the amount of payment in lieu of notice is reflected, there is a dash that has been covered over with white liquid paper.

There is a clear later addition that shows M150.00 added above the white liquid paper erasure of the dash. In front of this where the signature of the recipient are the words in block letters "PAID OUT TO DICK". There is below all the following paid out 150.00 to Dick Monyane (common LAW HUSBAND), opposite this is the amount of M150.00 for which Plaintiff has signed. There is a flying leaf of an examination pad in which is written (Notice of 1 month's pay paid to Dick as she did not come to receive her own). It is clear that these referring to payment to Dick Monyane the common law husband were added later to the wrong column because the M150.00 given was in fact given to Plaintiff herself who even signed for it on 24/2/88. This date seems to have been added later.

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PW.2 Dick Monyane has his own wife Lisbeth Monyane who also worked for Second Defendant. She always signed for her wages which were given to her but never to her husband, Dick Monyane PW.2. This information is on page 4 of the wages register. On page 12 of the Wages register PW.2 signed for the sum of M1308.45 when he was paid off. Liquid paper has been added to blot out what was originally written. A lot of information was clearly added later including the words "wife's wages" and "Theresia". The later additions give a breakdown of the M1308.45 and end up with the words overpaid by M225.00. Plaintiff's first name is Theresia. PW.2 Dick Monyane denies he was ever given Plaintiff's money in lieu of notice.

The absence of First Defendant's explanation of suspect entries in the wages register does not help the Court to draw inferences favourable to case of the Defendants. The evidence of Plaintiff and PW.1 Dick Monyane on the question of failure to pay Plaintiff's money in lieu of notice stands unchallenged. I therefore hold that Plaintiff was never paid any money in lieu of notice.

While Plaintiff was not dismissed in the manner that she was entitled to expect having regard to the fact that no misconduct was proved against her, she did not seriously attempt to prove the damages she is claiming. She vaguely said in cross-examination that jobs are hard to come by and she looked for a job for two years. She did not say enough or enlighten the Court sufficiently to enable the Court to assess damages on this issue. Mr. Mohau for Plaintiff argued that Plaintiff offered enough evidence on damages for unlawful dismissal. I am unable to agree.

Plaintiff is also claiming damages for defamation. She says she was called a thief or words to that effect merely because there was a shortage of the sum of M15000 in the stock in trade. The fact that she was not even given one month's pay in lieu of notice supports Plaintiff's evidence. First Defendant did not give evidence in rebuttal. The only denial is in the plea and in cross-examination. There were at least six people before whom Plaintiff was called a thief. This in my view amounts to publication.

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Defendants did not offer any evidence to rebut the evidence of Plaintiff that this in fact happened. Since First Defendant was present, he is obliged to put the record straight if what Plaintiff and PW.2 say did not happen or happened in a different way. It is trite law that Plaintiff's evidence does not have to be accepted merely because it is unrebutted. In certain circumstances, however, (especially where the alleged occurrence took place in the presence of Defendant) Defendant's failure to give his version might enhance supplemental inferences in favour of Plaintiff—Hoffmann & Zeffertt *The South African Law of Evidence* 4th Ed at page 596.

The major thrust of what was submitted by Mr. Buys on behalf of Defendants is that Plaintiff must allege and prove *ipsissima verba* or at least allege words more or less used by the First Defendant.

What according to evidence did First Defendant say when he sacked Plaintiff? In her evidence-in-chief Plaintiff said:

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"I was not given any notice pay. First Defendant said I was a thief. I was in front of his office. There were more than 6 people. He said my stock is short by M15000.00."

In cross-examination Plaintiff puts what First Defendant said as follows:

"First Defendant called me a thief. He said this thief of a woman (pointing at me). He was saying it in Sesotho...he said I was taking M50.00 per day after the stock was short and there was stock taking."

PW.2 Dick Monyane told the Court that First Defendant said the stock was short by M15000.00 because he had brought him Plaintiff who was a thief. PW.2 said he was with about 5 other people when this was said.

Paragraph 10 of Plaintiff's Declaration states that:

"The First Defendant charged Plaintiff of having stolen Second Defendant's money in the sum of

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M15000.00 and called her a thief amongst at least six other people who at all material times held Plaintiff in great esteem. As this was not true, Plaintiff suffered damages in the sum of M10000.00..."

The employment of PW.2 was terminated together with that of Plaintiff, but PW.2 was given all his terminal benefits among which was money in lieu of notice and severance pay. A misconduct of theft was imputed to Plaintiff and consequently she was summarily dismissed as if she was a thief although there was no proof that she was a thief. The employment of PW.2 was terminated because according to PW.2, PW.2 had brought Plaintiff who was a thief and caused First Defendant to employ her. What PW.2 says substantially corroborates what Plaintiff says save that they do not say exactly the same thing.

To call a person a thief or a murderer is *per se* defamatory. The fact that she was instantly dismissed without notice as a thief would be, underscores the fact that she was not only called a thief but she was also treated as one. As Mr. Mohau (for Plaintiff) has argued,

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this must have lowered Plaintiff in the estimation of right thinking members of society and diminished the esteem in which Plaintiff is held by the six people present.

Mr. Buys referred me to the case of *Beesham v Solidarity Party and Another* 1991 (1) SA 889 at page 892C where Alexander J said:

"As far as the plaintiff is concerned his case was simple. The words complained of were defamatory *per se*. Neither innuendo or secondary meaning was alleged."

It seems clear that Plaintiff was called a thief and accused of causing loss of stock of M15000.00 and instantly dismissed.

There was never any suggestion that the word thief which is *per se* defamatory was used with an innocent intention e.g. what appears in *Burchell The Law of Defamation* page 92 where a lady is said to have said to Lord X:

"Lord X, you are a thief, you have stolen my

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heart."

In the instant case the defamation is clarified and accompanied by action that leaves no one in doubt that First Defendant not only meant Plaintiff was a thief but actually treated her as one. In *Mohamed v Kassim* 1973 2 SA 1 it was held that the statement that Plaintiff had stolen M10000.00 was defamatory. In this case Plaintiff is called a thief and is accused of stealing M15000.00.

Every person is entitled to his or her good name and reputation. Our basis of the law of delict is fault or what is called *culpa*. There can be no doubt that First Defendant is blameworthy for calling Plaintiff a thief and treating her as a thief without having investigated the matter properly. First Defendant's words and conduct are presumed to have been accompanied by an *animus injuriandi* unless First Defendant can convince the Court that he had no such an intention. To put it in Wessels J.A's words in *Nationale Pers Bpk v Long* 1930 AD 87 at 99-100:

"...it is a principle of our law which applies to libel and slander as to other wrongs that if a man acts recklessly, not heeding whether he will or will not injure

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another, he cannot be heard to say he did not intend to hurt."

In this particular case the intention of First Defendant is not in issue because he chose to remain silent. The First Respondent's *animus injuriandi* is therefore deemed to be present because Plaintiff's claim in that respect stands unrebutted.

The cross-examination of Defendants was directed at Plaintiff's love affairs and that she had four children by different men. This Plaintiff admitted. The relevance of this to the case before Court is in my view a bit far-fetched. It does not follow that because Plaintiff was not lucky in conjugal matters, she has a bad name. Even if she does not for any reason want to conform to the conventional rule of procreation through marriage, that does not automatically mean she is necessarily immoral. It was in cross-examination alleged that Plaintiff was PW.2's lover, she denied this. First Defendant did not bring any evidence to back up this allegation. If she had taken some one's husband then it could be said she had done something clearly wrong. People's sexual lives are private. There is a difference between sin, conventional

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morality and ethics. Opinions differ a great deal in such matters.

Our law of defamation acknowledges the individual's right to privacy and personal dignity. Nobody in our law is entitled to publish whatever is unpleasant about other people unless this is in the public interest. McKerron *The Law of Delict* 7th Edition at page 186 has summarised our legal position crisply as follows:

"In English law truth in itself is a good defence, but it is settled law in South Africa that truth without the element of public benefit, although it may be pleaded in mitigation of damages, is not a complete defence."

It seems to me unhelpful for First Defendant to have gone out of his way to disparage Plaintiff's sexual morality. A lot of people stray from the path of virtue in sexual matters without necessarily being thieves.

Plaintiff to put it in McKerron's words in *The Law of Delict* 7th Edition at page 207:

"is entitled to general damages for the wrong

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done to him by the violation of his right to retain his good name and fame untarnished and the consequent injury to his feelings."

The amount of damages that Plaintiff is entitled to is a matter at the Court's discretion. Nevertheless I have to take the following factors into account:-

1. Plaintiff is an ordinary spinster who lives in a village.
2. First Defendant called Plaintiff a thief and dismissed her from employment treating her as a thief ought to be treated.
3. First Defendant has shown no grounds to call Plaintiff a thief, instead he denied calling her a thief and instead through cross-examination attacked Plaintiff's sexual morality which was not "relevant to the aspect of the Plaintiff's character that was traduced". McKerron *Law of Delict* page 208.
4. The words were uttered in the presence of six

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other people.

First Defendant as already stated has put himself in a position in which the following words of De Villiers A.J in *Maisel v Van Naeren* 1960 (4) SA 836 at 850G fit:

"If the person concerned does not in fact provide proof, an inference would mostly arise that he must, at the time of publication, have contemplated at least the possibility of being unable to justify his action."

We have to also to note what De Villiers A.J had said earlier at page 840 C G of *Maisel v Van Naeren* i.e:

"In Roman Dutch Law Defamation is a species of *injuria*, and a claim for general damages is merely an instance of *amende profitable* being claimed under *actio injuriarum*...*Dolus* or *animus injuriandi* is therefore conscious wrongful intention, in the sense that a wrongful invasion of another's rights is either desired as an end in itself or is foreseen as a consequence of the deliberate attainment of some other object."

I have noted that at the time summons was issued, all claims above the sum of M2000.00 had to be brought in the High Court. During the period this matter was before court

the jurisdiction of the Magistrate's Court has been increased to M10000.00.

The judgment of the Court is therefore as follows:

- (a) Defendants are absolved from the instance in respect of damages for unlawful dismissal.
- (b) Defendants are directed to pay M5000.000 (Five thousand Maloti) as damages for defamation of Plaintiff's character.
- (c) Defendants are directed to pay costs of suit.

W.C.M. MAQUTU  
JUDGE

For the Plaintiff : Mr. M. Mohau  
For the Defendants: Mr. S.C. Buys