

IN THE HIGH COURT OF LESOTHO

CIV/ T/ 352/ 2010

In the matter between:

MR JUSTICE THAMSANQA NOMONGCONGO

PLAINTIFF

And

REV. MALEKA ALPHONSE MATHIBELI
MAZENOD PINTING WORKS

1ST DEFENDANT
2ND DEFENDANT

JUDGMENT

Delivered by the Honourable Acting Judge L.A. Molete
On the 24th February 2011

The Plaintiff in this matter, a Judge of the High Court of Lesotho, instituted an action against the two Defendants for damages in the amount of M1,500,000.00 (one and half million Maloti) for defamation.

The claim arises out of two articles which appeared in the “Moeletsi oa Basotho” newspaper of the 10th May 2009. The two defendants are the editor and publishing company of the newspaper and plaintiff asserts that they intentionally published the articles with the object of impairing his right to dignity and fair name.

The matter was defended by a notice filed by E.H. Phoofolo attorneys and they further requested further particulars on 5th July 2010. After the particulars were supplied, no plea was filed. On the 7th December 2010 a notice to file plea was served upon the said attorneys, but no plea was filed. The matter therefore came before me as an application for default judgment.

I arranged a date of hearing on the 3rd January 2010, with Mr. Nathane for the plaintiff and raised with him my initial concerns about granting the judgment in default.

They related to procedural and substantive legal aspects of the claim. The procedural aspects were the discrepancy between the summons and declaration as well as service of the necessary process upon the defendant's attorney. I sought to confirm that the defendants were aware that the matter was proceeding in default of the plea.

Mr. Nathane immediately withdrew the claim for interest in the summons, which was in conflict with the declaration in that no claim for interest was included in the latter. He indicated that the further particulars were served upon the attorney as well as the notice to file plea and there was accordingly no doubt that they had defaulted. Furthermore, a notice of set down for the hearing was also served for that day.

I decided that a further date be allocated for the hearing of the matter and that counsel be ready to address the more substantial and legal aspects of the case which were the following:

- a) The time lapse between the publication of the alleged defamation and the commencement of the action. The period in between was one year. I sought an explanation thereof.

- b) The reasonableness and justification of the quantum of the claim.

The case was then allocated for hearing on the 17th February 2011; and I made the further order that E.H. Phoofolo attorneys be served with a notice of set down for that date.

On the 17th February 2011 the matter proceeded. There was no appearance for the defendants. Mr. Nathane had filed heads of argument to address the court on the issues to be considered by the court.

E.H. Phoofolo attorneys ought to have appeared on that day; or filed a notice of withdrawal as attorneys of record. This was not done. I need to make the point that it is the obligation of counsel or attorney as officers of the court to take the

necessary steps to inform the court or file a withdrawal notice in cases where they no longer act for any litigant. The court is otherwise be justified to infer that the failure to take the further steps in the proceedings is remissness on the part of the practitioners concerned.

The matter proceeded on the allocated date and I considered the facts and law applicable as well as the submissions by Mr. Nathane. I was not satisfied that the delay had been explained sufficiently; but Mr. Nathane's argument was that it may reduce the quantum of the damages, but will not totally exonerate the defendants.

The facts of the case can be briefly outlined as follows:

In the newspaper edition of the 10th May 2009 the publication contained two articles which referred to the court of Lesotho as the cause and agent of conflict or disputes amongst the public rather than an institution to resolve them. The first article in particular, made far reaching blatant and sweeping statements about this being a result of the corruption that is rife in the High Court. The following statement was made about the judges;

“to my observation, these people accept bribery with thieves and criminal indeed, there is a lot of

bribery in courts and it blindfolds peoplethere is no corruption that surpasses that of making a braai at the home of a politician and that of judges receiving vehicles in the amount of M4,000.00.”

No mention was made of plaintiff in his first article, but the writer (under a pseudonym) went on to say that to justify his point he would refer to two cases mentioned in the article. One of these cases was prescribed over by the plaintiff.

The second article was more direct and specifically referred to the case of the Lesotho Evangelical Church which the plaintiff prescribed over. It contained the following statement about the judge:

“They say this one who belongs to the Xhosa’s just muddled up the case and had it dismissed even before an hour had lapsed.”

The statement, in the Sesotho language, as it was disrespectful and arrogant, and condescending.

Although judge’s name was not mentioned; I do not hesitate to accept that reference was to none other than plaintiff; and would be understood as such by the reader. The plaintiff avers in the affidavit filed in support of the default judgment

that the import of the meaning of the articles is that because of his corrupt nature, he failed to apply his mind judicially to the matter. He further states that 1st defendant was charged with criminal contempt as a result of the articles, and eventually convicted by CULLINAN AJ under CRI/ T/ 90/ 2009 on 17th December 2009. The decision was never appealed.

A clear and concise definition of defamation by the media is contained in the book PERSONALITY RIGHT AND FREEDOMS (1998) by J.M. BURCHELL where he defines it as the unlawful (unreasonable) negligent publication of defamatory matter referring to the plaintiff which causes his or her reputation to be damaged.

I am satisfied that plaintiff has proved his case against defendants and is entitled to a judgment against defendants on the basis of their defamatory statements against him.

On the aspect of quantum, I considered the delay in bringing the action to be a factor to be taken into account.

I have also considered authorities on the matter and specifically acknowledge that the nature of the defamation; the words complained of; the indignity to which plaintiff was subjected to or suffered and his status have to be all taken into account.

Against this background and in the context of this trial, Mr. Nathane submitted that it is the duty of the court to make a ruling on the appropriate quantum of damages. This is entirely in the discretion of the court. He quoted the case of SKINNER v SHEPIRO 1924 WLD 157 at 167. Where it was held that the legal position is that the amount of damages is entirely in the discretion of the court. Such discretion however to be exercised on reasonable and not arbitrary principles. I agree. This is trite and has been consistently applied to date.

The court is required to consider all the relevant factors; but most importantly to strike a balance between the right to dignity and the right to freedom of expression in a case such as this. These factors to be taken into account in regard to both the merits and the quantum of damages to be awarded. Mr. Nathane agreed with me that the court will have to consider also the social and economic conditions of the country. In my view, a good defamation action may be trivialized or rendered ridiculous by an inflated and excessive amount claimed in damages. This may justify a punitive order against plaintiff in certain circumstances.

The authorities agree that the courts have to protect freedom of expression by granting the media a certain latitude in

instances where public affairs are concerned. The chilling effect brought about by a defamation action must be limited as far as possible.

NATIONAL MEDIA LIMITED vs BOGOSHI 1998 (4) SA 1196.

In any democracy, freedom of expression is regarded as fundamental because it facilitates open discussion and debate. It includes the right to hear, form and express opinions and views on a wide range of matters; thus making it possible for society to search for the truth.

SA NATIONAL DEFENCE UNION v MINISTER OF DEFENCE
1999 (4) SA 469

HOLOMISA v ARGUS NEWSPAPER LTD 1996(2) SA 588

MOAFRIKA NEWSPAPER RE: RULE NISI (R v MOKHANTŠO
AND OTHERS) 2003 BCLR 534

I have referred to the following cases to guide me in arriving at a fair decision on quantum.

1. MOEKETSI SELLO vs CANDI RATABANE
RAMINOANE AND ANOTHER CIV/ T/ 19/ 97
(unreported. Mr. Justice Lehohla (as he then was))

awarded an amount of M90,000.00 damages for defamation and M15,000.00 punitive damages.

2. ANTHONY CLOVIS MANYELI v VINCENT MAKHELE AND ANOTHER C of A (Civ) No 10 of 1983 where a sum of M8,000.00 was awarded and Lehohla J (as he then was) said in Sello (supra) that it was “a fairly huge amount by those days standards.” I agree. A simple illustration is that of a motor vehicle which at that time could be bought for such amount but would today be worth more than M100,000.00 (one hundred thousand maloti).
3. In DU PLESSIS JUANITA vs J.T. PUBLISHING (EDMS) BPK AND ANOTHER High Court of South Africa TPO case No 757/2005, an award of R80,000.00 plus interest and costs of two counsel was awarded to plaintiff.
4. DR `MAKOALI MAKOTOKO vs DR NYAMAKYE GYSI AGYEI CIV/ T/ 167/ 2006, before her Ladyship Madam Justice M. Hlajoane, awarded amount of M100,000.00 (one hundred thousand) was made to a doctor who alleged that the words complained of were understood to mean that she was “unpatriotic, discriminatory, corrupt, dishonest and immoral”. I am aware of the

fact that the parties in that case arrived at the sum by negotiating a settlement that was made an order of court. The significance of it however is that plaintiff's initial claim of half a million maloti, was upon further reflection and negotiation by the parties' counsel reduced to M100,000.00.

In this case I have taken into account the delay as already mentioned, the words complained of; and the fact that the defamation was not solely and directly aimed at the plaintiff; but was rather a wholesale swipe at the judiciary where reference was made to plaintiff in particular.

I make the following order:

Judgment is granted in favour of the plaintiff against both defendants jointly and severally in the amount of one hundred and eighty thousand maloti (M180,000.00) with costs in the matter.

L. A. MOLETE
ACTING JUDGE

For Plaintiff : Mr. Nathane
For Defendant : No Appearance (E.H. Phoofolo – Attorneys
of record)