

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MANKOKO KOTELLO (assisted by her husband)

PLAINTIFF

vs

'MATEBOHO LIPHAPANG (assisted by her husband)

DEFENDANT

Before the Honourable Chief Justice B.P. Cullinan

For the Plaintiff : Mr S.S. Mafisa  
For the Defendant : Mr A.T. Monyako

JUDGMENT

Cases referred to:

- (1) Manyeli vs Makhele & Another C of A (civ) No.10 of 1983, Unreported;
- (2) Dalgleish vs Lowther (1899) 2 Q.B. 590;
- (3) International Tobacco Co. vs United Tobacco Co. (1955) 2 S.A. 40 (W);
- (4) Mograbi vs Miller (1956) 4 S.A. 239 (T);
- (5) Ntsamo vs Letsie CIV/T/233/87, Unreported.

This is an action in defamation. Both parties are married women, aged approximately 42 and 44 years respectively in September, 1989, when the cause of the action (and counterclaim)

arose. The plaintiff is an Executive Officer in the Ministry of Agriculture and the Defendant is a Nursing Assistant. Both ladies live with their families at Mohalalitoe, Maseru, their respective houses being less than 100 metres distant from each other.

The plaintiff alleges that the defendant uttered defamatory words of and concerning her on 28th September, 1989. The defendant denies this, alleging in turn, in a counterclaim, that the plaintiff orally defamed her on Saturday 23rd September and again on Thursday 28th September, 1989. It is appropriate therefore to take up the narrative on 23rd September.

On that date there was a celebration in the house of one Ramagele, following a graduation ceremony at the National University of Lesotho. It was attended by the defendant, the plaintiff and a mutual neighbour Mrs Manthateng Mojaki, and also one Maseriti, one Matholo and one gentleman by the name of Tsila or Tsira. The latter was responsible for distributing beer, but the assembled ladies asked for a non-alcoholic drink. The defendant testified that at that stage, some time after lunch it seems, she gave two beers in her possession to the plaintiff. The plaintiff then said:

"you snobs 'Maliphapang and company. It's been said it's been a long time since you have been a drinker".

The defendant testified that the plaintiff then said that,

"I was a woman who had a lot of worries who was having a lot of difficulties in her household".

Mrs Mojaki advised the defendant to "keep quite". The defendant went into the kitchen, where she remained until 6.30 pm. She then went into the sitting room, where she found a small child crying. She picked up the child and sat down, comforting the child. The plaintiff came into the room and said to her:

"You devil 'Maliphapang. "Alice" (the plaintiff's servant) has told me that you are 'Jiving'. It seems to me you are ridding yourself of your worries".

The defendant understood the word 'jiving' to mean "to play in a manner which shows happiness". The latter utterance is in no way defamatory: the word 'devil' could well have been used in a jocose or even admiring vein. The first two utterances cannot be said to be defamatory either. I do not in particular see that a reference to having at one stage been a 'drinker' (of alcohol, no doubt) rather than a 'drunkard', would lower the defendant in the estimation of right thinking men or women, unless that is, the words contain an innuendo (which is not pleaded), whether or not based on extrinsic facts (which have not been pleaded).

And there is the plaintiff's difficulty. The utterances to which the defendant testified bear no relation whatever to those pleaded. Those pleaded alleged that the defendant, and here I repeat only the obviously defamatory allegations, was a drunken

prostitute who went about naked, exposing herself to young boys. To add to the defendant's difficulty those were accordingly the defamatory allegations which Mr Monyako had put to the plaintiff in cross-examination and which she in turn had denied, saying, "This is my first time to hear this". So that when the defendant had given her evidence of the utterances by the plaintiff on 23rd September, Mr Monyako was, very properly, constrained to say, "I will leave the events of 23rd September. The evidence is at variance with that pleaded".

I turn then to the transaction on 28th September. The plaintiff testified that she, as Secretary of the St. Ann's Church Organisation, left her home, between 3.30 pm and 4 pm, leading for the bus stop on the nearby roadside, there to catch a bus to take her to that Church, where she wished to attend a 'Retreat'. Before setting out for the bus stop, approximately 100 yards distant, she retraced her steps to the home of her next door neighbour and friend Mrs Majaki, so the latter testified, there to greet her and inform her of her departure, requesting her to look after her (the plaintiff's) children. She then headed for the bus stop accompanied by her servant Mrs Mamokhethi Eliza Molieleng ("Eliza"), and two other ladies. En route to the bus stop, she retraced her steps to her own house, having left something behind, leaving the other three ladies to carry on to the bus stop.

Seemingly on her way back from her home, again en route to the bus stop, she observed the defendant in the yard of her home,

as she passed it by. She greeted the defendant. The defendant turned upon her and uttered grossly defamatory words, as pleaded. I see no need to repeat them. Where they are not grossly defamatory, they are grossly insulting and grossly insensitive. While they do not sound, as Schutz J.A. (as he then was) put it in Manyeli vs Makhele & Another (1) at p 2, "like an index of the seven deadly sins," they nonetheless contain allegations, in the natural and ordinary meaning of the words used, of theft, prostitution, infanticide, witchcraft and Satanism.

The plaintiff testified that the defendant kept on repeating herself. Eliza, who had carried some of the plaintiff's clothing, presumably 'uniforms' for Church wear, had left the items with the other two ladies at the bus stop and had retraced her steps in search of the plaintiff; she came back running, as the time for the bus to depart was approaching, in time to hear the defendant repeat the defamation. The plaintiff was beside herself with anger: she conceded in evidence that she had wanted to 'fight' the defendant, particularly as a number of villagers had gathered, including schoolchildren, who had all heard the defamation. She went to the extent of taking off her purple cape, an item of uniform which she wore in Church: presumably she felt it would be incongruous to wear it if involved in a brawl with the defendant.

Meanwhile Mrs Mojaki, alerted by her child who had heard the defendant's insults, went outside her house, only to hear the defendant repeat the defamatory words. At an earlier stage it

seems that a Mrs Mosisili had managed to get the defendant to go into her house, but she had emerged therefrom to repeat the defamation. Mrs Mojaki in turn approached her and took her into her (the defendant's) house. The defendant overpowered her however and went outside again. Mrs Mojaki decided that the best plan was to get the plaintiff to leave. This she did, assisted by her husband, and Eliza it seems, physically pulling the plaintiff away from the scene, persuading her to go to Church. Eventually they succeeded in getting her to the bus stop from whence the plaintiff and Eliza departed for Church.

The defendant denies uttering the above words. As for the defendant's counterclaim, she testified that in the morning of 28th September she overheard the plaintiff telling some boy to "take a stick and beat this lunatic .....". The reference there was to some casual gardener who apparently made a habit of "insulting people" after he had been paid. "After the boy had whipped the man", so the defendant testified, apparently without any protest from her in the matter, she heard the plaintiff say, "Go ahead and whip that lunatic. I will be answerable." "The boy did not come to me," the defendant then said. Apparently the defendant understood the word "lunatic" to refer to her. She gave no evidence however to substantiate that aspect, apart that is from a subsequent utterance from the plaintiff, later that day. But in any event, the defendant's difficulty, once again, is that she never pleaded any transaction in the morning of 28th September; that pleaded occurred at 3.30 pm, and again bears no relation to the words allegedly uttered that morning.

As for the transaction in the afternoon, the defendant testified that as she was watering in her garden, she observed the three ladies, including "Alice" (a reference to Eliza) pass by. They were followed by the plaintiff. The plaintiff said

"you lunatic 'Maliphapang, I am coming"

The plaintiff carried on after the other three. After a few minutes she returned, passed by and proceeded behind Ramagele's house. She stopped at the corner thereof and addressed the defendant. Again I see no need to repeat the tirade which followed. Suffice it to say that whilst it is a good deal less defamatory than that allegedly said by the plaintiff, it is equally insulting and at one point disgustingly so. The utterance was clearly defamatory in that it alleged that the defendant was a prostitute and that "you sometimes go to Seapoint and give yourself over to boys". The utterance is at variance with that pleaded and indeed that put to the plaintiff in cross-examination in that in such version it is claimed that the plaintiff also alleged that the defendant was a drunkard "who goes about giving birth everywhere".

In any event, the plaintiff denies uttering any defamatory words at any time on 28th September. It was her evidence in chief that when the defendant defamed her, she was so taken aback that she did not know what to do or say, contenting herself with saying "I am coming", meaning that she would deal with the issue later, as she was then on her way to church. From her evidence,

and that of Eliza, it appears that she was undecided, as at one stage she ran towards the bus stop but then, taking off her Church cape, and draping it over a fence, she ran back in the direction of her house and that of the defendant, presumably intending to assault the defendant.

Be that as it may, it was the defendant's evidence that while the plaintiff was in the process of defaming her, Mr and Mrs Mojaki emerged from their house. Mr Mojaki stood near to the plaintiff and Mrs Mojaki came and stood near her. The latter then "came from behind and grabbed hold of my arms and pushed me into the house", she said, Mrs Mojaki saying, "you see what I told you would happen".

Later that evening, so the defendant testified, "Alice" approached her and said that "the plaintiff wished to offer her apologies". Her evidence then reads:

"Alice went back to the plaintiff's house, Alice came and said the plaintiff was together with the plaintiff's mother at her house and said if I wanted to keep the peace, I must approach the plaintiff at the plaintiff's house.

I did go. The plaintiff and Alice ..... my apologies: I did not go. The plaintiff came to my house".

The defendant testified that after the plaintiff had spoken inter alia of the inevitable friction between neighbours, and



their Christian background, "the plaintiff and I shook hands". Her husband "was there" she had said earlier. She asked the plaintiff "why she was making trouble" and the latter said "she was doing that because I had once said that she was consoling 'Mathabang at Lakeside'".

Despite the reconciliation, the plaintiff reported the matter to the police five days later, on 3rd October, at the Pitso ground Police Station, to where the defendant was summoned. The latter testified that a policewoman tried to effect reconciliation but the plaintiff wanted none of it. Eventually the defendant was charged in criminal proceedings, so she testified, before a Local Court. The plaintiff testified that a 'trial' took place but that there was no judgment, she being advised to commence civil proceedings. Her evidence on the point was impugned as an issue of credibility, but I agree with Mr Mafisa that the layman could well confuse a trial with what in fact took place. The balance of the evidence indicates that the Clerk or Prosecutor spoke to all the witnesses in his office and decided that a criminal charge would not succeed and then advised the plaintiff to institute civil proceedings.

The defendant's husband, a Prosecutor at the Traffic Court, who incidentally had signed and apparently drafted all of the defendant's pleadings before trial, corroborated the defendant's evidence as to the reconciliation at their home. He testified that he arrived home on 28th September, somewhere between 4.30 pm. and 5.30 pm, unaware of what had transpired that afternoon.

Some time thereafter, the plaintiff, followed by her "housegirl" and followed in turn by the defendant herself, entered the house. The three ladies sat in the sitting room, while he remained in the kitchen, from where he could see and hear the ladies. The plaintiff did not accede to the defendant's suggestion that the witness should join them. His evidence in places then reads thus:

"This I heard the plaintiff say" I think it is better that we apologize to one another, as I have seen my mistake." She indicated that this thing should end right there and then, and should not be carried out elsewhere."

The witness then went on to describe how it was that, seated in the kitchen, he was able to see what took place in the sitting room, to the extent indeed, during a short court adjournment, of drawing a sketch (Exhibit "B") to illustrate the lay-out of the interior of the house. His evidence then continued:

"After the plaintiff had said "We should apologize to one another," my wife agreed to the suggestion. They apologized to one another and I still could hear them"

At that stage, the witness testified, Mr Mojaki arrived "to collect the plaintiff and the lady with the plaintiff". This aspect indeed corroborated the defendant's evidence that Mr Mojaki, just before she and the plaintiff shook hands, "came running into the house. He said he had come to see somebody," she said.

The defendant's evidence was further corroborated, when Policewoman Mosenene gave evidence. She had been stationed at the Pitso Ground Police Station in October, 1989, and she recalled the visit of the defendant and the plaintiff thereto. She recalled in particular that the defendant had come first to the station, saying that she had been instructed to report thereto. Although the defendant did not know the reason for such report, the witness testified that the defendant "said she had quarrelled with Mrs Kotelo about two weeks back". The witness then discovered a police docket, indicating that the plaintiff had laid a charge against the defendant "for insulting her". She informed the defendant of this. This plaintiff subsequently reported to the witness, after the defendant had left the station. The witness' evidence continued:

"I told the plaintiff that the defendant had just been there and that she had said that they had apologized together two weeks earlier. The plaintiff said that it was true that at one stage she had gone to the defendant's home to apologize, but thereafter the defendant went from house to house talking about her: that is why she laid the charge".

On the issue of credibility, I found the plaintiff and Mrs Mojaki and Eliza, to be impressive witnesses. The plaintiff was frank in admitting that her anger was such that she wished to physically attack the defendant on 28th September, to the extent indeed of divesting herself of her Church cape: that aspect lends

a ring of truth to her evidence, and was never impugned by the defendant, nor indeed the evidence that the plaintiff had to be physically pulled to the bus stop by Mr and Mrs Mojaki and Eliza. Only the defendant's words could have generated such anger. The defendant herself was also the subject of attention by Mrs Mosisili and Mrs Mojaki. But it was never the defendant's evidence that she wished, as a result of the plaintiff's words, to assault the plaintiff. On the contrary, when asked if she was "physically fighting", she answered, "Not at all." The fact that she was physically removed from the scene by at least one lady, the defendant acknowledging Mrs Mojaki's intervention, rather than peacefully retiring to her home in fear of the plaintiff's assault, indicates therefore that her presence at the scene was the cause of the friction, and supports the plaintiff's evidence of the defendant's defamatory attack. There is also the corroborative evidence of Mrs Mojaki and Eliza in the matter.

As to allegation of defamation by the plaintiff, the defendant's credibility as a witness was surely weakened by the fact that she adduced evidence of two transactions, namely on 23rd September and on the morning of 28th September which, as indicated earlier, did not accord with her pleadings in the first case and was never mentioned in her pleadings in the second case. As to such pleadings, she was asked for further and better particulars, (i) of those present at Ramagele's house on 23rd September and again (ii) of the names of those who had understood the alleged plaintiff's defamatory words on 23rd and 28th September to refer to the defendant. Such particulars were not

supplied, that is, until the Court ordered that they be supplied. The particulars supplied read

(i) "'Maseriti, 'Mamoruti Pheko 'Manthateng Mojaki the other names forgotten."

(ii) "By those referred to above, and passers - by.

*(Italics added)*

Yet when it came to the trial, the name of one Tsira was introduced as the person who distributed beer at the party on 23rd September. Further, the defendant testified that on 28th September, when the plaintiff returned to again defame her, one Kelebene and Tsira were present. These were the only persons whom she could name, despite the particulars supplied by her. Again it is to say the least of it unusual that the defendant could not before the trial remember the name of Tsira, who was present on both the 23rd and the 28th September, nor indeed make any attempt to identify him in the particulars eventually supplied (see Dalglish vs howther (2), International Tobacco Co. vs United Tobacco Co. (3) and Mograbi vs Miller (4)).

Further, there is the inherent improbability of the plaintiff ever having defamed her. The defendant's evidence indicates that having hurled the first defamatory epithet at the defendant and departed for the bus stop, the plaintiff subsequently retraced her steps back to Ramagele's house, for the sole purpose of further defaming the defendant. At that stage,

the other three ladies were waiting for her at the bus stop, and the bus was shortly due to arrive and depart.. At that stage, she was en route to Church and was clad in Church uniform. The incongruity of engaging in a physical brawl, while so clad, was apparent to the plaintiff, when she draped her Church cape across the fence. The incongruity of grossly defaming another lady in the hearing of neighbours and their children, while so clad, would then have been all the more apparent to the plaintiff. There is of course the possibility that she removed her cape for the purpose of at once assaulting and defaming the defendant, that is in a double form of self-defence: but that is not the defendant's evidence: she denies defaming the plaintiff and indicates therefore that the plaintiff acted in cold blood. I consider that most unlikely. I do not for a moment wish to be understood as saying that Church-goers do not indulge in oral defamation. But it does seem to me less likely for such defamation to be uttered while en route to and ostensibly clad for Church.

The plaintiff's anger at being so grossly defamed is apparent, not alone from her inclination to "fight" the defendant. It is also apparent in the fact that she made a complaint to the police. I cannot see that she would have taken that course, if she herself had indulged in defamation or counter defamation. Again, if it was the case that the plaintiff had done so, I cannot imagine why the defendant, having had criminal proceedings instituted against her would not in turn file a complaint with the police against the defendant. The extent of

the plaintiff's anger can be measured by the fact that she also lodged a complaint in the matter with the defendant's superior at her place of work. Whilst I do not see that that course was in any way necessary, the plaintiff's reaction points inevitably to the extent of her inquired feelings, and the corresponding improbability that she in turn had been guilty of defamation or counter defamation.

I turn then to the aspect of the alleged apology. The plaintiff's evidence on the point, reproduced above, reveals uncertainly. It was her ultimate evidence that the plaintiff and "Alice" came to her house: if that was the case, then she was fortuitous to meet them outside the house, as her husband's evidence indicates that he had not met his wife on arrival at home, was unaware of what had happened, and so was a completely impartial and dispassionate observer in the matter. I find it unusual that the defendant did not know the first (nor apparently the second) name of the plaintiff's servant, when, on the defendant's evidence, "Alice" had come twice to her home that day. Eliza had, incidentally, obviously played a key role in the transaction that afternoon, yet the defendant had denied her very presence at the scene.

In any event, the defence evidence of the apology is contradictory - The defendant's evidence indicates that it was the plaintiff who apologized, and explained why she had been "making trouble". The husband's evidence however was that, quite specifically, the two ladies "apologized to one another".

Policewoman Mosenene's evidence on the point was first that the defendant had said that "she had quarrelled with Mrs Kotelo about two weeks back", which surely indicates a share in the liability involved. Thereafter the policewoman testified that she told the plaintiff that the defendant "had said that they had apologized together two weeks earlier". The balance of the defence evidence indicates therefore that, whatever about the plaintiff apologizing to the defendant, the defendant, on the evidence adduced by her witnesses had apologized to the plaintiff. The defendant cannot therefore be telling the truth when she says that she did not defame the plaintiff.

As to the scene in the defendant's home, quite clearly, had the plaintiff arrived without her husband, she would have objected to the presence of the defendant's husband. Bearing that in mind, I have to say that the evidence of the defendant's husband sounds contrived, in that although he was not present in the particular room he was nonetheless able to see and hear what transpired therein. In this respect the witness was careful to, and indeed interrupted the narrative of his evidence, to establish that aspect. It seems to me that if he could see and hear the plaintiff the latter would be fully aware of and would object to such aspect, as she had allegedly done after entering the sitting room, saying "Don't let us involve our husbands". In any event, the evidence of the defendant's husband is at variance with that of his wife. The defendant never recounted that the plaintiff objected to her husband being present. She did say that the plaintiff had at first declined to shake hands,



saying, "Wart, lets sit down and talk". She then related that "my husband was there, the plaintiff and 'Alice'". Having related what the plaintiff then said to her, and the arrival of Mr Mojaki, she testified, "Besides Alice there was Liphafa my husband. The plaintiff and I shook hands". Nowhere did the defendant indicate that her husband was not a member of the group. Indeed, it had been put to the plaintiff in cross-examination that she had "asked for forgiveness in the presence of the defendant's husband, "which she denied a question which no doubt adheres to the defendant's version, but not that of her husband.

It had also been put to the plaintiff and also Eliza that they had both come to the defendant's home at 5 pm approximately on 28th September. The plaintiff denied the suggestion, Aliza testifying that they were both in Church at 5 pm. This aspect was put to the defendant in cross-examination: initially she replied that the plaintiff and Eliza "are not telling the truth": ultimately her reply was "I cannot say".

There is then the aspect of the evidence of Policewoman Mosenene. Four matters put me on enquiry. Firstly, whereas the witness testified that she knew both parties, she said "it was her first time to meet" the plaintiff. That could indicate that she was, in the least, an acquaintance of the defendant.

Secondly she testified in chief that she related to the plaintiff that the defendant "had said that they had apologized together two weeks earlier". But her earlier evidence indicated

that the defendant had said no more to her than that "she had quarrelled with Mrs Kotelo about two weeks back". The witness then laid no basis for what she allegedly said to the plaintiff. Thirdly, the defendant testified in chief that she was summoned to the police station on 3rd October, 1989, that is five days after the transaction of 28th September. Indeed, it was put to the plaintiff in cross-examination that she had approached the police at the Pitso Ground on 3rd October, and she agreed. When it was put to the defendant in cross-examination that, if it was the case that the plaintiff had "made peace" with her on 28th September, she would not then have laid a complaint with the Police 5 days later, the defendant answered, "It was after two weeks". Her evidence then reads

"Q: You said you were called to the Police on 3rd October?

A: That is so: I was mistaken".

I consider it unusual that the witness could be mistaken about the date of such a traumatic event as being summoned to a police station to answer a criminal charge. It will be seen that Policewoman Mosenene's evidence in chief also puts the date of the transaction in the police station "two weeks" after the transaction in question. When cross-examined in the matter however, she replied "I only know I met her (the defendant) after Independence - that was on 5th October: I can't remember what day. The witness there materially altered her evidence. It is then significant that both witnesses could be similarly mistaken

as to the date of the transaction in the police station and the inference arises therefore that the evidence is contrived.

Fourthly, the allegation that the plaintiff had admitted to the witness that "it was true that at one stage she had gone to the defendant's home to apologize", is obviously a telling piece of evidence, going to establish that, whatever about the defendant defaming the plaintiff, the plaintiff had clearly defamed the defendant... yet that vital admission was never put to the plaintiff in cross-examination.

The onus is on the defendant in the matter of the alleged apology by the plaintiff. For all the reasons indicated I am in no way satisfied that any such apology ever took place, nor indeed that the defendant ever apologized to the plaintiff. On the contrary, on the issue of credibility, I am satisfied that the defendant defamed the plaintiff in the words to which the plaintiff, Mrs Mojaki and Eliza testified. As to the defendants counterclaim, again on the issue of credibility, for all the reasons indicated, I am not satisfied that the plaintiff ever uttered any of the defamatory words alleged. Accordingly I dismiss the defendant's counterclaim.

As to quantum, there is no doubt that the words uttered were grossly defamatory. Mr Mafisa refers me to the case of Manyeli (1) where the Court of Appeal awarded M8,000 as damages. But there the appellant was a prominent politician, had been a member of Parliament for many years and had held two Ministerial posts

for a total of seven years. Again, the defamation was contained in a pamphlet which was distributed during a political rally, at which a thousand or more persons were present. Mr Mafisa has also referred me to the case of Ntsamo vs Letsie (5) where M3,000 was awarded as damages. But there the publication of an oral defamation was relatively widespread, inasmuch as publication was effected at a funeral. In the present case publication extended, at the most to but a few neighbours, at least two of whom were still prepared to testify as witnesses for the plaintiff. The defamation was also heard by some school children.

Assessing quantum is always a difficult matter. Bearing in mind the decrease in the value of money over the years, and doing the best I can, I would assess the plaintiff's damages at M2,000. Accordingly I give judgment to the plaintiff in the amount of M2,000. I grant costs to the plaintiff.

Dated This 27th Day of November, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE