THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 575/04

In the matter between:

CHARLES MOGALE **First Appellant**

JOHNNIC PUBLISHING LIMITED &
NAP PUBLICATIONS **Second Appellant**

ALLIED PUBLISHING LIMITED **Third Appellant**

and

EPHRAIM SEIMA **Respondent**

Coram: HARMS, ZULMAN, NAVSA, JAFTA, JJA and NKABINDE AJA
Heard: 1 NOVEMBER 2005
Delivered: 14 NOVEMBER 2005

Subject: Defamation *quantum*

J U D G M E N T

HARMS JA/

HARMS JA:

[1] The editor, the publisher and the distributor of the Sowetan Sunday World newspaper are appealing an award of damages for defamation against them. In a gossip column named *Shwashwi* the paper carried on 2 September 2001 an item in concerning the plaintiff, the present respondent. The plaintiff at the time was an advocate practicing of about four years' standing at the Pretoria Bar. He had a romantic relationship with Ms Michelle Molatlou, a television presenter of a magazine programme called *Mamepe*. *Shwashwi* reported that the plaintiff, after a wedding reception and being annoyed by the fact that Ms Molatlou had taken notice of other men, gave her, in the local slang, a 'hot klap' through the face. ('Klap' is the Afrikaans word for a slap.) Wounded by the defamatory statement, the plaintiff decided to claim damages amounting to R150 000. The court below, per Motata J, awarded R70 000. Dissatisfied with the size of the award, the appellants (the defendants) sought leave to appeal from the trial judge, which he refused. This Court eventually granted the necessary leave.

[2] The hearing of the application in the court below lasted many hours during which some remarks fell from the bench that gave rise to further grounds of appeal and additional written argument. I do not intend to dwell on these remarks simply because an appeal is supposed to be directed

against the judgment and order and not against *ex post facto* attempts to justify what was contained in or omitted from the judgment, or against gratuitous remarks made during the course of argument. This would not have happened if the trial court, in the exercise of its inherent jurisdiction, had contained the hearing of the application for leave to appeal within reasonable limits. There is no reason why in all such cases strict time limits should not be imposed, either at the outset or during the argument, on both sides. A cue may be taken from the US Supreme Court that allows half an hour a side, and the Federal Appeal Courts that allow a quarter of an hour a side, for the hearing of oral argument in a full appeal. Oral argument may even be dispensed with, considering that this Court and the Constitutional Court routinely dispose of applications for leave to appeal without oral argument. A judge of first instance knows the issues in the case and has a judgment dealing with them and ought to be able, in the light of the notice of application for leave to appeal, to dispose of the application one way or the other without too much ado. And if leave is sought orally as soon as judgment is delivered, normally the matter can and should be disposed of there and then.

[3] Reverting then to the facts of the case, already on the first page of the newspaper the reader was alerted to the fact that the *Shwashwi* column

carried an item ‘TV STAR GETS HOT KLAP’. The main heading in the column read ‘SICK WAY TO TREAT A LADY’. For the sake of context I quote the full text of the item, which hardly qualifies as an article:

‘Michelle Molatlou, the sultry *Mamepe* presenter was left with an inflamed cheek after her boyfriend Ephraim Sima gave her a hot klap last Saturday.

The incident happened after the wedding of Sidney Baloyi, the socialite and SABC producer, in Giyani, Northern Province, at about 5pm at the Masingita filling station in Giyani in front of surprised gawkers.

Sima apparently swung into action after catching her eyeing Baloyi’s best man, the former *Woza Weekend* presenter James Shikwambane.

She had a plaster on her cheek this week, which apparently sent the *Mamepe* producers into a tizz during the shooting of the magazine programme.

Sima has reportedly been irritated by rumours linking Molatlou to Metro FM head Leasley Nhloko and several other men. Egad.’

[4] The plaintiff relied on three sentences, which concern him, as being defamatory. They are the introductory sentence stating that he gave Ms Molatlou a ‘hot klap’; the sentence alleging that he swung into action; and the allegation that he was ‘reportedly irritated by rumours’. Let me immediately state that the second and third sentences can by no stretch of the imagination be considered defamatory and I do not find any indication that the trial judge thought otherwise.

[5] The plaintiff proceeded to allege that the article was defamatory and meant that (i) the plaintiff is abusive; (ii) he behaved in a violent manner towards his girlfriend in public; (iii) he is a man of violent and aggressive behaviour; and (iv) he behaved in a manner unbecoming of his profession. The defendants admitted from the outset that the item bore the meaning set out in (ii) but they pleaded that the report was substantially true and in the public interest.

[6] During preparation for trial the defendants could not trace some of the original informants and those they did locate were not prepared to testify. In consequence, the defendants in a letter of 7 October 2003 (the trial was initially set down for the next day) conceded that the article was defamatory in the sense set out in (ii); they abandoned all their defences; and they stated that they would rely on a lack of intention to injure and the freedom of expression as factors that reduce the quantum of damages. The letter ended with a tender of

‘an apology and retraction to be published in the Sowetan Sunday World. Such apology will specifically retract the allegation that your client struck Ms Molatlou, express regret for the publication and apologise for it.’

[7] The tender was not accepted and the apology was consequently not published. The trial nevertheless did not proceed as intended on the given day and commenced only on 4 February 2004. During his testimony the plaintiff was asked to comment on the meaning of the article as an ordinary member of the newspaper reading public. Over the defendants' objections the question was allowed and the plaintiff proceeded to say what the pleadings said the article meant. Shortly afterwards the plaintiff conceded that the evidence was inadmissible to prove the meaning of the article but the court said that the question had been allowed in the context of damages (whatever that might mean). The evidence was clearly inadmissible (*Demmers v Wyllie and others* 1978 (4) SA 619 (D) at 624A-C) but it does not matter because the judge below nowhere held that (i), (iii) and (iv) were established and consequently did not make any finding against the defendants based on that evidence, rightly so in my mind.

[8] The sole issue is then one of quantum. The determination of quantum in respect of sentimental damages is inherently difficult and requires the exercise of a discretion, more properly called a value judgment, by the judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is and it is therefore the rule that a court of appeal has a limited power of intervention. The court of

appeal usually considers what it would have awarded and if there is a palpable or manifest discrepancy between that amount and that awarded by the trial court, it will interfere (e.g. *Salzmann v* Holmes 1914 AD 471 at 480 and *Sutter v Brown* 1926 AD 155 at 171). A court of appeal may also interfere if the court of first instance materially misdirected itself and in this regard it is important for a court of second instance to know what factors a trial court took into account in determining the award, something conspicuously lacking in this case.

[9] The Constitution, in line with the common law, places a great value on human dignity (including reputation). It also, more so than the common law, emphasises the right to the freedom of expression. These two rights have to be balanced, a somewhat delicate and difficult exercise. But it is not only in regard to justification of a defamation that the freedom of expression impacts on the right of dignity. It also impacts on questions such as the interpretation of an allegedly defamatory statement: life is robust and over-sensitivity does not require legal protection; and of quantum: too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right. It is not, however, without interest to note that since or due to the

influence of the Code Napoleon civil law countries such as Germany do not recognise a damages claim for defamation unless the defamation is a criminal defamation. Our own indigenous law also does not in general allow damages claims for defamation unless allegations of witchcraft are involved (Olivier et al 'Indigenous law' 32 *Lawsa* 1st re-issue para 202-205) but our Roman Dutch common law provides for defamation claims for all on the same basis.

[10] As to the general approach to quantum, there are many dicta that create the impression that compensation may be awarded as a penalty imposed on the defendant and that the amount is not only to serve as compensation for the plaintiff's loss of dignity, for example *Die Spoorbond and another v South African Railways* 1946 AD 999 at 1005. These dicta were put in context by Didcott J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 830 para [80] when he said the following:

'Past awards of general damages in cases of defamation, *injuria* and the like coming before our courts have sometimes taken into account a strong disapproval of the defendant's conduct which was judicially felt. That has always been done, however, on the footing that such behaviour was considered to have aggravated the actionable harm suffered, and consequently to have increased the compensation payable for it. Claims for damages not purporting to provide a cent of compensation, but with the

different object of producing some punitive or exemplary result, have never on the other hand been authoritatively recognised in modern South African law.'

[11] In a like vein Hattingh J said in *Esselen v Argus Printing and Publishing Co Ltd and others* 1992 (3) SA 764 (T) at 771F-I:

'In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways – as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.

In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalise or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict. Only a criminal court passes sentence with the object of *inter alia* deterring the accused, as well as other persons, from committing similar offences in future; it is not the function of a civil court to anticipate what may happen in the future or to 'punish' future conduct (cf *Lynch v Agnew* 1929 TPD 974 at 978 and Burchell *The Law of Defamation in South Africa* (1985) at 293).'

[12] I mention this because the learned trial judge was not made aware of these principles and he apparently considered that an award, which would teach newspapers to limit themselves to inform and entertain the public

without affecting anyone, was justified. The ‘teach them a lesson’ theme underlies the judgment, as the learned judge himself later emphasised. In this regard he erred.

[13] Turning then from the general to the particular. The main factor determining quantum is the seriousness of the defamation. (FDJ Brand ‘Defamation’ 7 *Lawsa* 2 ed para 260 provides a useful checklist of factors.) Admittedly, the allegation attributed a criminal act, which is at the same time morally reprehensible, to the plaintiff. That much is common cause. The fact of the matter is, however, that the report itself provides some kind of justification for the ‘klap’, namely the alleged flirtations of his girlfriend. The ordinary reader, I believe, would have seen that as a provocation that somewhat reduced the plaintiff’s culpability.

[14] The second factor is the nature and extent of the publication. The newspaper had a circulation of about 90 000 to 95 000 and a readership of many more, maybe even ten times more. The publication was accordingly in local terms wide. On the other hand, the item formed part of a gossip column and the average reader would have taken anything there stated with more than a pinch of salt: the item was not dressed up as hard news

but as gossip, i.e., ‘casual conversation or unsubstantiated reports about other people’ (according to the Concise Oxford English Dictionary).

[15] The third factor is the reputation, character and conduct of the plaintiff. The defendants did not attack the reputation or character of the plaintiff and as he said, everyone he knows accepted that the allegation was untrue. However, not unlike politicians, persons who move in or close to the limelight have to expect that their lives will be to some extent in the public domain and they must be prepared to endure somewhat more than the ordinary citizen has to endure.

[16] Lastly, the motives and conduct of the defendants are relevant. The reporter (Mr Molele) testified that he had received the information about the assault from four persons. He cross-checked the facts and was satisfied of their correctness since his informants told the same story. He did not ask for the plaintiff’s version because it he thought it unlikely that the plaintiff would admit the allegations. Afterwards he could not trace all his sources for purposes of the trial and those he could find were not prepared to testify. (He gave their names.) There can be no doubt that the reporter must have had at least one source for his story. The information concerning the attendance of the couple at a wedding in Giyani was correct. How did he

obtain that? There is no suggestion that he ever harboured a personal grievance against the plaintiff or his girlfriend (both of whom he knew personally) or that the report was actuated by malice. There is accordingly no reason to disbelieve his evidence on this point. Although the trial court held that the reporter was not the originator but only the conveyor of the gossip it also held that the report was ‘unsubstantiated’, a finding that was not explained and which is inexplicable in the light of the evidence as a whole. (The demeanour finding, namely that the reporter was generally evasive and suffered from amnesia about a matter that had nothing to do with the case, added nothing to the judgment as did the finding that the plaintiff was an impressive witness because he admitted that he had not read all the case law on quantum.)

[17] As mentioned, as soon as the defendants realised that they could not establish the truth of the statement they tendered a published apology. This was not to the satisfaction of the plaintiff, why I have some difficulty to understand. He did not make a counterproposal. The apology may have been late, but the defendants until then had reason to believe that none was called for. The trial court erred in disregarding this material factor.

[18] To sum up: having regard to the foregoing and the general trend of awards in recent times and the fact that our courts have not been generous in their awards of *solatia* (*Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590), a practice that is to be commended, I believe that a proper award in this case should have been R12 000,00. There is a material discrepancy between this amount and that awarded and there is accordingly more than sufficient reason to interfere with the award.

[19] The defendants made an unconditional tender of R20 000,00 with costs taxed at the high court scale already on 12 September 2003. However, they only tendered their apology on 7 October 2003.

It would accordingly be fair to award the plaintiff his costs until the latter date. Although the matter was one for the magistrates' courts – the idea that defamation and other *injuria* claims may, without regard to their monetary value, of right be instituted in the high courts is outdated – in the light of the defendants' tender to pay costs on the high court scale I shall hold them to it.

[20] In the event the following order is made:

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and replaced with the following:

(i) Judgment for the plaintiff in the amount of R12 000,00 with costs on the High Court scale until 7 October 2003.

(ii) The plaintiff is to pay the costs of the defendants as from 8 October 2003, including the costs of the postponement on that day.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

ZULMAN JA
NAVSA JA
JAFTA JA
NKABINDE AJA