CIV/T/281/91

IN THE HIGH COURT OF LESOTHO

In the matter of :

KAKALESOE NTAOTE	Plaintiff
vs	
ATTORNEY GENERAL	1st Defendant
MINISTRY OF INFORMATION and BROADCASTING	2nd Defendant
THE EDITOR LENTSOE LA BASOTHO	3rd Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 14th day of December, 1994

The Plaintiff filed a summons in this Court in which he claimed a sum of M50,000.00 for defamation, payment of interest on the sum claimed at the rate of 11% from the date of judgment, costs of suit and further and/or alternative relief. The Plaintiff gave evidence to support his claim. He was the only witness. There were no witnesses for Defendants. Defendants' Counsel elected to close his case without putting in any evidence.

The Plaintiff's claim is a result of two statements made

firstly in the Lentsoe la Basotho newspaper, issue of the 22nd September 1990 and secondly over Radio Lesotho Broadcasting station around the mentioned date about and concerning the Plaintiff which statements were as follows:

> "A man called KAKALESOE NTAOTE of Thaba-Tseka was sentenced to Five (5) years imprisonment by the Thaba-Tseka magistrate, after he was found guilty of housebreaking and theft committed in that district" (a translation)

It is common cause that the statement over the radio was very much similar to the statement in the newspaper. The newspaper is in Sesotho language. This Court was not informed as to the frequency of beaming of the news item over the radio. But there is no doubt that such a broadcast must have received a wide coverage. There is no dispute again that the Lentsoe la Basotho Newspaper does not have a very wide readership, it being something akin to a government newsletter, to be found in the major towns of Lesotho. Hence a copy of the contentious issue was shown to the Plaintiff by a friend when he had visited the Thaba Tseka Town from his own village which is a few kilometres outside the town. The newspaper is a government owned paper controlled by the second Defendant's ministry. Not only did Plaintiff hear the radio broadcast some person in Johannesburg phoned to inquire about the news item. It is also common cause that the radio item was beamed by an announcer called SEOPI MAKARA who is still alive and attached to the radio station. The

Court was not told why it was difficult to get hold of the announcer or newscaster and the people responsible for the publication of the news in the paper, to give evidence, even in mitigation. The offices of both the radio and the newspaper are housed in one compound or premises not more than two (2) kilometres from the Court room. I have a reason for making this remark.

The Defendants' plea is remarkable for its simplicity and generosity - that is quite unusual these days. I cannot avoid quoting it quite extensively to make the point. It reads:

"4

Ad para 7, 8 and 9

It is admitted that ordinarily a statement over the radio and the publication in the paper would be defamatory and could be so understood. The statement and publication in the present case were never intended to refer to the Plaintiff who is a chief, but to a person who is the Plaintiff's subject.

Defendant relied on information from the police and that was a source of wrong information. The Defendants were entitled to rely on information from that source and were not reckless at all. The publications were lawfully made for public purpose.

Defendants therefore deny liability to Plaintiff in as much as they have apologised and pray that the action be dismissed with costs." (My underlining)

It is clear therefore that as at the stage of commencement

of the hearing a few things stood not being disputed, as the plea suggests. That is why the copies of the new item, (and translation), a copy of the retraction published on the front page of the Lentsoe la Basotho paper of the 11th May 1991 (and translation), a letter dated 3rd May 1991 (and translation) from the editor Lentsoe la Basotho newspaper containing another retraction, and a letter dated 3rd May 1991 (and translation) were handed in my consent by the Counseis. These included another letter. Supposedly a covering letter to the copy of the mentioned letter from the said editor addressed to the officer commanding police station Thaba Tseka. All exhibits were marked 1A. 1B, 2A, 2BA, 3A, 3B, 4A, 4B.

Those things that I referred to in the preceding paragraphs as being not disputed are the following:

(a) That the Plaintiff is junior chief under the chief of Thaba-Tseka.

(b) That the publication in the papers and the new item were in fact made.

(c) That the statements were in fact defamatory (per se) of the Plaintiff and would be so understood.

(d) That someone else and not the Plaintiff was in fact the convicted person (a Plaintiff's subject)

I now remark about the vicinity of the second and Third

Respondent's offence to this Court. I say that I was not quite pleased with the explanation why witnesses were not called on behalf of these Respondents (despite opportunity granted to enable procuring of those witnesses) to clarify a few things and the circumstances surrounding the following issues referred to in this plea:

(a) How the Defendants came to rely on information from the police as a source who gave Defendants wrong information (as alleged from the box).

(b) Why Defendants were entitled to rely on information from that source.

(c) Whether the Defendants were not reckless in not having taken requisite steps to find the truth of the publication.

(d) Why the publication was said to be lawfully made and for public purpose.

(e) The apology and retraction as a basis for denial of liability or as amounting to mitigation.

I would therefore hold that the case of the Plaintiff has been proved on the facts, having considered the evidence of the Plaintiff. The absence of evidence on the side of the Defendants to address this circumstances that I have spoken about even make it different to assess certain aspects even for the purpose of mitigation. I would hold that as Plaintiff's Counsel has submitted, that from a purely factual point of view "it no longer remains in issue that the Defendants' statements were not

intended to refer to the Plaintiff but to a person who is Plaintiff's subject but being wrong information from the police." I however cannot ignore that there has not been any apology or retraction addressed to the allegedly defamatory radio news item. I note that there has been a retraction or apology from the 3rd Respondent. There will be a need later in the judgment to comment about what the Plaintiff calls the unsatisfactory feature of the retraction.

The delict of defamation is the unlawful publication *animo injuriandi* of a statement concerning another person which has the effect of injury the person in his reputation. A defamatory statement is a statement which tends to degrade the persons esteem. Before preceding on to the attitude of our law as to these kind of defamatory statements namely in the press and over the radio I have found this overview of *animus injuriandi* and the basis of the law of defamation by the learned authors of the Law of South Africa Vol.7 at page 195 at paragraph 236 very comprehensive.

> "236 ..... The publication of a defamatory statement about a person constitutes an invasion of his right to reputation, and is prima facie unlawful. When in defamation proceedings the publication of a defamatory statement is proved or admitted two inferences arise, viz that the publication was wrongful and that the defendant acted animo iniuriandi. The onus is then upon the defendant to establish either some justification or excuse for the defamatory language used or the absence of intent to defame."

It is defamatory to impute that someone has committed a criminal offence. It is defamatory to say that a person has been charged with a criminal offence. The learned author Burchell considers that a distinction should be drawn between allegations of charges of crimes involving moral turpitude and charges of crimes which do not involve moral turpitude. The allegations against the Plaintiff, were indeed, of a serious kind.

In the case of defamatory statements broadcast over the radio, the ordinary listener must be treated differently from a reasonable reader (Suid-Afrikaanse Uitsaaikorporasie v O'malley 1977 (3) SA 394 (A). In the case of a reader such person is able to re-read the article or book in question to verify or contradict his first impressions. In the case of a person listening to the radio or viewing the television, this is not so, and first impression's are very often lasting impressions. That is one of the reasons why a retraction over the radio should have by all means been done.

After many years of controversy it was finally settled by the Appellate division of the Republic of South Africa that intention or animus injuriandi is an essential element of defamation by an individual as distinct from the press or public media (see Suid-Afrikaanse v O'Malley case, (Supra) and De

Parkendorf vs Flamingh and Another 1982(3) SA 146(A)). Intention has been defined as the state of mind of intending a particular result, with the knowledge that the intended result will be unlawful. In other words it has been recognized by the Court that animus injurandi is the subjective intention to defame with knowledge that defamation is unlawful (Suid Afrikaanse Uitsaikorporasie v O'malley supra). As we shall see later animus injuriandi is not a requirement for a defamatory statement published in the press, and the defence raised in this case would accordingly not have been open to the press.

I have already alluded to the apology made by the Defendants and that there was no attempt to do the same over the radio. Mr. Khasipe's submission is that the publication of an apology will not be a defence to an action for defamation, and that it may reduce the amount of damages which a Court will award. I agree I take note of the fact that as soon as the Plaintiff's Attorneys lodged a complaint steps were taken by the Third Defendant perhaps with the unfortunate coincidence that the letter addressed to the Commander of Police for onward transmission to the Plaintiff seems not to have reached the Plaintiff. I take note that it was incumbent upon the Defendants to have acted even without the complaint by the Plaintiff not vice-versa. I however am unable to decide that there was any half-heatedness on the part of the 3rd Defendant. I am inclined to say that he did all

he believe he could although it was not enough. I take the view that when an apology is proper and it should have had the effect of removing all adverse imputations and must constitute an unqualified expression of regret. It is never very easy to determine whether an apology is a mere reluctant correction of an incorrect report and contains as a fact very little frank expression of regret. It is however settled in law that even such attempt may still have a mitigating effect depending on the extent to which genuine repentance has been revealed. To that extent damages will be reduced. That is why these pithy comments by J.M. Burchell in his work. The law of Defamation in South Africa 1st edition are worthwhile:

> "It is acknowledged that an award of damages may play an important role in vindication of reputation, or at least the satisfaction or partial satisfaction of the injured Plaintiff but there may be additional ways of achieving this end" (page 30)
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> "Because of the difficulties involved in litigation designed primarily to recover damages, a prompt retraction of a statement and unqualified apology may well not be the effectual, and effective way to vindicate a Plaintiff's reputation. A prompt and unqualified refraction and apology by a newspaper may, in fact, serve to enhance its reputation for journalistic integrity." (page 31).

I agree that in defining defamation one has to distinguish between defamation by an individual and defamation by the public

media namely the press, radio and television. In the South African case of Pakendorf vs De Flamingh 1982 (3) SA 146 9AD) it was decided that the press is strictly liable for publication of defamatory matter. In other words intention or *animus injuriandi* is no longer a requirement of liability. This is even so where one republishing a defamatory without endorsing it. The defences open to the press radio, television, have been strictly curtailed following on this decision of Pabendorf v Flamingh (supra). The media has now been held to be strictly liable for the publication of defamatory matter. This means that those defence which rebut the presumption of intention or animus injuriandi are no longer open to the press. This is so, for instance, in the instant matter where defamatory matter against Plaintiff has been published by the Second Defendant (Newspaper) and that Third Respondent (radio) in an honest but mistaken reference to a wrong person (Plaintiff). It would not be open to a newspaper to raise a defence that it took all reasonable precautions to ensure that mistakes of that nature did not occur. The fact that (as the Defendants' Counsel disclosed from the bar) the police were the usual source of information makes things even more serious. That is why this Court would have wished that there had been evidence of some kind to inform as to circumstances of the source and the eventual publication of the unlawfulness defamatory matter including absence of knowledge of unlawfulness. Following from the above principles the value of such favourable information if

it came out would have achieved a lot towards mitigation. A high degree of care is required of those who act for a newspaper when they are proposing to publish, or cause the publication therein, of a matter injurious to the reputation of someone (see Hansen vs Post Newspapers (Pty) Ltd 1965 (3) SA 562, (W) at 577A)

I am persuaded that publication of the alleged injurious matter has been widespread. There has not been evidence seeking to persuade me that it was otherwise. It is beyond question that the wider the publication the heavier the damages one's reputation and this reflects on the estimation that other people have of one and, therefore, the more people who read or hear the defamatory matter, this greater the potential loss of reputation (see Buchell - The Law of Defamation in South Africa 1st Edition page 297).

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11% from the date of this judgment.

3. Defendants to pay costs of suit.

T. MONAPATHI
J U D G E

For the Plaintiff : Mr. Khasipe - M. Khasipe & Co.

For the Respondents : Mr. Mosito - Office of the Attorney General