



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 77/2013

In the matter between

**AFRICAN ECHO (PTY) LTD t/a TIMES
OF SWAZILAND
THULANI THWALA
MANDLA BHEMBE**

1ST APPELLANT

2ND APPELLANT

3RD APPELLANT

And

INKHOSATANA GELANE SIMELANE

RESPONDENT

Neutral citation: *African Echo (Pty) Ltd t/a Times of Swaziland vs
Inkhosatana Gelane Simelane (77/2013) SZSC 83
(3 December 2014)*

Coram: **RAMODIBEDI CJ, MOORE JA AND OTA JA**

Heard **21 NOVEMBER 2014**

Delivered: **3 DECEMBER 2014**

Summary: **Civil appeal: appeal against the decision of the High Court awarding the sum of E550,000 (Five Hundred and Fifty Thousand Emalangen) to the Respondent as damages arising out of**

defamatory publication by the Appellants; whether context of the words in the publication an innuendo or defamatory per se; guiding principles discussed; whether quantum of damages excessive; guiding principles in assessment of damages considered; held: the publication was unreasonable in all the circumstances of the case; held further: no misdirection disclosed in the assessment of the quantum of damages by the court *a quo*; appeal dismissed with costs.

JUDGMENT

OTA. JA

[1] INTRODUCTION

This appeal is steeped in the fundamental human right of dignity of every individual in the Kingdom of Swaziland as well as the right of freedom of expression. In the wake of the new constitutional dispensation, both common law rights acquired constitutional hegemony in the Constitution Act, 2005.

- [2] Both fundamental rights are of paramountcy in a democratic society. Commenting on the right of dignity in my decision in **The Swaziland Government v Aaron Ngomane Civil Appeal Case No. 25/2013**, paras [1] – [4], I stated as follows:-

“[1] We live in an era of human rights. As Justice Pikiis, President of the Supreme Court of Cyprus, rightly observed in the text “The

**Constitutional Position and Role of the Judge in a Civil Society.”
Commonwealth Jud. J, December 2000 at 9.**

‘The essence of human rights lies in the existence within the fabric of the law of a code of unalterable rules affecting the rights of the individual. Human rights have a universal dimension, they are perceived as inherent in man constituting the inborn attributes of human existence to be enjoyed at all times in all circumstances and at every place.’

- [2] The substratum of all human rights is the right of dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole.**
- [3] It is universally recognized that human dignity is firstly the dignity of each human being as a human being. In this encapsulates the viewpoint that human dignity includes the equality of human beings. Discrimination infringes on a person’s dignity. Human dignity is a person’s freedom of will. This is the freedom of choice given to people to develop their personalities and determine their own fate. Human dignity is infringed if a person’s life or physical and mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members.**
- [4] Even though this matter is not steeped in constitutional damages, it is important that we observe that human dignity is itself a right protected under the Constitution Act 2005, via section 18 as read with section 14 (1) (e) thereof.”**

[3] Yes, indeed the right of human dignity is guaranteed by the Constitution Act, via sections 14 (1) (e) and 18 thereof, in the following words:-

“14 (1) The fundamental human rights and freedoms of the individual enshrined in this chapter are hereby declared and guaranteed namely-----

(e) Protection from inhuman and degrading treatment, slavery and forced labour, arbitrary search and entry; ----

18 (1) The dignity of every person is inviolable.

- (2) **A person shall not be subjected to torture or inhuman or degrading treatment or punishment.”**

[4] Similarly, the right of freedom of expression in a democratic society where the need of public information through the robust criticism and comments of the media, cannot be over-emphasized. Section 24 of the Constitution protects the right of freedom of expression as follows:

- “24 (1) **A person has a right of freedom of expression and opinion.**
- (2) **A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say**
- (a) **freedom to hold opinions without interference;**
 - (b) **freedom to receive ideas and information without interference;**
 - (c) **freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and**
 - (d) **freedom from interference with the correspondence of that person.**
- (3) **Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -**
- (a) **that is reasonably required in the interests of defence, public safety, public order, public morality or public health;**
 - (b) **that is reasonably required for the purpose of -**
 - (i) **protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;**

- (ii) preventing the disclosure of information received in confidence;
 - (iii) maintaining the authority and independence of the courts; or
 - (vi) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or
- (c) that imposes reasonable restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.”

(emphasis added)

[5] I note straightaway that the right of freedom of expression is not the law of the Medes and Persians. It is not sacrosanct. The Constitution subjects it to respect for the rights of dignity of others, amongst other fundamental rights.

[6] It follows that where these two crucial fundamental rights conflict, it becomes necessary that the courts embark on a balancing act in order to maintain the very fabric of our constitutional democracy. This requires a value judgment to ensure that none prevails over the other.

[7] Speaking about this balancing prerogative in the case of **Khumalo v Holomisa 2002 (5) SA 401 (CC) O’Regan J**, made the following condign remarks.

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is

crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledging democracy, if they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society-----

However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality-----

It has long been recognized in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name-----

Under our new Constitutional order, the recognition and protection of human dignity is a foundational constitutional value-----

The value of human dignity in our Constitution therefore values both the personal self-worth as well as the public's estimation of the worth or value of an individual-----

The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.”

[8] This right to human dignity is obviously what propelled the Respondent (as Plaintiff) to approach the court *a quo*, alleging that a certain article published by the Appellants (as Defendants) on 9 May 2009, damaged her reputation and good name and that she suffered injury thereby. The Respondent claimed damages, in the following terms:-

“(1) Payment of the sum of E2,000,000-00.

- (2) **Interest thereon at the rate of 9% per annum from the date of summons to date of payment.**
- (3) **Costs of suit.**
- (4) **Further and / or alternative relief.”**

[9] It is not in dispute that the Respondent is a very powerful woman in the political scene of Swaziland. She is one of the foremost and very few women who have risen to power to the extent of acquiring the nationally acclaimed appellation “**Iron Lady.**” She wears two hats. She is both the Senate President as well as Acting Chief of Kontshingila. She can safely be said to be at the very pinnacle of her profession. She is indeed a force to be reckoned with.

[10] Also not in dispute is that the Appellants, who comprise of the 1st Appellant who owns the newspaper that carried the publication, the 2nd Appellant its Publisher and the 3rd Appellant the Editor and Reporter, published the article in issue.

[11] Suffice it to say that after a full blown trial, which saw the Respondent testify and call three (3) other witnesses in support of her case, and the Appellants also paraded three witnesses in advancement of their defence, the court *a quo* per **Hlophe J**, rendered judgment on 5 December 2013. The court upheld the Respondent’s claim and awarded her damages in the sum of E550,000.00 (Five Hundred and Fifty Thousand Emalangeni), interests at the rate of 9% per annum from date of judgment to date of payment as well as the costs of suit.

[12] **THE APPEAL**

The Appellants are dissatisfied with the judgment of the court *a quo*. They have approached this court for its intervention via a notice of appeal which embodies the following grounds of complaint.

- “1 The court *a quo* erred in law and fact in finding that the meaning ascribed to the words complained by the Defendant was not different to the one pleaded and accordingly not dismissing the Respondent’s action on that basis.**
- 2. The court erred in that even if the court correctly found that the meaning ascribed to the words complained of by the Respondent were not different to the meaning pleaded, in not upholding the Appellants’ defence that the publication of the words concerned was not unlawful because the Appellants were not aware of the falsity of the articles and their publication was not made negligently or recklessly and such publication was made objectively, reasonably and without *animus injuriandi*.**
- 3. The court erred in that even in the event it correctly found for the Respondent, which finding Appellant challenges on the basis set out above, the award of E550,000.00 was with all due respect excessive in all the circumstances of the matter and with due regard to all relevant precedents, the value of currency and other applicable considerations including but not limited to the effect that an award of this nature has on the flow of information to the public.**
- 4. With regard to the ground of appeal above, the Honourable court erred in finding, that there was evidence that the Appellant took sides in the chieftaincy dispute and that the publication was made with malice.”**

[13] The grounds of appeal raise only two (2) issues for determination namely:-

1. Whether or not the court *a quo* erred in finding the Appellants liable for defamation flowing from the article in question.

2. Whether or not the court *a quo* erred in awarding damages in the sum of E550,000-00 (Five Hundred and Fifty Thousand Emalangeni), to the Respondent.

[14] A proper decision of these issues will entail an enquiry as to whether the court *a quo* committed a material misdirection in its decision, resulting in a miscarriage of justice. I will now consider the issues raised *ad seriatim* vis a vis the impugned judgment to gauge their efficacy.

[15] **ISSUE ONE: Whether or not the court a quo erred in finding the Appellants liable for defamation flowing from the article in question?**

[16] A proper answer to the foregoing question is best approached from a critical look at the article of 9 May 2009. This appears in these proceedings as annexure A. I have carefully considered the said article and I am convinced that **Hlophe J** comprehensively and accurately captured its essence (with slight adaptations by me) as follows in paragraphs [3] - [12] of the impugned judgment.

“[3] **The first page of the Swazi News of the 9th May 2009 bears the words, “ MR. MAHLANGU’S SCHOCKER” above the bold words “I AM GELANE’S FATHER” below which are written the following sentences:-**

- **This man tells us Gelane is a Mahlangu, not a Simelane as the nation knows.**
- **He also claims Gelane deserted him and does not care about him.**
- **Ludzidzini Committee has been told about this.**

Next to the bold Headlines referred to above is a photograph allegedly belonging to the person who claims to have fathered the Plaintiff, one Ambrose Mahlangu, who looks old and frail.

[4] At page 2 of the Newspaper concerned there are three articles on the same story which bear the following titles or headings:-

- **SENATE PRESIDENT GELANE IS MY CHILD**
- **My daughter deserted me – Father.**
- **----this means Gelane could be acting illegally.**

[5] Under the first title or heading on page 2 referred to above, which from the boldness of the print as distinguished from the other two, suggests it is the main story, there is written the following paragraph in big eye – catching words as an extract from the story:-

“----the revelation by Mahlangu will definitely come as shocking news to Kontshingila residents, where Gelane is Acting Chief. The area is dominated by the Simelane clan that has been ruled by Gelane for a long time as chief albeit on an acting basis.

[6] The opening sentences of the article, which I have referred to as the main one, reads as follows:- “Mbabane - Gelane is my daughter. The quote sounds innocent but when you take a closer look at it you will realize that it has the potential of changing the fortunes (for the worst) of one of the country (sic) iron ladies, Senate President Gelane Zwane.”

[7] In the article titled “My daughter deserted me – Father”. It is stated that, “Gelane knows her real father is out there and where he is employed but has decided to stay away from him.”

[8] The article titled “---- this means Gelane could be acting illegally,” has the following opening words stated:-

‘If Ambrose Mahlangu’s shocking revelation is anything to go by, then Senate President Gelane Zwane is not the rightful person to act or be appointed as chief of Kontshingila.’

[9] A reference was also made to certain allegations attributed to the Former and Late Ludzidzini Governor Jim Gama to the following effect:- “the area should be under the guidance of a person originally born as a Simelane.”

- [10] The following is also stated in this article; “When the Swazi News visited Kontshingila this week, some residents sounded shocked that Gelane could be a Mahlangu.”
- [11] On the last paragraph of page 2, of the Swazi News concerned, the following statements were made in the article:- “They (Simelane’s) have always known her as a Simelane thus her rise to the position she has held as acting chief.”
- [12] The main article also stated the following which is for reasons that will follow crucial. “Although I never took her (Dorah Dube) as my wife, but I paid the necessary customary dues to the Dube family and they know it.”

[17] It is in respect of the foregoing article that the Respondent (as Plaintiff) pleaded as follows in paragraphs [6] – [10] of her Particulars of Claim:-

“6. On or about the 9th day of May 2009 at Mbabane an article entitled “I am Gelane’s Father” was published in the said newspaper.

A copy of the newspaper is annexed and marked “A”

7. The said newspaper is a paper widely distributed and widely read in Swaziland and abroad by members of the public.
8. The said newspaper stated that the Plaintiff was not a Simelane born of the Chief of Kontshingila but a Mahlangu.
9. The said words in the context of the article are wrongful and defamatory of Plaintiff in that they were intended and were understood by the readers of the newspaper to mean that Plaintiff was an imposter who has usurped the chieftaincy of Kontshingila when she is not entitled to so act by virtue of the fact that she is not a Simelane.
10. As a result of the defamation Plaintiff has been damaged in her reputation and good name and has suffered damages in an amount of E2,000,000.00 (Two Million Emalangeneni).” (underlining mine)

[18] In their plea, the Appellants (as Defendants) answered the foregoing allegations of fact as follows in paragraphs [3] – [8] thereof.

“3. Ad paragraph 6
The contents of this paragraph are admitted

4. Ad paragraph 7
The contents herein are not in dispute.
5. Ad paragraph 8
The contents herein are disputed and Defendant's state that the said article stated that Ambrose Mahlangu alleges that Gelane Simelane was his daughter.
6. Ad paragraph 9
The Defendant denies the allegations that the article was wrongful and defamatory to Plaintiff. Defendant pleads that:-
 - 6.1 The article was in essence true
 - 6.2 The said publication was to the benefit of the public.

Alternatively

- 7 The Defendant pleads that the publication of the article was not unlawful in that:-
 - 7.1 Defendants were unaware of the falsity of any averments in the articles, in that Defendants relied on the claim by Mr Ambrose Mahlangu,
 - 7.2 Defendants did not publish the article recklessly. That is not caring whether the contents of such article were true or false, the facts the Defendants rely on and in this context are the contents of interview report of Mr. Mahlangu confirming the Plaintiff as his daughter.
 - 7.3 Defendants were not negligent in publishing the article, in that attempts were made to contact Plaintiff for her comments on the claims by Mr Mahlangu, however the Plaintiff did not answer her phone or respond to messages left with her secretary.
 - 7.4 In view of the facts alleged the publication was objectively reasonable.
 - 7.5 The articles were consequently published without *animus injurandi*.

8. Ad paragraph 10

The contents herein are denied, and Defendant avers.

8.1 Defendant disputes that the Plaintiff has suffered damages in the amounts claimed or at all.

8.2 Defendant further states that the amount claimed by Plaintiff is excessive.

8.3 Defendants deny that they are obliged to pay the Applicant (sic) the amount claimed or any at all.” (emphasis added)

[19] It is patently obvious to me that while the Appellants denied that the context of the article are wrongful and defamatory of the Respondent, they however failed to deny the allegation that the words in the context of the article **“were intended and were understood by the readers of the newspaper to mean that Plaintiff was an imposter who had usurped the chieftaincy of Kontshingila when she is not entitled to so act by virtue of the fact that she is not a Simelane.”**

[20] The legal position in these circumstances, is that the Appellants are bound by their plea and must be taken to have admitted this portion of the Respondent’s pleading. This derogates the necessity of leading any further evidence in proof of it.

[21] Adumbrating on this trite principle of law in my decision in **The Swaziland Government v Aaron Ngomane (Supra) paragraphs [27] and [32] (Ramodibedi CJ and Maphalala JA concurring)** I stated as follows:-

“[27] Since this issue turns on the general principle that parties are bound by their pleadings, it is important that we detail the functions of pleadings in this regard which are two dimensional. This is to

facilitate a proper resolution of this issue. These functions are as follows:-

1. Pleadings define with clarity and precision the issue or questions which are in dispute between the parties and fall to be decided by the court. If the Defendant admits in his statement of defence a fact which is alleged in the statement of claim, what is admitted ceases to be in controversy between the parties. It need not be proved at the trial by any of the parties but is taken as established. It is only those facts alleged in the statement of claim and denied in the statement of defence that will require trial. They constitute the facts on which the parties have joined issues. These alone call for trial. Evidence has to be addressed to prove them. Accordingly, it is at the close of the pleadings that the scope of the dispute can be determined.

[32] From the combined effect of the two principles detailed ante emerges the cardinal rule that a party is not permitted to advance evidence on a matter that is not raised in his own pleadings nor in that of his opponent. Having specifically pleaded a fact a party is bound by the fact as pleaded and cannot seek to lead evidence at variance with it. The court is also bound by the pleadings. Its jurisdiction is circumscribed within the facts as pleaded by the parties.”

[22] Having admitted that the words in the context of the article were intended and were understood by the readers of the newspaper to mean that the Respondent was an imposter who had usurped the chieftaincy of Kontshingila where she is not entitled to act by virtue of the fact that she is not a Simelane, the Appellants cannot turn around, as they sought to do both in the court *a quo* and this court, to say that the words used are an innuendo and not defamatory per se. This is because by their admission they agreed that the meaning is apparent from the words used and is so understood by the ordinary reader of the newspaper, which reader, according to the authorities is the ordinary intelligent and reasonable man on the streets of Swaziland. This takes the words in the context of the article out of the realm of an innuendo. This is the applicable test. See for instance: **Argus Printing**

and Publishing Co Ltd v Esselen’s Estate 1994 (2) SA 1 (A); Sankie Mthembu – Mahanyele Mail and Guardian and Another [2004] All SA 511 (SCA) paragraph [26].

[23] In spite of this established fact, learned counsel for the Appellants, Adv. Flynn, tenaciously contended that the words in the context used are an innuendo and not defamatory per se. I find myself unable to subscribe to this proposition for reasons that appear hereunder.

[24] The law of defamation construes an innuendo to mean, an explanation of a statement’s defamatory meaning when that meaning is not apparent from the statement’s face. This concept is appositively espoused by **Blacks Law Dictionary (8th ed) pages 805 – 806**, which defines the term “**innuendo**” in the following words:-

“An oblique remark or indirect suggestion of a derogatory nature. An explanatory word or passage inserted parenthetically into a legal document. In criminal law, an innuendo is a statement in an indictment showing the application or meaning of matter previously expressed, the meaning of which would not otherwise be clear. In the law of defamation, an innuendo is the plaintiff’s explanation of a statement’s defamatory meaning when that meaning is not apparent from the statement’s face. For example, the innuendo of the statement “David burned down his house” can be shown by pleading that the statement was understood to mean that David was defrauding his insurance company (the fact that he had insured his house is pleaded and proved by inducement). CF. INDUCEMENT (4); COLLOQUIUM. [Cases: Libel and Slander; Injurious Falsehood 4, 129]

‘Innuendo----- is a word used in declaration and law pleadings, to ascertain a person or thing which was named before ----If a man say, that such a one had the pox, innuendo the French pox, this will not be admitted, because the French pox was not mentioned before, and the words shall be construed in a more favourable sense. But if in discourse of the French pox, one say, that such a one had the pox, innuendo the French pox, this will be admitted to render that certain which was uncertain before” 2 Richard Burn, A New Law Dictionary 24 (1792).

It is not a true innuendo to repeat the obvious meaning of defamatory words in other language or in an embroidered or exaggerated way. Otherwise an ingenious pleader could perplex the Judge and jury and harry the defendant by ringing the changes on the same words, creating numerous different causes of action, each requiring a separate verdict. A true innuendo relies on a conjunction of the words used and some extrinsic fact. Thus, it is defamatory in itself to say that a man's affairs are being investigated by the Fraud Squad: but the statement does not support the innuendo that those affairs are being carried on fraudulently. Conversely, the statement 'X is a good advertiser' is innocent in itself, but carries a libelous innuendo if published to persons, who know the extrinsic fact that X is an eminent member of the Bar." R.F.V Heuston, Salmond on the Law of Torts 149 (17th ed. 1977). The example about lawyers' advertising no longer has relevance to American law."

[25] The foregoing goes to show the complexity of an innuendo, as opposed to ordinary words used in a different language or embroidered form to explain the meaning of defamatory words and which words or implication thereof, can be easily understood by the reasonable person.

[26] I say this because in the case of **Argus Printing and Publishing Co Ltd v Esselen's Estate (Supra)** the headnotes espouse the applicable test in determining whether the words of a publication are defamatory per se or an innuendo, in the following terms:-

"The basic criterion for adjudicating in an exception to the Particulars of Claim in an action for damages, whether the words complained of are reasonably capable of conveying a defamatory meaning, is whether a reasonable person of ordinary intelligence might reasonably understand the words of the article to convey a meaning defamatory of the Plaintiff. The test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the court must take into account not only what the words expressly say, but also what they imply----- It must be emphasized that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be

attributed to the words used only by the hearing having knowledge of special circumstances. (emphasis added)

[27] The foregoing on the applicable test of a reasonable person, is buttressed by the pronouncement of the court in **Sankie Mthembu - Mahanyele v Mail and Guardian and Another (Supra)**, where the court stated as follows:-

“[26] One must have regard also, however, to what the ordinary reader of a particular publication would understand from the words complained of. A clear statement of this principle is to be found in **Channing v South African Financial Gazette Ltd** a passage relied on by Joffe J in the court below. In **Channing**, Colam J said, with reference to the locus Classicus in point, **Johnson v Rand Daily Mails Ltd**.

‘From these and other authorities it emerges that the ordinary reader is a “reasonable” “right – thinking” person of average education and normal intelligence; he is not a man of “morbid and suspicious mind” / nor is he “super-critical “ or abnormally sensitive, and he must be assumed to have read the articles as articles in newspapers are usually read. For that assumption authority is to be found in **Basner v Trigger 1945 – AD 22 at pp 35 – 6**--- But this , I think is clear one may not impute to him for the purposes of this inquiry, the training or the habits of mind of a lawyer.’”

[28] It is beyond contradiction, that the foregoing article was intended to impress in the mind of the ordinary reasonable and intelligent man on the streets of Swaziland, that the Respondent fully knowing that she is not a Simelane but a Mahlangu, falsely concealed her true identity, and deceived the whole Kingdom that she is a Simelane, in furtherance of her ambition and political gains of becoming and retaining the position of Acting Chief of Kontshingila, which is in fact not her birthright. This is so when judged against the background fact that (1) Respondent’s position as Acting Chief stems from her birthright as a Simelane, (a fact which is well known in Swaziland), (2) yet the foregoing article proclaimed that the Respondent is

in fact not a Simelane but a Mahlangu, (3) that the Respondent knows that her real father is out there but is distancing herself from him because he has nothing to offer unlike the Simelane's, (4) coupled with the further statement that Gelane could be acting illegally, and (5) that the Ludzidzini Council has been told about it and that the late Governor of Ludzidzini Jim Gama, said that the area should be under the guidance of a person originally born a Simelane. Indeed, implicit from the article is that the Respondent is a fraudster, an imposer who usurped the position of Chief of Kontshingila. The words "**imposter**" and "**usurp**" is language elaborately used to convey the ordinary meaning of the defamatory words. The context of the words is not an innuendo. It is defamatory per se.

[29] I cannot therefore fault the court *a quo* when it held as follows:-

“[32] My considered view is that the meaning attributed to the articles by the Plaintiff is the natural one and is either express or implied by the words in question. Put differently, the articles convey the defamatory meaning which the Plaintiff seeks to place upon them, which is their natural meaning. This means that the articles are per se defamatory of the Plaintiff and no innuendo is relied upon as a basis for the defamation just as I do not think that there is reliance upon a specific sting by the Plaintiff to contend she was defamed. For the removal of doubt I must say I agree with the meanings attributed to the words in question by Mr. Jele at paragraph 28 herein above and I also find those meanings to be the natural ones to draw from the words used.

[33] Having concluded in the manner I have, I disagree with Mr. Flynn that the Plaintiff was in her submission no longer relying on the natural meaning she had attributed to her words in her pleadings. She may have said that the words meant that she was an imposter who had allegedly usurped the chieftaincy of Kontshingila when she was not entitled to by virtue of the fact that she was not a Simelane. But that did not in my view suggest that she was pleading an innuendo. I am convinced she was merely stating the natural meaning of the said articles as would be understood by a reasonable lay citizen as stated in the Independent Newspaper Holdings Ltd Walleed Sullieman except referred in paragraph 29 above.

[34] In any event, I do not think that those specific meanings attributed to the articles and referred to at paragraph 31 above, mean anything different from what is said in the foregoing paragraphs when considering the implied meanings of an “imposter: and a “usurper”, in the context of the articles concerned.

[35] Even if the Plaintiff was relying on an innuendo, assuming I am wrong in my conclusion that the articles were per se defamatory, I do not think that it can realistically be said that the Plaintiff has deviated from the pleaded meaning and therefore that the claim should be dismissed on that ground. It seems to me that a reasonable reader would be justified to understand the articles to be saying that the Plaintiff was an imposter, whose definition according to the Compact Oxford English Dictionary (Revised) third Edition, 2008, “is a person who pretends to be someone else in order to deceive or defraud others.” When considering the statement to the effect “Gelane knows her real father is out there and where he is employed but has decided to stay away from him, I cannot say much about the reasons behind her deserting me” and also the statement that, “She does not want to associate herself with me may be because I have nothing to offer her compared to what the Simelane’s do.” These words can indeed be understood by reasonable readers to mean that she was pretending to be who she was not in order to deceive them and perhaps even the nation at large and its authorities. It therefore would not be correct to suggest that she was providing a different case from the one pleaded or that she was now relying on a different meaning to the one attached to the pleadings in the context of the matter.

[36] I also have no doubt that another reasonable reader would be justified to conclude that the Plaintiff was considering the statements in the articles to the effect that “this means Gelane could be acting illegally together with the statement; “According to Jim Gama, the area should be under the guidance of a person originally born as a Simelane.” According to the Compact Oxford English Dictionary Revised Third Edition, 2008, a usurper is a person who “seizes articles over a person’s position or power illegally or by force.”

I need to mention that in terms of the Swazi Culture or way of life, something I take judicial notice of, it is downright defamatory to publicly refer to someone as being born of a different surname than the one he knows himself or he is known of. Such a person is called a livezandlebe, (a bastard) which is a derogatory term to effectively mean such a person has no rights where he has always know himself

to be from. Such publication is therefore defamatory per se, which eliminates considerations of an *innuendo* as contended.”

[30] It is arguable, as contended by Adv Flynn, that the court *a quo* misdirected itself by placing reliance on Swazi law and custom as it did in paragraph [36] above, in arriving at its decision, when such custom has not been proved by evidence. This is arguable. However, speaking for myself, this does not detract from the finding of the court *a quo* that the publication is defamatory per se, as the court also placed reliance on other facts evident in the record in reaching that conclusion. The pronouncement of the court on the Swazi custom, therefore, translates to mere surplusage and is of no moment.

[31] **THE DEFENCES**

The position of the law in these circumstances, where the words are admitted and are defamatory per se, is that the court should find for the Plaintiff, except where the Defendant successfully raises some defences. Commenting on this issue in **The Editor, The Times of Swaziland and Another v Albert Shabangu (Supra)** at page 4, the court declared as follows:

“In terms of our law, where the words complained of are admitted and they are per se defamatory, the court is justified to find in favour of the Plaintiff. However, the defendants have an array of defences, open to them. If they are successful, defendants would not be liable even though the words are per se defamatory.”

[32] *In casu*, the Appellants raised a couple of defences which I have hereinbefore recounted in paragraph [18]. In sum they are:-

1. The article was in essence true.
2. It was to the benefit of the public.

3. The publication of the article was not unlawful because Appellants were not aware of any falsity in it as they relied on a claim made by Mr Mahlangu.
4. The publication was not reckless or negligent.
5. The publication was objectively reasonable and the articles were published without *animus injuriandi*.

[33] It is obvious to me as contended by the Appellants, that by their plea they raise what is now known as the Bogoshi defence. This defence as the name acclaims, has its legal pedigree in the case of **National Media Ltd v Bogoshi (1998) (4) SA 1196 (SCA)**. The *raison d’etre* of this defence is best summarized as follows:- in an action for defamation against the media the defendant is entitled to raise “**reasonable publication**” as a defence; the publication of defamatory statements will not be unlawful if upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in a particular way and at a particular time; protection is only afforded to publication of material in which the public has an interest (i.e which it is in the public interest to make known) as distinct from material which is interesting to the public; the form of fault in defamation actions against the media is thus negligence rather than intentional harm; fault, however, need not be in issue if in particular circumstances anterior injury shows that the publication is lawful because it is reasonable; in appropriate cases where the publisher reasonably believes that the information published is true, then the publication is not unlawful; political speech might depending upon the context be lawful, even where false, provided that its publication is reasonable.

[34] It is imperative that I point out at this juncture, that the Bogoshi decision, just like all other decisions of South African courts, are merely of persuasive authority in the Kingdom. They are not binding on our courts. It needs also be emphasized that the Bogoshi decision was based on the uniquely liberal Constitution of South Africa, which exhibits some marked difference with our Constitution and should be approached with trepidation. The foregoing notwithstanding, since the reasonableness concept of the Bogoshi phenomenon, which commends itself to me, was relied upon by the court *a quo*, I am compelled to consider it in that regard.

[35] What then is the test for reasonableness within the context of this case?.

[36] In the case of **Lange v TB Atkinson and Another (New Zealand) (1990) UKPC 46, Brennan CJ** articulated the guiding principles as follows:-

“Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant’s conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant’s conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.”(emphasis added)

[37] Similarly, in **Bogoshi, pg 1211 F-H**, the court held that the defendant bears the onus of proving reasonableness. In the inquiry as to the reasonableness of the publication, account must be taken of the following factors:-

- (a) whether there was no unnecessary sting attached.
- (b) the nature of the information published.

- (c) the reliability of the source.
- (d) the steps taken to verify the information.

[38] Then there is the position of the court on this issue in **Sankie Mthembu – Mahanyele paragraph [68]**, which is encapsulated in the following words:-

“----- justifiability is to be determined by having regard to all relevant circumstances, including the interest of the public being informed; the manner of the publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information (this factor would play an important role too in considering the distinct question whether there was negligence on the part of the press, assuming that the publication was found defamatory); and whether the person defamed has been given the opportunity to comment on the statement before publication. In cases where information is critical to the public, and is urgent it may be justifiable to publish without giving an opportunity to comment.” (my underlining)

[39] The question here is, was the publication of 9 October 2009 by the Appellants reasonable in the circumstances of this case?.

[40] The court *a quo* after carefully canvassing the law and the facts and circumstances came to the conclusion that the article was not reasonable. In arriving at this conclusion the court *a quo* opined as follows in paragraphs [41] – [55] of the impugned judgment:-

“[41] In ascertaining whether the publication was true, one must consider as stated in the foregoing paragraph, whether the Plaintiff did have reasonable grounds for believing that same was true and whether proper available steps were taken to ascertain the accuracy of the claims by Mr Mahlangu that the Plaintiff was his daughter. Furthermore, a response must have been sought from the Plaintiff and published which is not the case in this matter.

[42] According to the facts of the matter the Defendants Reporter, Mabandla Bhembe claims to have been told by Mr. Mahlangu that the Plaintiff was his daughter. In fact the said Mr Mahlangu did not of his own free will set out looking for the Reporter or the

Editor of the Newspaper concerned to inform him that he was the father to the Plaintiff. Instead he was sought after by Mabandla Bhembe after he himself was told by his Editor that Mahlangu claimed to have fathered Gelane. It is not revealed how the Editor had himself got to know about the allegation except that it transpired it had come out from some Simelane's. Clearly the story called for caution before publication when considering that to the Newspaper's own knowledge and the nation at large, Gelane who by now was an elderly person occupying high profile positions in the country as both Senate President and as an Acting Chief of Kontshingila, had always been known as a Simelane at that stage. Furthermore the allegations (sic) she was a Mahlangu, came about at a time when she was involved in a widely published chieftaincy dispute with some Simelanes who did not approve of her being an acting chief. In such circumstances there would be no reasonable grounds to believe such a prominent figure and at that age has different surname than the one she is known by.

[43] They got the confirmation from Mr Mahlangu who does not give a sound explanation on why he had to conceal such vital information all these years only to come up now when he was himself old and frail with the Plaintiff having reached the age she has considering her being born in 1952, according to the evidence. Furthermore Mahlangu's claim was itself based on very stretchy circumstantial evidence in circumstances where he claims to have been staying in Johannesburg at the time of her being conceived and eventually born. He did not know when (date, month and year) of her birth, which would be very strange and improbable for a father who had always known about her being his daughter. This cannot in my view be indicative of the Defendants having reasonable grounds that what they were to publish was true. This is compounded by the fact that Mr. Mahlangu did not seem to know anything about Dorah Dube's life after the birth of David Mahlangu, a state of affairs one would not expect of a girl friend with whom he has children.

[44] Indeed when Mr. Mahlangu eventually gave evidence in Court, and after starting on a confident basis that the Plaintiff was his daughter, cracked and faltered under cross-examination and started saying he would demand that she goes with him for DNA test (egezini) as he put it so that he himself be satisfied that she was not his daughter. Clearly the said Mahlangu was unsure if the Plaintiff was indeed his daughter and wanted to use this Court to compel her to confirm or dispel his suspicions she was. Had the Newspaper taken reasonably proper steps to ascertain (sic) accuracy of the allegation they would have noted same was not

true or was not safe to publish as it could not be confirmed. In *Khumalo and Others vs Holomisa* 2002 (5) SA 401 (CC) the following which underscores the importance of ascertaining the facts and truthfulness of a matter before publication, was stated at paragraph 39:-

‘The difficulty of providing the truth or otherwise of defamatory statements and Common Law rule which lets the risk of the failure to establish truth, lies on defendants, in the absence of a defence of reasonable publication, thus causing a “chilling effect” in the publication of information. A publisher will think twice before publishing a defamatory statement where it may be difficult or impossible to prove the truth of that statement and where no other defence to defamation would be available.’

The court went on to cite a quote from (sic) English case of *Derbyshire Country Council v Times Newspapers*, 1993 1 ALL E. R. 1011 (HL) at page 1018:-

‘What has been described as the “chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts that would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.’

[45] I was clearly not prepared to order the DNA test as urged by Mr. Mahlangu. Firstly I was not dealing with a paternity matter where Mr. Mahlangu had instituted these proceedings seeking an order that the Plaintiff be compelled to submit to a DNA test or exercise for him to prove he was her father or the other way round. Instead the proceedings are brought to Court because Mr. Mahlangu is alleged (which he confirms) to have boldly said that the Plaintiff is his daughter and not that she could be his daughter which would be a different case altogether. Clearly if the Plaintiff (sic) had the audacity to publicly and boldly claim in 2009 that someone, who in terms of her birth certificate was born in 1952, was his daughter, he surely should as at that stage have had all the evidence proving that. This became all the more so when the said Mr. Mahlangu could himself not even attest that he had at some stage in their long lives confronted the said Gelane about his being her father at some point since her birth. The publication of the allegations, taken together with the language used and the sensationalization that attached thereto, was clearly calculated to

embarrass the Plaintiff if one considers the uncertainty expressed by Mr. Mahlangu in Court.

[46] It was established in evidence that in terms of Swazi Law and Custom, certain rituals consistent with the Simelanes, were performed on the Plaintiff after her birth by the same Simelanes who went on to pay lobola for her mother which also included the necessary fines. Otherwise, Mr Mahlangu does not even know if on his part the customary fines were paid vis a vis the Plaintiff including whether the customary rituals were performed at her birth. He contented himself with saying he left all that to his sister which is improbable. The sister in question was not called as a witness. Mr Mahlangu's version is therefore improbable when considering that he had always had all the access to Gelane's half brother David, born of his relationship with Dorah Dube, Gelane's mother, begging the question what would have stopped him from having such access to Gelane for over fifty years if he was her father.

[47] The Defendants had not bothered ascertaining from the Dube's who were there as to the accuracy of Mr. Mahlangu's allegation which was an available avenue consistent with Swazi culture that more about such children as they alleged Plaintiff was, could be found from their material side. They also had not ascertained from or confronted Gelane herself about the information. In deed it was stated in the above cited excerpt from the Bogoshi case that it can never be reasonable to publish defamatory material about a person if that person had not been confronted with those allegations for his / her side to be published as well. I cannot say that the attempts allegedly taken by Mabandla Bhembe before publishing the story were reasonable. He in his own words had not divulged to the Plaintiff through any form of information why he wanted her. He had, he said, failed to meet her on two occasions including failing to reach her over her cellphone. He had not even prepared any questionnaire for her to comment at least after having noted she could not be reached. I have therefore come to the conclusion that the allegations in questions have no scintilla of truth in them and only made to be sensational whilst embarrassing the Plaintiff in the process and I have no hesitation that they are indicative of malice on the Defendants part.

[49] It became clear during the trial of the matter that there was no truth in the contentions made forming the gravamen of this action. There was shown to be for instance, no truth in the contention that the Plaintiff was a dishonest person who deliberately concealed her true identity just as there was none in the contention

that she was misleading the authorities of the nation as well as that she knowingly failed to acknowledge a surviving parent and lastly over the contention that she was not a Simelane but a Mahlangu. The evidence led did not establish this at all. The closest to establishing was a suspicion by Mr. Mahlangu that the Plaintiff could be his child. The basis for this suspicion are not sound. In any event the publication was not about a suspicion as it was unequivocal in its terms that the Plaintiff is Mr. Mahlangu's daughter, who was an imposter as acting chief and was ignoring her own father just because unlike the Simelane's he had nothing to offer her.

[50] The position is settled that truth as a defence would avail the Defendants where it is shown that the publication was in the public interest. According to Burchell J. M's *The Law of Defamation in South Africa, 1985* Publication, Juta and Company at page 207:-

‘The South African Case Law does not adopt De Villier’s interpretation, but rather takes the view that the general rule is that truth alone is no defence – the publication must also be for the public benefit. Truth alone may, however, be pleaded in mitigation of damages.’

[51] It is argued that the matter was, owing to the fact that the Plaintiff was a public figure in so far as she was both an acting chief and Senate President in Parliament, one of public interest which necessitated the publication of the allegations concerned against her.

[52] Having come to the conclusion that the said allegations were untrue and were defamatory, it cannot avail one to say their publication was in order simply because the Plaintiff was a public figure. At page 1212 of the South African case of *National Media Ltd and Others vs Bogoshi 1998 (4) SA 1196 (SCA)* (the Bogoshi Judgment) the position was put in the following words:-

‘In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know for instance, that greater latitude is usually allowed in respect of Political discussion, and that the tone in which a Newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also feature prominently is the nature of the information on which the

allegations were based and the reliability of their source, as well as the steps taken to verify the information.

Ultimately there can be no justification for the publication of untruths and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before the defamatory matter is published in a Newspaper.'

[53] **In Independent Newspapers Holdings LTD vs Walled Suliman Supreme Court of Appeal of South Africa Case No. 49/2003, the Supreme Court referred to the following:-**

'False and injurious statements cannot enhance self development. Nor can it be said they lead to healthy participation in the affairs of the community, indeed they are detrimental to the advancement of these values and harmful to the interest of a free and democratic society.'

[54] **Having found that the publications by the Defendants comprised untruths, it cannot be said they are in the public interest. That they may have been interesting to the public does not mean that they were in the public interest as was stated in the Independent Newspapers Holdings LTD vs Walleed Suluman (Supra) where the position was expressed as follows at paragraph 42:-**

'It is true that what is interesting to the public is not necessarily the same as what is in the public interest for the public to know----'

[55] **I am therefore of the view that the defence raised by the Defendants cannot avail them. In the circumstances the Defendants cannot avoid liability for the publication of defamatory material of and concerning the Plaintiff."**

[41] Having tested the facts and circumstances of this case against the rigours of the guiding principles on the question of reasonableness, I find myself unable to fault the court *a quo* in its assessment of the evidence, the law and the circumstances of this case. I wholistically adopt the foregoing analogy of the court *a quo*.

[42] Having stated as above, and without the danger of sounding repetitive, it is imperative that I stress the unreasonableness of the publication in support of the findings of the court *a quo*.

[43] I agree entirely that this is a case that required a proper investigation in view of the sketchy and unreliable source of the information, as well as the shocking impact of the publication on the dignity and esteem of the Respondent, who is not just the Senate President, but also, the Acting Chief of Kontshingila. The Appellants' themselves acknowledged the shocking impact of the publication in several portions of the impugned publication where they stated as follows:- **“Mr Mahlangu’s shocker ---“the revelation by Mahlangu will definitely come as shocking news to Kontshingila residents, where Gelane is Acting Chief. The area is dominated by the Simelane clan that has been ruled by Gelane for a long time as chief albeit on acting basis”;** **“Mbabane – Gelane is my daughter. The quote sounds innocent but when you take a closer look at it you will realize that it has the potential of changing the fortunes (for the worst) of one of the country (sic) iron ladies, Senate President Gelane Zwane”** and **“If Ambrose Mahlangu’s shocking revelation is anything to go by, then Senate President Gelane Zwane is not the rightful person to act or be appointed as Chief of Kontshingila.”**

[44] Then there is the article of 16 May 2009, which I tag the Appellants' **“false bravado”** where they informed the whole nation that the impact or result of their article of 9 May 2009 was that the residents of Kontshingila had taken steps to enforce changes resulting in the removal of Gelane as the Acting Chief of the area. Having by their own showing demonstrated the

devastating impact the publication could have on the Respondent, it behoved the Appellants to properly check out Mr Mahlangu's information before publication.

[45] Moreso as the untruthfulness of the publication was established in the trial. I say this because the Appellants failed to prove the truthfulness of the assertion that Mr Mahlangu is Gelane's father. In our constitutional dispensation, no one has the *carte blanche* to denigrate the reputation and dignity of another and then seek to hide behind the spurious defence that he had no reason to believe that the allegation that led to the defamation was false. The defamer must show the reasonableness of that belief. So, in a case such as the one we are faced with, where the only working tool the Appellants' bothered to rely on was the pathetic, inconsistent and unreliable ramblings of Mr Mahlangu (a fact which leaped out from the record), there was in my view, no reasonableness in the Appellants' belief. I cannot fault the court *a quo* for reaching this conclusion, as it did in the excerpt of the impugned judgment recounted above, and for discarding Mr Mahlangu's evidence.

[46] In view of the circumstances portrayed above, the Appellants were required to take the appropriate steps to ascertain the veracity of the information gleaned from Mr Mahlangu before proceeding to publication. They failed to do this. They failed to seek out and interview any of the Dubes (Gelane's maternal family) in spite of Mr Mahlangu's emphatic assertions that the Dubes knew the facts of the Respondent's paternity. This is moreso as there is uncontroverted evidence that the Respondent was born at and grew up at her maternal homestead. DW2's allegation that he did not do this because

it is improper to go to a person's homestead to conduct an interview, cannot avail the Appellants. This is because, DW2 by his own showing, sought to interview residents of Kontshingila at their homesteads prior to the publication. He told the court that he was finally able to gain entrance into the home of one resident, a police officer. The question is why not extend the same courtesy to the Dubes in order to ascertain the veracity of the scurrilous publication and balance out the story? They did not do this.

[47] The further gambit which is that they believed Mr Mahlangu's assertion that all the relevant Dubes were deceased, is also unsustainable. Mr Mahlangu made it clear, that though some of the Dubes were dead, the Respondent's Uncle's wife was in his belief, still alive and would know all the facts. The Appellants did not avail themselves of this window of opportunity to balance out the story. They proceeded with the publication, only to thereafter, on 18 October 2009, interview one Jane Dube who is Respondent's Aunt by reason of being her mother's sister. Jane Dube refuted Mr Mahlangu's claims making it clear that the Respondent is a Simelane. The Appellants ought to have taken the steps to interview the Dubes as well as the Simelanes before the publication. The interview that was orchestrated subsequent to the publication, was to my mind, water under the bridge. The damage had already occasioned.

[48] Then, there is the contention by the Appellants that they made several attempts to reach the Respondent on her cell phone but failed. DW2 also visited the Respondent's office on three different occasions where he spoke to her secretary, one Happy.

[49] What stands out clearly from the evidence, and as admitted by DW2, is that the Respondent was engaged in a seminar taking place outside her office throughout the material week. The only time DW2 saw her in person, is according to his evidence, when he sought her out in her office early one morning. Respondent had rushed out of the office because she was called to attend a meeting at Ludzidzini. What has most agitated my mind, is, why then did the Appellants not write her a letter or send her a questionnaire as is the norm with the media, to enable her respond to these issues? Why also did the Appellants not divulge the reason why they wanted to see the Respondent to her secretary, Happy, or in the text messages allegedly sent to her, considering the shocking and impactful nature of the information. This would have been appropriate in all the circumstances of this case, and would have, to my mind, elicited a reaction from the Respondent.

[50] DW2's explanation that he did not divulge the information to Happy in order to prevent a leakage to other media houses has no merits. It, in my view, shows the recklessness of the Appellants in failing to afford the Respondent the opportunity of a response before the publication. This is so because, by so alleging, the Appellants appear to be approbating and reprobating, due to the fact that they have alleged that the information about the Respondent's paternity was already in the public domain. The poser, is, if the information was already in the public domain then why the need to conceal it? This question begs the answer.

[51] Another aspect of this case which is disturbing, is that the whole attempt to get a reaction from the Respondent lasted for only one week before the Appellants rushed into publication of the story. There is no demonstrable

urgency that necessitated the rush into such a momentous publication. Neither has it been shown that the information was critical to the public to warrant such urgency. Prudence and good practice necessitated that in these circumstances, the Appellants should have afforded the Respondent a reasonable opportunity to respond, in view of the fact that she was engaged in a seminar during the penultimate week. In my view, they should have held off the publication until the following week to enable the Respondent return from her seminar to respond. Their failure to do this was unreasonable in the circumstances.

[52] Furthermore, prudence and good investigative journalism, required that since the Appellants failed to get a response from the Respondent and also failed to interview any of the Dubes, that they at least took steps in other established directions, such as the Registry of Births, Deaths and Marriages, to glean information on the status of the Respondent's birth. This would have been cogent and reliable information, in view of Mr Mahlangu's precarious and improbable story. They failed to do this. It is not surprising therefore, that DW2 admitted under cross-examination that apart from Mr Mahlangu's story, he had no other information supporting the allegation that the Respondent was his daughter prior to the publication.

[53] It appears to me that the Appellants' efforts to verify the story or obtain a reaction from the Respondent's side, were perfunctory. They were simply going through the motions. Their conduct was not reasonable in any democratic society.

[54] It remains to consider the argument that since the Respondent is a politician and the publication was in the public interest, even if defamatory per se, it is not unlawful.

[55] Let me first dispel the notion cast by the Appellants that the Respondent being a politician, and indeed a public servant in general, is deprived by virtue of her status or role in government, of the normal protection afforded to individuals by the law of defamation. What the Appellants' proposition loses sight of, is, that though several law authorities propound this theory, they however throw a qualifier into the mix. I say this because while the law is agreed that as a matter of public policy, politicians and public officials should be more resilient to attacks on their performance as such, however, there would be justification to such publication, if only the defamatory statement is reasonable in the peculiar circumstances and therefore not unlawful. Furthermore, if the defamation relates to purely personal matters, it is actionable whether or not the Plaintiff is a politician or public officer.

[56] Speaking about this subject-matter in **Sankie Mthembu – Mahanyele (Supra) paragraphs [40] – [43]**, the court observed as follows:-

“[40] ---- to deny a Cabinet Minister *locus standi* to sue for defamation when the words complained of related to performance of work as a Cabinet Minister are, with respect, well founded. A blanket immunity for defaming Cabinet Ministers would undermine the protection of dignity. It would give the public and the media in particular, a licence to publish defamatory material unless the Plaintiff can prove malice. In elevating freedom of expression above dignity in this way the decision simply goes too far. A balance must be struck. That there is no hierarchy of the rights protected by the Constitution is affirmed by the Constitutional court in *Khumalo v Holomisa*.

[41] **The decision of the court below in denying a Cabinet Minister *locus standi* to claim damages for defamation is, with respect, incorrect. It does not give sufficient weight to the right to dignity and to not having one's reputation unlawfully harmed. It elevates freedom of expression above that of dignity when there is not, and there should not be a hierarchy of rights. It denies to a class of people the ability to protect their reputations, save where defamatory statements are made with malice.**

[42] **How then is the balance between the right to dignity and the right to freedom of expression in a democratic state to be struck when dealing with "political speech." I consider that the proper approach to finding the appropriate balance is to recognize that, in particular circumstances, the publication of defamatory statements about a Cabinet Minister (or any member of government) may be justifiable (reasonable) in the particular circumstances and therefore not unlawful."**

See the dictum of O' Regan J in *Khumalo v Hlomisa* (Supra) reproduced in paragraph [6] above, see also PQR Bobery, in 1975 Annual Survey of South African Law.

[57] I am highly persuaded by the foregoing proposition. It commends itself to me both on sound legal principles and common sense.

[58] *In casu*, it cannot be gainsaid that the article was in the public interest in the sense that the Respondent's paternity is directly tied to her eligibility for appointment as Acting Chief of Kontshingila. It speaks directly to her competence for appointment as such. In spite of this public interest factor, it is however information which the public had no right to know. This is because, and as correctly found by the court *a quo*, the information was untruthful. It was published recklessly and negligently not caring whether it was false. In these premises, the mere fact that it was salacious to the

public, does not make it of public interest. It was thus unreasonable in all the circumstances of the case.

[59] It appears to me, and as correctly found by the court *a quo*, that the publication was motivated by malice. This is because, well knowing of the existing chieftaincy dispute in Kontshingila involving two factions, one led by the Respondent and the other led by DW3, Dr M.J. Simelane, the Appellants swayed heavily on the side of DW3. They sought information from that faction alone and shunned available opportunities to verify the information from the Respondent's faction. The Appellants by their posture appeared to be on a mission to demean the Respondent leaving her hitherto high esteem and good name in tatters. The *coupe de grace* of this enterprise was the subsequent publication of 16 May 2009, which falsely acclaimed that Gelane had been dethroned from her position of Acting Chief of Kontshingila. The malice here is palpable. It cannot be gainsaid.

[60] In light of the totality of the foregoing, there was no justification for the publication either on grounds of fairness, morality or public and legal policy.

[61] **QUANTUM OF DAMAGES**

ISSUE 2 Whether or not the court *a quo* erred in awarding damages in the sum of E550,000=00 (Five Hundred and Fifty Thousand Emalangen) to the Respondent.

[62] It is trite law that since the award of damages is a discretionary measure of the court of trial, an appellate court will be hesitant to interfere with the damages awarded, except in the face of material misdirection resulting in

the miscarriage of justice. In **Swaziland Government v Aaron Ngomane (Supra)** paragraph [80], I recounted this principle as follows:-

“In certain circumstances an appellate court may reverse a discretionary decision if it is not judicial and judicious in the sense that it exhibits a material misdirection. These circumstances have been identified by case law to include but are not limited to the following:-

- (a) Where the trial court exercised its discretion wrongly in that no weight or sufficient weight was given to relevant factors.**
- (b) Where the decision is wrong in law or will result in injustice being done.**
- (c) Where the trial court:-**
 - (i) acted under a mistake of law;**
 - (ii) in disregard of principles;**
 - (iii) under a misapprehension of the facts; or**
 - (iv) took into account irrelevant considerations. See *Saffeidine v Commissioner of Police (1965) 1 All NLR 54, Solanke v Ajibola (1969) 1 NMLR 25.3***
- (d) Where there is a striking disparity between the amount that the trial court awarded and what the appellate Court considers ought to have been awarded. See *Protea Assurance Company Ltd v Lambs 1971 (1) SA 530 AD at 534 – 535 A.***
- (e) The reason or reasons given by the Judge for exercising a discretion in a particular way often provide the basis for challenging such exercise. They show what he considered and the general ground for his decision.”**

[63] It is to ensure a judicial exercise of this discretion that the law has evolved certain parameters as guides to the trial court in the process.

[64] Adumbrating on these guiding principles in **The Swaziland Government v Aaron Ngomane (Supra)**, I observed as follows:-

“ [81] This is a meet juncture for me to also indicate that the assessment of damages in non-pecuniary loss cases is a difficult and challenging task. Jurisprudence has, however, over the years endeavoured to articulate some parameters which should serve as useful guides in the award of this school of damages to ensure a judicial and judicious process. In this regard, Lord Diplock in the

case of **Wright v British Railway Board (1983) AC 733** at pg 777C declared as follows:-

‘Non-economic loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even handed instead of depending on idiosyncrasies of the assessor, whether jury or Judge, the figure must be basically a conventional figure derived from experience and from awards in comparable cases.’

[82] **It follows from the above that one of the parameters for a judicious award of damages in non-pecuniary loss cases is consideration of awards in comparable cases. It is imperative that I also observe here that since this matter turns on injury to the Plaintiff’s dignity, the Plaintiff’s social standing is of paramountcy in the award of appropriate damages. Also to be weighed in the equation is any lack of apology as well as the nature, extent and gravity of the violation of the Plaintiff’s dignity. See *Ryan v Petros 2010 (1) SA 169* at 1774. The amount awarded must also be a conventional sum which would in the Swazi society be deemed to be reasonable. Each case must invariably be treated according to its own peculiar facts and circumstances.”**

[65] Furthermore, in the case of **Lindifa Mamba and Another v Vusi Ginindza Civil Case No. 1354/2000**, the High Court detailed the applicable factors in assessment of damages as follows:-

- (a) Character, status and regard of Plaintiff.
- (b) Nature and extent of publication.
- (c) Nature of imputation (serious or not).
- (d) Probable consequences of imputation.
- (e) Partial justification.
- (f) Retraction or apology and
- (g) Comparable awards and declining value of money.

[66] Then, there is the very comprehensive exposition of these principles by **Kelsy Staurts Newspapersman's Guide to the Law, (5th ed) Butterworths at page 67**, in the following terms:-

- “(a) The conduct of the Defendant from the time of publication until judgment.
- (b) The manner of publication and the area and extent of dissemination.
- (c) The character of the defamatory words, their falseness and the malice.
- (d) The mark and position of the parties in society and any special relationship which existed between them.
- (e) the persons to whom the defamatory words were published.
- (f) The place, time and mode of publication.
- (g) The continuance of the circulation of the defamatory words.
- (h) The tardiness, inadequacy or absence of apology.
- (i) Publication intended or authorized.
- (j) The time of publication of the apology and the prominence of its publication.
- (k) Whether the defamer first employed the defamatory words or whether he simply repeated the defamatory words of another.
- (l) The character of the person defamed.
- (m) The responsibility which the Plaintiff may have to bear for bringing about the publication of the defamatory matter.
- (n) Absence or presence of actual ill-will towards the person defamed on the part of the defamer.
- (o) Any undue delay by the Plaintiff in bringing his action.
- (p) Whether the matter published was true, even if it was not published for the benefit of the public.
- (q) Any prolonged or obstinate failure by the defamer to do anything to assuage the hurt of the person defamed.
- (r) Whether the attack injured the defamed person in the way of his business or profession.
- (s) A decrease in the value of money.
- (t) The fact that the Defendant in conducting his defence (e.g. did he seek to attack the Plaintiff's character; did he dispute his evidence unduly or did he seek to discredit his witness?).”

See **Sikelela Dlamini v The Editor of the Nation Magazine and Another, Civil Case No. 2534/2007.**

[67] In awarding the sum of E550,000 as damages to the Respondent, the court a quo held as follows in paragraphs [56] – [66] of the assailed decision:-

“[56] It was submitted by Mr Flynn that in the event the Court was to find the Defendants liable to the Plaintiff it should order that she be compensated through the payment of nominal damages considering that the allegations merely emphasized what was already known and secondly in view of the Plaintiff having allegedly claimed excessive damages. According to Mr Flynn, damages in defamation matters should not exceed E50,000.00 as he said was stated in The Times of Swaziland and Other vs Albert Heshange Shabangu Appeal Case No. 30/2006. Whatever the facts in the said matter, it cannot be true that it was setting a rule oparticularly where it is clear the publication was malicious and a result of the Defendants having taken sides in an existing dispute. Furtherstill I am convinced that cannot be the case where it becomes clear that the Defendants, because of their financial standing calculated the pros and cons of publishing the article based on what they considered to be extent of their risk. There should not be a doubt that the damages should be meaningful with the victims and potential victims being assured of their rights to dignity and reputation being protected as well. Certainly if this has not been the case, perhaps the time has come for the media to have greater responsibilities in their publication.

[57] I do not agree, firstly that the matter of the Plaintiff allegedly being a Mahlangu, was already a matter in the public domain as alleged. In fact that is against the contents of the publication themselves where the Defendants stated that the contents of their publication or their revelation was going to shock the nation which had always known the Plaintiff to be a Simelane and further that their “revelation “ as they chose to call it was going to turn the fortunes of one of the iron ladies in Swaziland, in the Plaintiff, for the worst. Clearly all these paraphrases are not consistent with a matter that was already in the public domain. It shall be remembered that they also stated in a follow-up article that their revelation or publication had had the impact of forcing the Simelanes to bring about changes within their area as they removed Gelane from the Acting position. In fact this comment of theirs encapsuled the very purpose of the Defendant’s article.

[58] The evidence of Mahlangu Simelane to the effect they had always known Gelane to be a Mahlangu as opposed to a Simelane, is not only improbable but is devoid of truth. It is unfathomable that if they, as the Simelane’s had always known her to be a Mahlangu they would have appointed her to act as a chief in the first place or put differently it is unfathomable they would not have brought that to the fore much sooner or after her having assumed the role of Acting Chief. In any event his evidence is contradictory in the

later, he testified that they got to hear about her not being a Simelane at a meeting with the Regional Administrator and later that they learnt of it in a meeting with the Ludzidzini Governor, the late Jim Gama and later that they had always known about her being a Mahlangu as she arrived at Kontshingila with her mother. It is a fact that they only started looking for Mr. Mahlangu from the meeting with Jim Gama which was only attended by the Simelane's, which is indicative that if it ever was made, it would have been on that day. In any event, Mr Malangeni Simelane's evidence is exposed of being untruthful by his admission under cross-examination that sometime back and during the Plaintiff's youthful years she had umcwasho rites being conferred on her as an Inkhosatana, (Senior chief's daughter of the Simelane) (sic). This would not have been done if she was known not to be a Simelane as Malangeni Simelane now wants this Court to believe.

[59] I furthermore cannot agree that the damages claimed are excessive when considering the nature extent and tone of the allegations including the deliberateness involved and insistence to publish it on the part of the Defendants. I agree with the Plaintiff that the publication concerned brought about greater unrest in the area. In fact recent events in the area as published in the media are indicative of this.

[60] Clearly the general rule stated in the African Echo (Pty) LTD and Others vs Albert Heshange Shabangu Case was by no means a rule to Thumb to say that at all times Plaintiff's in defamation matters would or should be paid nominal damages despite the circumstances of the matter at hand. It has been stated that where a Defendant in a defamation case makes an attack without verifying his facts and is not prepared or able to justify them he should incur liability for substantial damages. I therefore do not agree that even where there is malice in a given case, the Defendant in a given case should have his damages confined to E50 000.00 as was stated by Mr Flynn to find otherwise would suggest that the right of the media to publish material, even defamatory ones about members of the public should run superior to all the other constitutionally safeguarded rights like the one to individual dignity enshrined in the Constitution which is not and cannot be the case in our law.

[61] I agree and subscribe to the principle that where malice is found to be in existence the damages have to be reflectively high. I have found that in the present matter the Defendants deliberately failed to investigate the propriety of their allegations when considering

their failure to engage the Plaintiff first and also when they failed to engage the Dubes who are the maternal parents of the Plaintiff. I say this because of what was stated in Chinamasa vs Jongwe Printing and Publishing Co. (PTY) LTD and Another 1994 ZLR 133 (A) at 167 – 168 where Barlet J stated the following:-

‘---that failure to investigate or to get comment from the person who is the subject of a story is indicative of malice.’

Clearly in the matter at hand other than the fact that Defendants had clearly taken sides in the dispute of the Simelanes and felt they had to advance the side they had chosen, no sound explanation has been given why they published the articles before getting the Plaintiff’s side nor even before properly verifying the truthfulness of the allegations concerned.

[62] In the matter I have no hesitation that the Defendant took side in a long established chieftaincy dispute and therefore put aside all the consideration it needed to take in order to advance the side it had chosen. It should have known however that as it did so it was taking a risk. From the suggestion of the damages in the sum of E50 000.00 by Mr Flynn, I have no hesitation in concluding that it was fuelled to do what it did because of its belief that it would in any event be made to pay no more than the amount in question. Such thinking must come to an end. The media is a powerful tool which can be used to build or destroy innocent people and they cannot be allowed to get away lightly where they were not only deliberate but downright malicious in their publication.

[63] Furtherstill I have to consider the nature of the defamatory statements; the extent of the publication, the reputation and character of the Plaintiff as well as the motive and conduct of the Defendant. The Plaintiff was otherwise labeled as a dishonest person who would conceal her true identity so as to secure an appointment as a chief and as a Senate President. She was also one who conceals her true identity in order to associate herself with the Simelane’s where there was going to be something for her benefit. Clearly these allegations once shown to be untrue cannot in my view attract the usual nominal damages.

[64] The publication was sensationalized and was widely distributed throughout the country and even on internet. On the other hand the Plaintiff is an Acting Chief and as such a recognized traditional structure – she is responsible for a wide community which according to the Defendants’ own assertions in the Newspapers was peaceful until after their publication which

enforced changes. The Plaintiff's standing is also high because of her position as Senate President.

[65] It was submitted that the highest ever award was in the case of The Editor, The Times of Swaziland and Others vs Martin Akker Supreme Court Case No. 44/2009 where a sum of E100 000.00 was awarded as damages. Whilst that may be the case, I am of (sic) view that the said case ought to be distinguished from the present one. Mr. Akker was a Deputy sheriff yet in this case the Plaintiff is the Acting Chief responsible for a wide community and is also Senate President. The extent and effect of the publications was more scathing in the present matter than it was in the Martin Akker one. I have to consider as well the periods between the two and the devaluation in currency. Furtherstill I must consider that the publication of the offending material in the Martin Akker matter was not shown to be as sustained and serialized as this one was. This matter is also different when considering that the negative effect in the Akker matter was not shown as having been felt immediately and in reality as was the case herein where according to the Defendants' own story it caused the Simelanes to enforce changes by allegedly or supposedly removing the Plaintiff from her position.

[66] Having considered all the circumstances of the matter, its seriousness and its effect on the Plaintiff, I am convinced that damages in the sum of Five Hundred and Fifty Thousand Emalangeni (E550 000.00) will be an appropriate award to make and I accordingly award Plaintiff the said amount as damages together with interest at 9% per annum from date of judgment to date of payment as well as the costs of suit."

[68] Adv. Flynn has raised before us some arguments, principal of which is that, the amount awarded is too excessive and will have a chilling effect on the media; the matter was already in the public domain before the publication; the highest amount awarded in Swaziland in relation to such damages was the sum of E100,000 in the Akker case; the publication did not have much effect on the Respondent as she has retained her position as Senate President and Acting Chief of Kontshingila; the Appellants made every effort to get the Respondent's side of the story but to no avail, therefore, they could not

be said to have erred on the side of the opposing Simelane faction as the court *a quo* held; the Appellants did not act with malice; the Appellants subsequently published a rejoinder from the Respondent's Aunt Jane Dube. In light of these factors, Adv. Flynn prayed the court to set aside the award of E550,000 and substitute it with a lesser award.

[69] The contention that the damages awarded is disproportionate to the prejudice suffered by the Respondent and it should accordingly be reduced and to what extent, cannot lie. This is so because, it is patently obvious to me that the court *a quo* considered the issues urged by Adv. Flynn, within the context of the guiding principles in its process of the award of damages. If the court *a quo* did not give reasons for the award or the award is not supported by the evidence, then this court will have the power to interfere with the award. This is however not such a case. The trial court gave copious reasons for the award, which reasons are supported by the evidence on record. This court therefore lacks the power to interfere with the award.

[70] There is however, a thorny part of this case which I find the need to comment on for the purposes of emphasis. This is the contention that the award is excessive on the basis that the highest award granted in Swaziland for this sort of damages, is the sum of E100,000 in the Akker case.

[71] If this argument is well understood by me, it means that since the alleged highest award was E100,000, the court *a quo* was not at liberty to exceed this amount, therefore, the exercise of its discretion in awarding the sum of E550,000 to the Respondent, was erroneous. Put differently, it means that the sum of E100,000 is forever a benchmark for the award of damages, and

the court can only exercise its discretion to award damages of E100,000 and below, in all cases.

[72] It seems to me that the fallacy of this argument lies on different fronts which I detail hereunder.

[73] Firstly, I know of no rule or principle of our law under which the discretionary power of the court to award damages, can be so fettered. The suggestion that the discretion of the court *a quo* must be approximated to the amount of E100,000 divests such a discretionary power of its judicial and judicious efficacy, based on all the peculiar facts and circumstances. Such a process, with respect, will amount to an arbitrary and capricious exercise of discretion without any rational basis. It will be wrong in principle. See the **Government of Swaziland v Aaron Ngomane (Supra) paragraph [88]**.

[74] Secondly, the proposition loses sight of the fact that Mr. Akker was a Deputy Sheriff. His status in the society as such, was of far less prominence than that of the Respondent, the Senate President and Acting Chief of Kontshingila. She is not just a local figure but an international personality. The egregiousness of the degradation is incomparable regard being had to the fact that the newspaper circulates around the globe in the cyberspace. On the surface it extends beyond the borders of Swaziland to other nations. Not losing sight also of the fact that the defamation in Akker was less acrimonious and the decision was given in 2009, about five (5) years ago. The court *a quo* correctly considered these factors in its judgment.

[75] Then, there is the fact that the proposition also loses sight of the case of **Sikelela Dlamini v The Editor of the Nation and Another (Supra)**, where the High Court awarded the sum of E120,000.00 to the Plaintiff as damages.

[76] In that case, the Defendants had written some articles about the Plaintiff an employee of the Government of Swaziland, employed as such as the Under Secretary in the Ministry of Health and Social Welfare. In paragraph 10 of his statement of claim, the Plaintiff alleged that the publications were defamatory in that they were intended to mean and were understood to mean that he is very corrupt, immoral, of reprehensive demeanor, not worthy of public confidence, and wrongfully, unlawfully, furtively and clandestinely abused his position to make personal economic gain. And this, by attempting to influence the outcome of Tender No. 2 and thereafter, it was alleged that the Plaintiff influenced non approval of the said tender, by the Drug Advisory Committee and the Tender Board. Alternatively, the Plaintiff knowingly and dishonestly attempted to award the said tender to a particular bidder by attempting to sit in the Drug Advisory Committee and take charge of the Committee's task in the adjudication of tenders.

[77] Here again, the defamation was less pungent, in that the status of Mr. Dlamini as Under Secretary in a Government ministry, is of less protuberance than that of the Respondent. The publication though impinging on his dignity, however, dealt with his conduct and performance under his portfolio as the said Under Secretary, as opposed to the case instant, where the defamatory words were a vicious attack on the Respondent's personal life and origins. Then, there is the fact that the award was made 6 years ago in 2008. This of course takes into account the rate of

inflation and devaluation of the currency of Swaziland in the intervening period.

[78] The proposition also loses sight of the fact of the dynamics and progression of the law. The law is not static. Therefore, if Judges did not do what has never been done before, when the facts and circumstances justify same, as in the case instant, then the law will remain static while the rest of the world goes by. That will be dangerous for both. I am compelled to recap the words of the court *a quo* in this regard in paragraph [56] of the assailed judgment, as follows:-

“----- There should not be a doubt that damages should be meaningful with the victims and potential victims being assured of their rights of dignity and reputation being protected as well. Certainly, if this has not been the case, perhaps the time has come for the media to have greater responsibility in their publication.”

[79] Finally, there has been no apology from the Appellants even in the face of the untruthfulness and unreasonableness of the publication. Rather, they have maintained an intransigent and reprehensible conduct in their pursuit of some spurious and unfounded defence. By so doing, they attempt to defend the indefensible. The lack of justification of the publication coupled with the lack of apology from the Appellants, should command a condign award of damages.

[80] In the final analysis, it has not been shown that the court *a quo* improperly exercised its discretion in arriving at the award. This court lacks the power to interfere.

[81] **CONCLUSION**

The Appellants' appeal lacks merits. It is dismissed accordingly with costs.

[82] **ORDER**

1. The Appellants' appeal be and is hereby dismissed with costs.
2. The judgment of the court *a quo* of 5 December 2013, be and is hereby affirmed.

E.A. OTA
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

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