

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/926/2020

In the matter between:

BOKANG MOHAJANE

PLAINTIFF

AND

FIRST NATIONAL BANK – LESOTHO

1ST DEFENDANT

MOEKOA THAHANE

2ND DEFENDANT

Neutral Citation: Bokang Mohajane v FNB – Lesotho & Another [2022] LSHC
137 Civ (18 AUGUST 2022)

CORAM: MOKHESI J

HEARD: 05TH APRIL 2022

DELIVERED: 18 AUGUST 2022

SUMMARY:

LAW OD DELICT: *Commercial appropriation of a person's image- Applicable principles- Plaintiff alleging that his image was used for commercial purposes without his consent- Plaintiff failing to discharge the onus of proof- The plaintiff further alleging that his rights to corpus and privacy have been infringed- the plaintiff failing to discharge the onus, the claims accordingly dismissed with costs*

ANNOTATIONS:

CASES:

Grütter v Lombard and Another 2007 (4) SA 89 (SCA)

Naidoo v Senti LAC (2007 – 2008) 161

Makakole v Vodacom Lesotho (Pty) Ltd C of A (CIV) NO: (01 January 2004)

National Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)

Pillay v Krishma 1946 AD 946

Wells v Atoll Media (Pty) Ltd [2010] 4 ALL SA 548 (WCC) (9 November 2009)

BOOKS:

Neethling et al *Law of Delict 3rd Ed.*

ARTICLES:

S. J Cornelius, Commercial Appropriation of a person's image: Wells v Atoll Media (Pty) Ltd (unreported 1196/2006) [2009] ZAWCHC 173 (9

November 2009); Potchefstroom Electronic Law Journal (PELJ) PER

Vol. 14(2011)

JUDGMENT

[1] **Introduction**

At the outset, it should be stated that the plaintiff's pleadings leave a lot to be desired. They are not a model of clarity and precision in the language used. The plaintiff had instituted an action against the defendants wherein he sought the following reliefs:

“(i) The Respondent’s wrongful and unlawful use and posting of the plaintiff’s image/or photographs without permission and consent and posting same on static Billboards, Street Poles Advertisements and National Newspapers, to the tune of TWELVE MILLION MALOTI (M12,000,000.00), all around Lesotho and part of South Africa and every other place where there are distribution points of Lesotho newspapers;

(ii) The Respondents’ wrongful and unlawful posting of plaintiff’s image/photographs without permission and consent on, for a period of five months after which some were removed without informing him as means of advertising to the tune of FOUR MILLION MALOTI (M4,000,000.00);

(iii) The Respondent’s wrongful, unlawful use of the Plaintiff’s image and photographs in total violation of Plaintiff’s privacy to the tune of THREE MILLION MALOTI (M3,000,000.00);

(iv) The Respondents’ wrongful, unlawful and traumatizing, intimidation and persuasion to accept liability of “Lira Li tjamme’s articles and assuming ‘Lira Li Tjamme’s identity thereof through police to the tune of TWO MILLION MALOTI (M2,000,000,00);

(v) *The Respondent's wrongful, unlawful and malicious insinuations to the Plaintiff to the effect that the Plaintiff is "Lira Li Tjamme", thus putting Plaintiff's life at risk and potentially in conflict with people that have been offended by the general nature of 'Lira Li Tjamme's articles and Facebook Posts, to the tune of TWO MILLION MALOTI (M2,000,000.00);*

(vi) *The Respondents' wrongful and unlawful intimidation of portraying the plaintiff personal being of public scrutiny and in contravention of his personal rights to the tune of TWO MILLION MALOTI (M2,000,000.00);*

(vii) *18.5 percent interest at tempore morae;*

(viii) *collection fee at 10 percent of the total claim" (sic)*

[2] **Respective Parties' cases**

The plaintiff testified and led evidence of one witness Ms Lintle Masilo and tendered documents in support of his case.

Documentary evidence:

- (i) Exhibit A – Plaintiff's photographs as they appear on the static Billboards, Street Poles Advertisements and National Newspapers.
- (ii) Exhibit B – A cease and desist letter from FNB to the Plaintiff
- (iii) Exhibit C – Plaintiff's letter of suspension from Supertactix Marketing and Advertising Agency and confirmation of plaintiff's prior employment relationship from the same Agency
- (iv) Exhibit D – Plaintiff's Letter of Reference from Media 24 Magazines

- (v) Exhibit E – Plaintiff’s curriculum vitae and academic certificates
- (vi) Exhibit F – Photos of the plaintiff in the company of prominent people and other documents
- (vii) Exhibit G – Documents appearing from page 112 to 121 of the bundle of documents.

The defendant’s case, on the one hand, was anchored on the oral testimony of two witnesses:

- (a) DW2 – Ms Lebohang Setlalekgosi
- (b) DW2 – Mr Moekoa Thahane

Respective Parties’ Evidence

[3] Plaintiff’s Evidence

Plaintiff testified that in July 2019 he was approached by the 2nd defendant, Mr. Moekoa Thahane who is the 1st defendant’s agent responsible for sourcing individuals who are willing to participate in its advertising campaigns. The 2nd defendant approached the plaintiff because they were acquaintances. What would happen after the 2nd defendant had sourced the models was that he would take the pictures of individuals chosen as models and would later make a selection of the picture which best suited the first defendant’s advertising campaign. Essentially, the 1st defendant would feature the selected picture in advertising its products. The plaintiff told the court that he was informed by the 2nd defendant that once his picture had been selected, he would sign a release or consent form or contract stating the terms of their engagement. He testified that he consented to his photographs

being taken by the 2nd defendant. He stated that his pictures were taken following what he called “a verbal understanding” made by the 2nd defendant to revert to him with a written contract for his signature once his picture is chosen as the best.

[4] He testified that at the photoshoot, the first defendant’s Marketing Manager DW1 (Ms Lebohang Kou) was present. The 2nd defendant was not present. After the photoshoot the 2nd defendant confirmed to him that he saw the pictures. A week after the photoshoot, he telephonically called the 2nd defendant to inquire about the progress of selecting eligible pictures. The plaintiff was told by the 2nd defendant that the first defendant had not yet made the decision.

[5] Sometime in September 2019 he got a call from his acquaintance that he saw his pictures of the Billboards of the first defendant. Those are the pictures appearing in Exhibit A. He told the court he was bewildered by this as his consent had not been sought. He had not signed the release form/consent or contract – the 2nd defendant had promised. Because the 2nd defendant was uncooperative in providing answers why this was happening, he approached the first defendant’s offices directly. He approached Ms Lebohang Kou as the 1st defendant’s Marketing Manager, who told him that the first defendant did not have his contract, rather he should talk to the 2nd defendant as he is the person he is contracted to.

[6] As the 2nd defendant was uncooperative he approached the Pitso Ground Police to mediate. The 2nd defendant did not honour the call to come to the police station, while the 1st defendant was represented by the said Ms

Lebohang Kou. Before the mediator, Ms Kou repeated the same stance that the plaintiff was contracted to the 2nd defendant and not the 1st defendant.

- [7] He testified that sometime in October 2019 an article appeared on the Facebook page called “Lira Li Tjamme” which related his experiences with the first defendant. He testified that he had informed his friends and relatives about the treatment he suffered in the hands of the 1st defendant. Some two days later he received a call from Pitso Ground Police informing him about the complaint which had been lodged by the 1st defendant and wanted to know his whereabouts, to which he replied that he was at his partner’s staff residences at Maseru Central Prison.
- [8] The police officer by the name of Koikoi came and confronted him about the issue of ‘Lira Li Tjamme’ and told him to confess his association with it. Upon the plaintiff denying any association, the officer took him in a vehicle to the 1st defendant’s head office where they met Ms Lebohang Kou. He testified that upon Ms Kou seeing him, she said he was ‘Lira Li Tjamme’ and that he should be arrested. Ms Kou made him to sign two letters and the officer drove him back home. A week later he received a call from the police that he should report at the Pitso Ground police station. Upon arrival at the police station, one officer told him that he was in possession of money from the 1st defendant so that he should stop harassing it. He was given the money and he counted it, and it amounted to Two Thousand Eight Hundred Maloti (M2800.00). He said he signed for the money and took it because he felt intimidated by the police.

[9] The Plaintiff was cross-examined by the defendants' Counsel, Adv. Shale and the following information was extracted:

(a) The plaintiff was recruited by the 2nd defendant and it was not their first campaign as they had worked together on a Vodacom Lesotho campaign in April 2019. His photograph was used in that campaign.

(b) The terms of the Vodacom campaign were:

(i) It was a once off photoshoot for which he was paid M1000.00;

(ii) That his pictures were used on the Static Billboards, pamphlets and shops around the country;

(iii) That the contract did not specify the duration within which they would be used;

(iv) He had consented to his pictures being taken after being approached by the 2nd defendant.

A question was put to him that when the 2nd defendant engaged him for FNB campaign, the former told him that the terms and conditions will be like Vodacom Lesotho campaign. He denied this as false.

[10] What emerged, further, was that, he never reported police officer Koikoi to his superiors about the incident when the latter took him to the plaintiff's headquarters. Even though he told the court that he took the money under

duress he never reported the incident to police authorities. It was put to him as he had already sought police mediation, when defamatory comments appeared on Lira Li Tjamme the 1st defendant asked the police office to deliver the letter of lease and desist to him. His answer was that it is a lie. He said that when he was labelled as ‘Lira Li Tjamme’ by Ms Lebohang Kou, they were in the 1st defendant’s boardroom with police officer Koikoi. He said he lost all employment and business opportunities because of this label.

[11] PW2, Ms. Lintle Masilo testified that she is the plaintiff’s partner. She confirmed that the plaintiff’s pictures were on the Billboards. She was telephoned by the plaintiff, telling her that police officer Koikoi had come to see him and was accusing him of being ‘Lira Li Tjamme’. She told the court that the plaintiff was called by the Pitso Ground Police and when he returned home, he had money amounting to M2300.00 or M2500.00, which he said was from the 2nd defendant. Under cross examination, when the witness was asked whether the plaintiff had been permanently employed by Supertactix before being dismissed, her answer was that she did not know. She told the court that the money the plaintiff received was used for seeking legal advice. She confirmed that the issue of duress upon the plaintiff by police officer Koikoi was never reported to police authorities.

[12] **Defendants’ Evidence**

The defendant’s case was based on the oral testimony of two witnesses as already said. The first witness was Ms Lebohang Setlalekgosi (DW1) who testified that she worked as the first defendant’s Marketing Manager – during the time in question. She testified that in June 2019 the 1st defendant

had a campaign to advertise its products. In order to actualize it, the 2nd defendant was approached to source models for the campaign. The 2nd defendant would source models and discuss the terms of their engagement before the photoshoot. She said the plaintiff's pictures were approved following the internal selection process.

[13] She testified that after a short while, the plaintiff came to her office asking for his payment, to which she responded that the 2nd defendant was the right person to field the questions regarding the matter. After some time, she received a telephonic call summoning her to the police station, which she did. She was surprised, upon arrival at the police station, to find the plaintiff there claiming his payment. She told the court that the plaintiff said that he was in desperate need of money for travelling out of the country. She responded that the rightful person to which the plaintiff should be discussing his payment was the 2nd defendant as the 1st defendant dealt directly with the agencies.

[14] She told the court that after a while she noticed a post on 'Lira Li Tjamme' Facebook post which she considered to be a smear campaign against the 1st defendant. She brought it to the attention of the 1st defendant's management who instructed her to write a cease and desist letter to the plaintiff. As she could not find the 2nd defendant to personally to deliver the letter to the plaintiff, she sought help from the police officer who had earlier mediated their payment dispute. The police officer brought the plaintiff to her office, where in the boardroom only three of them, plaintiff denied having anything to do with 'Lira Li Tjamme' Facebook posts. The plaintiff however, conceded that he told his friends and family about his experience, and that it

could have been anyone of them who was responsible for the Facebook post. The witness testified that the plaintiff received the letter and signed on her copy. She told the court that the plaintiff had promised to go onto the post and distance himself from the defamatory statement. DW1's cross examination was not effective and left her version of events undisturbed.

[15] DW2, was Mr Moekoa Thahane, who testified that he is a businessman and own a Company Blackdoor Holdings. It is a Media Company which takes pictures and produce radio advertisements. It sources models for those purposes. In April 2019, he engaged the plaintiff as a model on Vodacom Lesotho campaign advertising its new product called Mokhatlo Savings Account.

[16] In June 2019 on being approached by the 1st defendant to do a campaign for its product, he cast four individuals inclusive of the plaintiff on terms similar to the Vodacom project hence they proceeded with the photoshoot. After a few days he was informed by the 1st defendant that the plaintiff's picture had been selected as the preferred one. The plaintiff was to be paid M1000.00 for the campaign. He testified that the 1st defendant advised him that there was some saving on the project and therefore, the payment for models would be increased from M1000.00 to M3000.00. The plaintiff, after some time approached him asking for his payment. He then informed him that he was still awaiting payment from the 1st defendant.

[17] He told the court that in September 2019 he received a telephone call from police officer Koikoi telling him that the plaintiff had approached their office for intervention regarding payment delay. Police Officer Koikoi

advised the witness that he should bring the money to the police station. The witness brought the money in cash to the Administration desk at the police station and what he called an 'Occurrence Book ticket' was issued to him. The amount was M3000.00, which told the court, officer Koikoi later confirmed the plaintiff came and collected it.

[18] During cross-examination it was put to the witness that the plaintiff never consented to the taking of his pictures and placing them on Billboards, to which question the witness said the plaintiff consented. DW2 said the contract between his company and the plaintiff was concluded and signed by the parties. It was further put to him that unlike in Vodacom campaign "you never explained the terms to him in FNB because there was no contract?" The witness said he explained the terms as he had a working relationship with the plaintiff. It should be stated that the witness did not produce the written contract which he told the plaintiff signed.

[19] **Issues for determination**

(i) Whether the 1st defendant used Plaintiff's photographs/images without his consent.

(ii) Whether there has been impairment of Plaintiff's privacy

[20] **Analysis and the applicable law**

(i) **Unauthorized use of one's photographs/images for commercial purposes:**

The common law approach to this kind of a case is articulated in the case of **Grütter v Lombard and Another 2007 (4) SA 89 (SCA)**. That case recognised an image as an aspect of personality rights. An image forms part of the person's identity and therefore, worthy of protection. Nugent JA, relied on the Afrikaans work of Neethling, in which the learned author explains the identify as follows:

“[i]dentity is that uniqueness which identifies each person as a particular individual and as much distinguishes him from others. Identify manifests itself in various indicia by which a person involved can be recognised: that is, facets of his personality which are distinctive or peculiar to him, such as his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etcetera. A person has a definitive interest that the unique nature of his being and conduct must be respected by outsiders. Similarly, identity is infringed upon if indicia thereof is used without consent in a way which is not compatible with the image of the right-holder.” (translation provided by S. J Cornelius, **Commercial Appropriation of a person's image: Wells v Atoll Media (Pty) Ltd (unreported 1196/2006) [2009] ZAWCHC 173 (9 November 2009); Potchefstroom Electronic Law Journal (PELJ) PER Vol. 14 (2011) para. 7).**

[21] In **Grutter** Nugent JA recognized that the interest which a person has in preserving/protecting his identify/image from commercial exploitation is not distinguishable from and is encompassed by the protectable rights relating to dignitas (at p.95; para.12) (See also : **Wells v Atoll Media (Pty) Ltd [2010] 4 ALL SA 548 (WCC) (9 November 2009)**). The case of **Grutter** was concerned with the unauthorized use the person's name for commercial

advantage in a situation where it was misrepresenting that a person was associated with the infringing entity. But in the same case the court recognized that unauthorized usage of a person's image for commercial gain/advertising purposes violates his right to identity.

[22] Reverting to the facts of the case, as already seen, it is the plaintiff's case that his images were used by the 1st defendant in its advertising campaign without consent. He testified that no contract was ever signed regarding terms and conditions of their engagement. However, on the one hand the defendants deny that plaintiff's images were used without their consent. They, on the contrary, allege that terms and conditions were agreed upon, hence the plaintiff's submission to photo shooting exercise. The two versions are mutually destructive, and this being action proceedings the approach is that articulated in **National Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E)** a decision which was followed in **Naidoo v Senti LAC (2007 – 2008) 161**. In **National Insurance Co. Ltd v Jagers** (above) at 440 E – G the court stated approach as follows:

“[W]here the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will

accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[23] What is disputed in this case is whether there was a contract authorising the 1st defendant to use the plaintiff's images for advertising purposes. It is common cause that the plaintiff agreed that his photographs be taken. However, that is not the end of the matter because the standard practice was that after the photoshoot, the photographs had to undergo an internal approval process whose aim was to pick a suitable one. It is the plaintiff's case that before the photoshoot he was advised that the same procedures would be followed and in that in the event that his photograph got chosen he would then sign the contract authorising the usage of his photograph. He testified that he was taken aback upon seeing his photographs on advertising mediums without his consent.

[24] It is common cause that the plaintiff's pictures were used in the 1st defendant's campaign, which pictures were displayed on Billboards, newspapers and also appeared online. As already stated, the parties are in disagreement regarding the existence of a written contract. Mr Thahane (2nd defendant) seemed to vacillate between saying he engaged the plaintiff following his explanation of terms and conditions and between saying a contract was signed. The said contract was however, not handed in as evidence by Mr Thahane. I find that he was less candid with the court when he asserted that the contracts were signed. A sound or prudent business practice would entail keeping the copies for record purposes, but in the

absence of the contract I am not prepared to agree that it was ever signed. However, this notwithstanding, in my considered opinion, the parties had agreed on the payment hence the plaintiff's approach to the police to mediate. DW2's evidence that she was summoned to the police station where the plaintiff had sought police intervention regarding his delayed payment was uncontroverted. Police's intervention was not sought because the 1st defendant had flighted his images without his consent. This is consistent with his conduct following the meeting at the police station. Shortly after the meeting an amount of money was left at the police station as payment, and the plaintiff collected it without any hesitation. His assertion that he took it under duress is untrue. If he was forced to accept the money, he would have sought help from officer Koikoi's superiors, but he never did. The plaintiff conceded that he was paid an amount of M1000.00 on a Vodacom campaign on engagement by the 2nd defendant as recently as 2018, and therefore it would not be improbable that he would be engaged on similar terms in the 1st defendant campaign, hence his acceptance of M 2800.00, which he collected at the police station. On the conspectus of these facts I find that the plaintiff has failed to discharge the ouns of showing that his images were used without his consent.

[25] (ii) **Invasion of the Plaintiff's Privacy**

In terms of prayer (iii) the plaintiff is basing his case on privacy. He says that the use by the defendant of his photographs without his consent violated his privacy. In order to succeed, the plaintiff must allege and prove a wrongful and intentional infringement of his right to privacy. (**Makakole v Vodacom Lesotho (Pty) Ltd C of A (CIV) NO: (01 January 2004) at para.7**). However, in view of the conclusion reached above that the

plaintiff's photographs were used with his consent, his claim on this leg should fail as well.

[26] (iii) **Right to Corpus**

In terms of prayer (iv) the plaintiff prays that he be awarded damages for being intimidated into accepting that he was responsible for “Lira Li Tjamme” Facebook post. I am reading the reliefs sought benevolently, because as I stated earlier, the level of drafting leaves a lot to be desired. The right to corpus is protected under our common law, against every infringement of the person's “physique or psyche.” (**Neethling et al Law of Delict 3rd Ed. P. 332**). Psychological harm in individuals occur as a result of fear or emotional shock (**Neethling et al ibid**). For liability to arise, the following requirements must be satisfied.

- (i) The infringement must be wrongful and be accompanied by *animo injuriandi*.

[27] The learned authors, **Neethling et al**, (*above*), regarding wrongfulness, said the following:

“Due to the fact that the Corpus is regarded as being one of man's most valuable legal interests, every factual infringement of the physical – mental body is per se contra bonos mores or wrongful...”

It is trite that he who alleges must prove (**Pillay v Krishma 1946 AD 946 at 952 – 953**). In the present matter the plaintiff testified that he was intimidated into admitting that he was responsible for the defamatory

Facebook post, concerning 1st defendant. It is true that the plaintiff was brought to the office of Ms Kou where he was given a Cease and Desist Letter. In his evidence he told the court that he was forced to issue an apology or statement distancing himself from the defamatory statement. But that apology was never issued neither did he publicly distanced himself from the statement. I find the defence's version probable that they resorted to police for help when a defamatory statement appeared on Facebook, the reason being that the plaintiff had already sought police intervention in his payment dispute with the defendant's, and for the fact that the police were already involved in the matter, they felt it appropriate to resort to them. The plaintiff's case is that he was coerced into admitting responsibility for the defamatory Facebook post, but there is no evidence that he was ever intimidated into admitting liability nor is there any that he ever admitted liability. In short, the plaintiff has failed to prove that he coerced into admitting liability for the defamatory post.

[28] In the result, therefore;

(1) The action is dismissed with costs

MOKHESI J

For the Plaintiff:

**Adv. N. Hlalele instructed by K.D
Mabulu & Co. Attorneys**

For the Defendants:

**Adv. Shale Shale instructed by Dr I.M.P
Shale**