CIV/T/1/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LIFELILE MATSOSO PLANTIFF

and

ROBERT MAMBO

DEFENDANT

JUDGEMENT

Delivered by the Honourable Mrs Justice Hlajoane
Acting Judge on 17 Day of September, 2001

In this case the plaintiff has instituted an action for damages against the defendant in the following terms:

(a) Damages for defamation in the amount of ten thousand maloti (M10,000)

(b) Damages for insult in the amount of thirty five thousand maloti (M35,000)

(c) Damages for assault in the amount of five thousand maloti (M5000)

(d) Interest at the rate of 18% a *temporae morae*

(e) Cost of suit

(f) Further and/or alternative relief.

In filing his plea, the defendant also filed his counter claim, in which as Plaintiff in reconvention also claimed for damages for insults. In the counter claim, an amount of sixty thousand maloti (M60,000) was claimed for *contumelia.*

The facts of this case were as follows:-

Both the plaintiff and the defendant are Lecturers at the National University of Lesotho in the Faculty of Education. The plaintiff being a Lecturer and the defendant, Senior Lecturer.

It was common cause that there had been a Departmental meeting on the 30th October, 2000 where both parties had attended and other Lecturers in that Department of Education. The meeting discussed amongst other things, the promotion of the defendant and/or filling of a vacant post in the Development Studies Education. There had been a lot of debate on this issue and the resolution

arrived at was to advertise the position. The plaintiff was recording the Minutes of the meeting. There had been another meeting prior to that of the 30th where this issue of filling the position was discussed. The meeting had something to do with the defendant who showed interest in being offered the post. Plaintiff in the meeting of the 30th requested that members should stick to their initial resolution of advertising the post. The plaintiff had defendant's *curriculum vitae* and defendant did not approve of the way the plaintiff was perusing his *curriculum vitae.* Defendant left the meeting to teach. It has not been disputed that the defendant left the meeting of the 30th before close of business, and when he so left, the plaintiff was on the floor. The defendant went to plaintiff's office on the morning of 6th November, 2000, a week after the meeting. According to the defendant, he went there to get clarification on the meeting of the 30th as the plaintiff was the one who was taking minutes. The plaintiff disputed this and showed that the defendant's mission was that of confrontation. The defendant decided to via plaintiff's office as he saw the door to her office open. On the other hand Defendant's counsel had shown that the Defendant would state in evidence that plaintiff's office door was closed, hence the reason why he could not hear as to who allowed him in. **S v Gouws 1968 (4) S.A. 345** is an authority in that statements that are admitted by party's counsel in proceedings are taken to be binding on the litigant. This is more so in this case

where counsel has been in court when the statement was made and did not object.

Defendant did not dispute the fact that P. W. 2 was there when he entered P.W. 2's office, the dispute was only on whether or not the door was opened when he knocked and was allowed in. Defendant said that P.W.1 was on the telephone when he entered, but P.W. 1 disputed this. What is not disputed is the fact that P.W. 2 was in the same office and working on a computer and even came between the two parties and intervened by taking the defendant out.

The Primary issue for determination would therefore be, which version is the court to believe as forming the true basis of the claim and the counter claim including of course the respective defences raised by the parties. The plaintiff pleaded provocation whilst the defendant on the other hand raised a defence of *rixa.*

The plaintiff had called in evidence two witnesses, being herself and another, Mr Raselimo. The defendant on the other side has only one witness, the defendant himself.

In order for the court to get an answer on the facts as to who could have started

insulting the other, it has to look at the surrounding circumstances of the case. Here is the defendant, out of his own mouth showing that he was not amused in seeing the plaintiff tear apart his *curriculum vitae* (CV) during the meeting of the 30th October, 2000. The meeting was not attended by only the two of them, but there were other lecturers who had attended that meeting including P.W.2.. The defendant entered the plaintiff's office, according to him, to get how the meeting wound up. In asking the plaintiff about the meeting, he showed he was replied in a disparaging manner by the plaintiff.

The defendant himself under cross examination began to realise that he could have left at once on seeing that the plaintiff did not want to give him the information about the meeting. He even demonstrated to the Court how the plaintiff was twisting her mouth when talking to him, thus giving a clear indication that she was not prepared to give any information, she was not being co-operative at all. Defendant could have left at that stage.

The question that one would tend to ask, would be, why did the defendant choose to go to the plaintiff amongst all others who had attended the meeting. He has himself shown that he had not liked the way the plaintiff was tearing apart his

curriculum vitae. He said he felt offended by that act. In his own words, the defendant showed that, the minutes for the meeting were supposed to come from the office of the head of the Department, but he chose to approach someone who had offended him. His explanation was that the head of Department was not there, but he did not take the trouble of getting to know as to who had been acting in his absence. It would therefore not be unreasonable to infer from his behaviour that he in fact went to the plaintiff to start trouble. He had gone there for confrontation.

Plaintiff has been supported in her evidence by P.W. 2, who confirmed that the defendant was in fact very arrogant when he got to P.W.1's office. Even if for a second, we were to take Defendant's story as a true reflection of what in fact transpired on that day, defendant himself showed that when Plaintiff asked why he left the meeting yet all who attended had to go and teach also; then in reply defendant in his own words when giving evidence said, "If you think you are so smart why haven't you completed your studies after such a long time". He showed he said these because the plaintiff had gone for further studies. Defendant went further to show in evidence that he then said, "moreover no one has seen your *Curriculum Vitae*, why were you literally tearing mine apart."

It must be noted that, when the defendant was saying these words, the plaintiff had said nothing about his qualifications. This therefore made me doubt if I had to believe that in fact the defendant had to be believed when he said he had gone to plaintiff's office to get a feedback of how the meeting ended. The only reasonable inference to be drawn would be that, the defendant had gone there to confront the plaintiff and give her a piece of his mind.

The evidence of P.W.1 and P.W.2 have been the same in material respects. That the door was open when defendant was allowed in, though defendant's counsel, had shown in cross-examining P.W.1 that defendant was going to say when giving evidence that the door was closed, that is why he did not even know who between P.W. 1 and 2 asked him in. That P.W. 1 was not on the telephone as alleged by the defendant as he entered P.W.1's office. That the defendant was the one who started insulting the plaintiff by calling her a "bitch", a "whore". That it was after these insults that plaintiff began to be emotional and insulted the defendant back saying "you must be silly, you are a mother fucker".

The defendant on the other hand had said he went to P.W. 1's office because he saw her door opened, but through his Lawyer under cross examination he had said

plaintiff's office door was closed. Again in his evidence-in-chief defendant had said he went to plaintiff's office to get information as to how the Departmental meeting had wound up, but under cross examination he then said the purpose of his visit to P.W.1's office was to collect minutes of the meeting. If these were true it could have been stated in evidence.

The defendant had under cross examination shown that he did not leave even when he could realize that P.W.1 was not prepared to give him any information of how the meeting wound up . He did not leave even after he could realize that P.W.1 was then angry or provoked, instead he went on to insult her by showing he had fucked many women around including P.W.1 herself. The defendant has raised a defence of *rixa*, not fair comment or justification.

The plaintiff has not specifically said that she had been provoked, but has claimed damages for defamation. Provocation has only been inferred from the behaviour of the defendant, starting from the day when he left the meeting for whatever reason it was worth.

Intention is a requirement for defamation. But there are authorities showing

that provocation has on one hand been regarded as excluding *animus injuniandi* (or intention) or on the other hand justifying what would otherwise have constituted unlawful conduct. The defendant raised a defence of *Rixa*, but his behaviour and reaction after the altercation was inconsistent with his explanations. As if all were still normal after the altercation, he managed to go and teach. A normal reaction would have been to go and report to a colleague or to the authority. But because he had managed to vent out his anger and frustration of the meeting, he acted normally and went to teach.

The behaviour of the plaintiff after the altercation clearly demonstrated an attitude of someone who had just experienced an unexpected occurrence . She was crying and immediately rushed to report to the head of the Department and to her husband. Even in her evidence she did not deny that she too had insulted the Defendant, but it was after she had been provoked by being insulted first. This thus demonstrated her factual allegations of provocation. It was the defendant who came to plaintiff's office with a clear intention.

The Court is not convinced that the principle of *compensatio* applied in this case for the following reason. The two parties have insulted each other or defamed

one another, but the defendant had acted out of proportion because he started the whole episode by going to plaintiff's office yet the same person had some days back offended him. He did not even back off when he noticed that plaintiff was not going to co-operate.

The Court in **Bestee v Calitz 1982 (3) S.A.** had this to say, that "in a claim for damages arising from an insulting remark made in anger where this was elicited by a provocative insult of a similar nature, then provocation in such circumstances is a complete defence because the elicited response is not unlawful." In our case, the defendant is taken to have deprived himself of the redress as he had brought upon himself nothing more than what he should have reasonably expected as a result of his own prior unlawful conduct. The plaintiff acted in a natural human reaction of a most reasonable man to an unwarranted attack on his person by being called a "whore" , a "bitch".

In his evidence P.W. 2 showed that, from that day, he was no longer holding plaintiff in that high esteem as before as defendant, had said, he had fucked many women around including plaintiff herself. The defendant in his evidence showed that he had been called to the office of his head of Department and asked about the events

of the 6th November, 2000. He was also advised to write a letter to the plaintiff, which he did, Exhibit "A". In that letter he had asked for an apology. He said, " I don't know exactly why I behaved in such an unbecoming manner. I am sorry something just snapped. I lost control and things just got out of hand." He went further and said, "let me reiterate and say how sorry I am for having brought about this sorry situation."

The letter clearly showed that the defendant was admitting that he was at fault because he had started the whole thing. Though under cross examination defendant wanted to be taken as having only written that letter of apology because he realised that the encounter was not a good one. He also wrote because Dr Matšela had asked him to.

The matter for consideration here would be whether the apology was a genuine one. It would be genuine if it had been freely made. The defendant in our case only tendered his apology after he had been asked to. In his letter of apology, the defendant went further and said, "I am aware that this issue has been passed over to the higher authorities and that I shall appear before disciplinary committee."

There are authorities illustrating a point that usually an apology is a factor which has to be taken into account in determining the damages recoverable by the plaintiff for defamation; **Norton and Others v Ginsberg 1953 (4) S.A.537 at 540.** But the authorities go further to show that such an apology to pass the test must have been timeous and spontaneous, not to take place reluctantly, but must enjoy the same prominence as the defamatory words. In **Kuper (1983) SAL J at 480** the author observes that an apology is offered too late if it was done only after the plaintiff had to make a request or at a stage where the defendant realized that his legal position was already hopeless.

An apology which has been offered too late loses much of the effectiveness which it otherwise would have had **Gelb v Hawkins 1960 (3) S.A. 687 at 693,** where the apology was only made 11 months after the accusations.

The defendant in our case wrote a letter of apology only after he had been called to the head of Department 's office and requested to make an apology. He has shown that when he so wrote the letter of apology, he was aware that a disciplinary case was forthcoming. Had the defendant not been aware that he was facing a disciplinary action and also not been asked by Dr Matšela to write that letter of

apology, he could not have apologized. The defendant in our case wrote a letter only after he had been called to the head of Department's office and requested to make an apology.

Though plaintiff has said under cross examination that her reputation might not have been reduced she had shown that P.W.2 who used to respect her initially, lately after the events of the 6th November, 2000 is having some reservations about her because of the names which the defendant called her, "bitch', "whore" and that he, the defendant having fucked many women around and the plaintiff being one of them. Surely under normal circumstances no one would call her husband just to inform him that the truth has been made known about her sleeping with other men outside her marriage.

Now coming to the words used, would it be said that the words were *per se* defamatory. **Wood, N. O and Another vs Branson 1952 (3) S.A 369 at 372** showed that, "everything depends on the context, the tone, the circumstances, the setting and the locality. The words cannot be regarded in *abstracto*." The parties in our case are Lecturers at the National University of Lesotho, an Institution of higher learning. P.W.2 before whom the words were uttered showed under cross

examination that he considered P.W.1as his colleague. The words would therefore not bear any different meaning from what the plaintiff heard them to mean. P.W. 2 is not just an ordinary man who could have just taken the words to be uncouth and coarse according to **Wood vs Branson, Supra**. It is true that in our case as in Wood's case, there is no evidence to prove how the words complained of would have been understood. It is not the learned bookish meaning that the words must be given, but the meaning they convey to the man in the street. Wood's goes further to say, "the ordinary man does not carry about with him a pocket dictionary which he consults to see whether or not he has been defamed, but in our case for someone as learned as the plaintiff there was no need for her to consult a dictionary because she knew the meaning, that is why she became so mad as running from one office to the other reporting about the incident immediately after it had happened. P.W.2. also wrote a report the same day and submitted it.

In the result, plaintiff's claim succeeds and the defendant's counter claim is dismissed with costs. On the issues of costs, the defendant had argued that the special power of attorney had not authorized the claim for "interest" and "costs". **Midde - Vrystaatse Guivel - Korporassie Bpk vs Bondesio 1971 (3) S.A. 110** is the authority which shows that "a summons may validly include a prayer for costs

even though the power of attorney made no particular mention thereof."

On the question of interest, the defendant had further argued that the power of attorney did not authorize the claim for interest. Indeed failure to file power of attorney or irregularities therein will usually entail an application to set aside the proceedings as being irregular, but the court has wide powers of condonation, **Northern Assurance Co. Ltd vs Somdaka 1960 (1) S.A. 588.**

In dealing with quantum of damages in **Hassen vs Post Newspapers (Pty) Ltd and Others**1965 (3) S.A. 562, despite the wide circulation of the newspaper, the Court held that, in the eyes of a comparatively small number of its readers only that the plaintiff's reputation could have been injured. Plaintiff's damages were thus reduced.

In our case, the plaintiff has succeeded in her claim, she is awarded:

(i) M10,000 as damages for defamation

(ii) M25,000 damages for insult on the authority of Hassen's case above as it was only P.W.2 who was present when the insults were hurled

(iii) Claim for damages, for assault fails as the wagging of defendant's finger at plaintiff is taken to have been a gesture for purposes of emphasis on what the defendant was saying

(iv) Interest at 18% a *tempore morae* plus costs.

A.M. HLAJOANE
ACTING JUDGE

For Plaintiff: Mr Mosae

For Defendant: Mr Mosito