THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 127/2016

In the matter between:

MEDIA 24 LIMITED t/a DAILY SUN **FIRST APPELLANT**

THEMBA KHUMALO **SECOND APPELLANT**

and

BEKKER DU PLESSIS **RESPONDENT**

Neutral Citation: *Media 24 Limited v Du Plessis* (127/2016) [2017] ZASCA 33 (29 March 2017)

Coram: Cachalia, Petse, Swain and Mbha JJA and Gorven AJA

Heard: 27 February 2017

Delivered: 29 March 2017

Summary: Defamation: liability of the media: test of: words complained of to be considered from the point of view of the reasonable reader: defence of justification: truth and public benefit: only the material allegations or sting of the article required to be substantially true: publication of defamatory statement found not to have been reasonable: damages: assessment: award of R80 000 excessive justifying interference on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tokota AJ, sitting as court of first instance). Judgement reported *sub nom Du Plessis v Media 24 t/a Daily Sun & another* 2016 (3) SA 178 (GP):

1 The appeal is upheld to the extent set out below and the order of the High Court is set aside and substituted by the following:

'There will be judgment for the plaintiff against the first and second defendants jointly and severally the one paying the other to be absolved in the sum of R40 000 and costs of suit.'

2 Each of the parties shall pay their own costs of appeal.

JUDGMENT

Petse JA (Cachalia, Swain and Mbha JJA and Gorven AJA concurring):

[1] The main issue in this appeal is whether an article published by the appellant in the Daily Sun of 29 October 2010 is substantially true and in the public interest. The subsidiary issue is whether the publication of the article was reasonable in all the circumstances. If these issues are determined against the appellants, it will become necessary to consider the question whether the award of damages in the sum of R80 000 is disproportionate to the harm caused to the respondent. These issues arise against the following backdrop.

[2] The respondent, Mr Bekker du Plessis, as plaintiff, instituted an action against the first appellant, Media 24 Limited, trading as Daily Sun and the second appellant, Mr Themba Khumalo, as defendants, in the Gauteng Division of the High Court, Pretoria, for an alleged defamation and claimed damages in the sum of R500 000.

[3] The respondent was, on the date of publication of the article, the director and sales agent of D W Fresh Produce (Pty) Ltd, which was operating at the Tshwane

Fresh Produce Market. To work as a sales agent, the respondent required a certificate issued by the City of Tshwane.

[4] The statement appeared in the Daily Sun published by the appellants on 29 October 2010 and referred to the respondent as 'Mr Bekker'. The full text of the statement and the photocopy of the article as published in the Daily Sun are appended to this judgment as addenda. The article was published under a sensational headline that read: 'Frozen for an onion' and the sub-heading stating: 'Orel was in the cold room for two hours'. 'Orel' refers to Mr Orel Khoza who is the person that was detained in the cold room at the respondent's behest and whose photograph was depicted in the article.

[5] Pursuant to the publication of the article, the respondent instituted the aforementioned action in which he, inter alia, asserted that the article was wrongful and defamatory of him and was substantially untrue. He alleged that the article was understood by a reasonable reader of the Daily Sun to mean that he had deliberately subjected Khoza to cruel and potentially dangerous freezing conditions – for the sake of an onion. He further claimed that the article carried the additional sting that he was 'a racist who [valued] an onion more highly than the life and well-being' of another person.

[6] The action was defended by the appellants. The first appellant is the owner and publisher of the Daily Sun which is a daily newspaper whose targeted readers are what was described in evidence at the trial as the 'blue overall person', this being a reference to persons in the lowest rung of the social stratum, ie someone who is neither highly educated, nor well informed and critical. The second appellant was, at the time of the publication of the article, the editor of the newspaper. It is not in dispute that the Daily Sun enjoys a country-wide circulation.

[7] In their plea, the appellants admitted the publication of the article but denied that it referred to the respondent. They also denied that the article was defamatory. They pleaded further that the words complained of were, in their ordinary meaning, true in substance and fact and were published in the public interest. They further asserted that the article was published on a privileged occasion in that they were

under a duty as members of the press to inform the public of the detention of Mr Khoza in a cold room, and that in so doing they were acting as the voice of an informed and socially responsible readership. The appellants further contended that in the circumstances in which they found themselves, it was reasonable to publish the article in issue.

[8] At the conclusion of the trial, the High Court (Tokota AJ) gave judgment in favour of the respondent for R80 000 and costs of suit. The appellants appeal to this court against the judgment and order of the High Court with its leave.

[9] As to the truth or falsity of the article the High Court found that it was substantially untrue in a number of respects. It held that Khoza was falsely alleged in the article (a) to have been shoved into the cold storage; (b) to have been detained in the cold storage for two hours; (c) to have shivered for two hours after his rescue from the cold storage; (d) to have had frozen hair when in fact his head was bald; and (e) to have had his hands tied with a plastic strip. In the final analysis, the High Court found that the appellants had failed to establish that the gravamen of the article was substantially true, as it was replete with inaccuracies. The High Court concluded, incorrectly, that as the appellants had disavowed any reliance on the defence of reasonableness of the publication advanced in their plea, it was unnecessary to consider this defence.

[10] In this court, the appellants conceded the defamatory nature of the article. In order to justify the publication of the article, which was prima facie wrongful, the appellants only relied on two of the defences advanced in the High Court. These were publication of the truth in the public interest, alternatively, media privilege. They contended that the article complained of was substantially true, and thus of public interest, alternatively its publication was reasonable in the circumstances. The appellants accepted that they bore the onus of establishing these defences.

[11] Before considering the tenor of the article and the opposing contentions of the parties, some brief background as to how the article came to be published is necessary. There were four main characters that featured prominently in the events of 27 October 2010 which culminated in the publication of the article in the Daily Sun,

two days later, on 29 October 2010. They were: (a) the respondent, Mr Bekker du Plessis; (b) Khoza; (c) Khoza's companion Mr Small Makhubela; and (d) Ms Tebogo Moobi, the senior freelance journalist who was employed by the first appellant and had investigated the circumstances that led to Khoza being detained in the cold room at the behest of the respondent.

[12] On 27 October 2010 the respondent was at the Tshwane Fresh Produce Market when he was alerted to the fact that Khoza had stolen onions in Hall A at the market. He then requested one Mr Isaac, who was the supervisor, to prevent Khoza from leaving the market and to confront him about the alleged theft. Mr Isaac obliged and recovered two onions from Khoza's pockets. The respondent then telephoned the security office to alert the security personnel to what he perceived to be theft of onions, but the telephone went unanswered. According to the respondent, the market was plagued by thefts which were alleged to be prevalent and caused losses in the order of R20 000 per month. When confronted, Khoza explained that he had picked up the onions from the floor. As the security personnel were engaged elsewhere, the respondent decided to detain Khoza in the cold room. Once Khoza was placed in the cold room, the respondent turned his attention to something else. The respondent's intention, so he said, was to leave Khoza in the cold room until the security personnel were available to take over and hand Khoza to the police. The respondents' witnesses testified at the trial that the temperature in the cold room was set at nine degrees Celsius.

[13] In the meantime, Makhubela, who was Khoza's companion, telephoned the police and reported the incident to them. The police arrived at the market and rescued Khoza from the cold room after the latter had been there for 45 minutes. Makhubela also telephoned Moobi, the freelance journalist. Moobi came to the market accompanied by a Daily Sun photographer and interviewed both Khoza and Makhubela to obtain their version as to what had happened to Khoza. Khoza's photograph was also taken inside the cold room. Moobi then telephoned the respondent to obtain his version as to the events that had unfolded concerning Khoza. According to Moobi, the respondent initially told her that Khoza 'was a thief and deserved to be punished'. But the respondent denied that Khoza was detained in the cold room at his behest. The respondent then hung up. But shortly thereafter,

he telephoned Moobi and told her that he had video footage of the incident and also threatened to sue Moobi and the Daily Sun if she went ahead to publish the story. Moobi in turn asked the respondent to make the footage available to her. Although the respondent had initially agreed to do so, he later changed tack and said that the video footage was with his lawyers. The next day Moobi telephoned Khoza who then told her that he had not slept the previous night because he suffered a nosebleed throughout the night and as a result of this he went to the clinic again to seek medical help. It bears mentioning that it was not in dispute at the trial that Moobi did not verify what Khoza and Makhubela had told her from any other source.

[14] The second appellant, Mr Themba Khumalo, who it will be recalled was the editor of the Daily Sun when the offending article was published, also testified. He emphasised that one of the fundamental tenets of journalism is that news reporting must be balanced and fair and that the integrity of the story must be maintained at all times. He told the trial court that the Daily Sun's target readership is that category of reader who is not highly educated and sophisticated. He further testified that the Daily Sun, being a daily newspaper, does not engage in investigative journalism because of time constraints. He said that the Daily Sun is required to publish its stories as soon as possible after newsworthy events have occurred.

[15] Because the appellant conceded that the article was defamatory, it is unnecessary to examine the article to determine whether the words used convey a meaning defamatory of the respondent. It is, however, convenient at this stage to briefly examine the principles applicable to establishing the meaning of the defamatory article, in order to determine what the gist or sting of the article was, in preparation for a later examination of the defence of publication of the truth in the public interest. The gist or sting of the article is determined with reference to the legal construct of a reasonable reader. It is the meaning that the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. The test is an objective one. And as Corbett CJ explained in *Argus Printing and Publishing Co Ltd & others v Esselen's Estate* 1994 (2) SA 1 (A) at 20E-G, the

ordinary and natural meaning of the words takes account of not only what the words expressly said, but also of what they imply.[1]

[16] What Colman J said in *Channing v South African Financial Gazette Ltd* 1966 (3) SA 470 (W) is instructive. He said (at 474A-C):

'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 or 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 35 -36. It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. 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.'

[17] Accordingly, the pertinent question to ask is what an ordinary reader of the Daily Sun (bearing in mind his or her station in life as the High Court found) would have understood the words to mean when reading the article. The article has a sensational headline that reads: 'FROZEN – FOR AN ONION!' Below that the words 'Orel was in a cold room for two hours' appear. This is referred to as 'the subdeck' in media parlance. According to the second appellant the purpose of the subdeck is to arouse the reader's interest in the story. The subdeck is immediately followed by a caption reading: 'Shivering . . . Orel Khoza was allegedly handcuffed and locked inside a cold room for two hours for having an onion inside his pocket'. (A picture of Khoza standing beside stacked vegetables appears as part of the layout of the article. According to Moobi the inclusion of Khoza's picture was intended to 'put a face to the name'.) The article further stated that Khoza was still shivering an hour after his rescue by the police. Thereafter, he went to the clinic for treatment and yet bled through his nose throughout the night.

[18] The respondent asserted that the article implied that he had shoved Khoza into the cold room, detained him there for two hours, and that as a result, Khoza's hair was frozen. Further, that Khoza's detention in freezing conditions had

[1] See also *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC) at para 89.

deleterious consequences for him as his hair was frozen and he was still shivering an hour after his rescue. As a result of these harmful consequences, Khoza sought medical assistance from a clinic and suffered a nosebleed for the whole night. In essence, so it was contended, the meaning which would be attributed to the article by the reasonable reader of the Daily Sun of ordinary intelligence was that the respondent is a callous person who cruelly and forcibly confined Khoza to potentially dangerous freezing conditions which affected his health and well-being. This was the gist or sting of the article, being the legal construct of a reasonable reader. In my view the reasonable reader of the article would have understood these statements read in the context of the article as a whole[2] to have the meaning for which the respondent contended.

[19] It was nonetheless contended on behalf of the appellants that the meaning conveyed by the article was only that Khoza was detained in a cold storage against his will for allegedly stealing an onion and there was accordingly no basis for the meaning attributed to the article by the respondent. Seen in this light, so continued the argument, the article merely underscored no more than the disproportionality between the alleged theft of an onion and the unusual and cruel nature of the punishment imposed by the respondent. Counsel, strongly relying on *Johnson v Rand Daily Mails* 1928 AD 190, emphasised that the reasonable reader does not indulge in 'elaborate and overly subtle analysis' when reading an article. I do not agree. To my mind the article read in context and as a whole implied that the respondent was callous and bereft of compassion for fellow human beings.

[20] Having determined the gist or sting of the article in question I turn to examine the defences raised by the appellant. Since the appellants have conceded that the article was defamatory, the law presumes that the article was not only wrongful, but also published with the intent to injure. The first defence raised is that the article complained of was substantially true and published in the public interest. And secondly, the defence of media privilege which involves a determination of the question of whether, in publishing the article, the appellants acted reasonably. The

[2] F D J Brand in Joubert (ed) *The Law of South Africa* (2 ed) vol 7 para 239 on Defamation.

law is now settled that the appellants bore the onus to establish these defences on a balance of probabilities.[3]

[21] In *Modiri v Minister of Safety & Security & others* [2011] ZASCA 153; 2011 (6) SA 370 (SCA) this court said (para 11):

'In their plea the media respondents relied on a number of recognised grounds of justification, including truth and public benefit, fair comment, reasonable publication, and qualified privilege on the basis of a right or duty on their part to publish the defamatory statements and a corresponding right on the part of the readers of the Daily Sun to receive the same. Any one of these would, if established, serve to exclude wrongfulness.'

[22] So far as the defence of truth and publication in the public interest is concerned, the primary enquiry is whether the court a quo correctly concluded that the statements set out in para 9 supra, were false. In my view, it is clear upon a conspectus of the evidence as a whole, as submitted by the respondent in his heads of argument, that the article was false and untrue, alternatively the appellants' failed to prove the truthfulness of the article, in the following respects: (a) Khoza was not handcuffed; (b) his theft was not common practice at the fresh produce market; (c) he was not forcibly shoved into the fridge/cold storage room; (d) when the police arrived, he was not frozen nor was he shivering; (e) his hair was not frozen; (f) he had not been shivering in the fridge for two hours; (g) he was not shivering when he was removed, and he was not shivering an hour or two later; (h) he was not so cold that he was admitted to hospital; (i) his detention did not cause his nose to bleed for the rest of the night. All of these false statements were of relevance with regard to the gist or sting of the article as determined above. They all clearly added to the detrimental sting of the article and were not simply peripheral facts. In *Modiri* (para 22), this court said the following in relation to a defence of truth and public benefit:

'Under the rubric of truth and public benefit, the balancing act turns mainly on the element of public interest or benefit. If a defamatory statement is found to be substantially untrue, the

[3] See in this regard: *Benson v Robinson & Co (Pty) Ltd & another* 1967 (1) SA 420 (A) at 432E-G; *Hardakar v Phillips* 2005 (4) SA 515 (SCA) para 14; *Modiri v Minister of Safety & Security & others* 2011 (6) SA 370 (SCA) para 10; *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZASCA 4; 2011 (3) SA 274 (CC) para 85.

law does not regard its publication as justified. Publication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story.'

Thus, nothing more need be said about the ground of justification based on truth and publication in the public interest, save to state that this defence does not avail the appellants.

[23] I now turn to consider the question whether the appellants, who bore the onus, succeeded in establishing the defence of media privilege, namely that the publication was reasonable. In *National Media Ltd & others v Bogoshi* 1998 (4) SA 1196 (SCA) this court held that the publication of a defamatory statement will not be unlawful if on a consideration of all the circumstances it was reasonable to publish the material in the particular way and at a particular time.[4] The court went on to state that when the reasonableness of the publication is considered, the court must take 'account of the nature, extent and tone of the allegations'. Hefer JA continued and said at 1212I – 1213A:

'… that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional . . . sting. What will also figure 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 defamatory matter is published in a newspaper.'

Thus, if a defendant forming part of the media establishes the defence of publication of the truth in the public interest the publication of the defamatory statement will not be unlawful and the defence of media privilege need not be relied upon.

[24] In this court, the appellants contended that the High Court erred in failing to consider the defence of media privilege based as it was upon the reasonableness of the publication, upon which they also relied. First, they asserted that the article constituted a fair and balanced account of the interviews that Moobi had with Khoza, Makhubela, the respondent and her own observations when she attended at the market. Second, that Moobi attempted to obtain comment from the respondent who was uncooperative and instead chose to adopt a belligerent attitude. Third, that the

[4] At 1212F-G.

respondent had refused to allow Moobi an opportunity to view the video footage which he claimed to have and which showed how the incident had unfolded. Fourth, if the respondent had not reneged on his promise to provide the video footage to Moobi, the article would not have contained the falsehoods in question.

[25] Both counsel dealt exhaustively with an array of decided cases on the question of the reasonableness or otherwise of the publication of the article. There is a broad consensus amongst those decisions that there is no closed list of defences and that considerations of public and legal policy have a bearing on the question whether a particular publication is to be regarded as lawful or not.[5] In this way the courts strike a fine balance between the important role played by the media in providing information to the citizenry on the one hand, and the right to human dignity and reputation on the other.[6]

[26] Accordingly, no purpose would be served by an exhaustive discussion of those authorities. Suffice it to say that upon a proper analysis, those cases reveal not so much a divergence of opinion as to the principles applicable to a matter such as the present, but purely differences of emphasis on the approach adopted in applying those principles to a given set of facts.

[27] The question which arises for determination on this aspect of this case is whether the publication of the statement complained of was reasonable in the circumstances. In answering this question *Bogoshi* decrees that a court must take cognisance of the nature, extent and tone of the allegations. And, as explained by Hefer JA in *Bogoshi* (at 1212I), a court must also have regard to 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, bearing in mind that 'there can be no justification for the publication of untruths'.

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[5] See in this regard: *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402 – 403A; *Le Roux v Dey* paras 121-125; Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) at 208.
[6] See in this regard: *Khumalo & others v Holomisa* 2002 (5) SA 401 (CC) paras 24-28.

[28] In relation to the defence of justifiable publication of the article in issue, and as it was expressed in *Bogoshi,*[7] in an action for defamation against the media a defence of reasonable publication is available to a defendant. If this defence is upheld, the publication of a defamatory statement will be justified. This will be the case if on a consideration of all the circumstances of a given case, it is found that the publication of the statement was reasonable. Moreover, this court stated that the ultimate question in each case is whether a proper balance can be struck between the right to protect one's reputation (as required by the common law remedy of defamation) and the freedom of the press as enshrined in s 16 of the Constitution.

[29] Accordingly, it will not be regarded as unlawful when the media publishes false defamatory allegations of fact, if upon a consideration of all the circumstances of the case, it was reasonable to have published the facts in the particular manner in which they were published at that particular time.[8] The pertinent considerations that come to the fore are the nature of the information upon which the allegations had been based, the reliability of the source and the reasonable steps taken[9] to verify the accuracy of the information supplied to them by both Khoza and Mathebula before publishing the article. In answering this question it is as well to remember that the appellants bore the onus to prove all of the facts upon which they relied to establish that the publication was reasonable and that they had not been negligent. Proof of reasonableness was the substantive duty of the appellants. They accordingly had to prove the reasonable steps they took to verify the accuracy of the information before the publication of the article. The second appellant accepted under cross-examination that telling the truth and articulating the facts accurately was a basic tenet of any newspaper and that 'stories must tell the truth'.

[30] In this case it is not in dispute that no proper steps were taken to verify the information obtained both from Khoza and Makhubela as to the events of 27 October 2010. The appellants sought to justify their failure to do so on the ground that the Daily Sun is not an investigative newspaper and that it is required to publish without delay. This was so because, as the second appellant put it, 'each and every story

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[7] *Idem* para 6.
[8] Bogoshi at page 1212 G-H.
[9] Bogoshi at page 1212 I.

has a deadline' and that the Daily Sun 'will sit on a story for longer than two days under exceptional circumstances'. I agree with the submission of the respondent that the evidence of the second appellant and the reporter Moobi, clearly established that the predominant interest of the newspaper and its staff was to publish the story as quickly as possible. No attempt was made, for example, to verify whether Khoza's hands had indeed been tied or that he had been shoved into the cold room. Nor was the claim by Khoza that he sought medical help and suffered a nosebleed for the whole night verified. All of these assertions could have been verified without undue inconvenience from the clinic at which Khoza was allegedly treated and also by seeking access to the video footage which the respondent had said was with his attorneys. The appellants were content to rely solely on the versions of Khoza and Makhubela despite the fact that they had, in my view, ample opportunity to verify those versions before publication.

[31] To my mind, the defence of media privilege upon which the appellants relied on appeal is unsustainable on the evidence. As I see it, the appellants heedlessly proceeded to publish the defamatory statement without first bringing themselves within the strictures enunciated in *Bogoshi*. That the respondent had mentioned to Moobi that there was video footage which, in the normal course, would have captured activities at the market, should have caused the appellants to pause and reconsider. The appellants' indifference to the respondent's right to dignity and reputation was exacerbated by the fact that certain of the facts published were distorted. No attempt, for example, was made to verify the information obtained from Khoza relating to his alleged visits to a clinic for medical assistance. On a consideration of all of the evidence it was not reasonable of the appellants to have published the facts contained in the article, in the particular manner in which they were published and at that particular time. Accordingly, the appellants failed to discharge the substantive duty resting on them to prove the reasonableness of the publication. The publication of the article was consequently negligent and thus unlawful.

[32] I turn now to a consideration of the appeal against the award of damages to the respondent in the sum of R80 000. The appellants contended that the award is excessively disproportionate to the harm caused because the readership of the Daily

Sun is limited to the so-called 'blue overall person' and the publication of the article did not cause substantial damage to the respondent's reputation because members of his community, did not read the Daily Sun. It is trite that when it comes to the assessment of damages a trial court exercises a wide discretion.[10] Accordingly, an appellate court will not decide the question afresh. It will interfere with the exercise of that discretion only where it is shown that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, or where its assessment differs so markedly from that of the trial court as to warrant interference. (Compare *Transnet Ltd t/a Metrorail & another v Witter* 2008 (6) SA 549 (SCA) para 12.) In *Sadler v Wholesale Supplier Ltd* 1941 AD 194 at 200 this court held that should the appellate court find that the trial court had misdirected itself with regard to material facts or in its approach to assessment or the trial court's assessment of damages is markedly different to that of the appellate court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court.

[33] In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) paras 75-76, the Constitutional Court held that equity in determining a damages award in defamation remains an important consideration. That consideration must, in my view, come to the fore in this case. It is as well to bear in mind that the purpose of damages for defamation is not to punish the defendant but to offer solace to the plaintiff by payment of compensation for the harm caused[11] and to vindicate the plaintiff's dignity.[12]

[34] In *Tsedu & others v Lekota & another* [2009] ZASCA 11; 2009 (4) SA 372 (SCA) para 25 this court said that 'monetary compensation for [defamation] is not capable of being determined by any empirical measure'. It went on to say that awards made in other cases are of limited value as they only provide a generalised form of guidance in assessing damages. (See also in this regard: *Neethling v Du Preez & others, Neethling v Weekly Mail & others* 1995 (1) SA 292 (A) at 301H-I

[10] *Media Workers Association of South Africa & others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800D-E.
[11] *Lynch v Agnew* 1929 TPD 974 at 978.
[12] See *LAWSA* above fn 2, para 260.

where this court said that compensation in defamation cases is essentially for sentimental loss which is not easily quantified in monetary terms.)

[35] Upon consideration of all the facts that bear on the issue of quantum in this case, it is my view that the award of R80 000 to the respondent was excessive to a degree that warrants interference by this court. This is particularly so, if regard is had to the fact that the High Court found that the respondent's conduct in detaining Khoza in a cold room was reprehensible. In addition, one must not lose sight of the fact that the respondent had for a prolonged period distanced himself from Khoza's detention and obstinately protested his innocence. He persisted in his denials on the first day of his testimony before the High Court. However, on the second day he was constrained to concede under cross-examination that Khoza had indeed been detained at his behest. His conduct in orchestrating Khoza's detention, coupled with his persistent denials, already compromised his reputation. Our courts have for many years emphasised that: (a) the nature of the defamation statement; (b) the nature and extent of the publication; (c) the reputation, character and conduct of the plaintiff; and (d) the motives and conduct of the defendant are but some of the relevant considerations to be borne in mind in the assessment of damages. And that the list of such considerations is by no means exhaustive.

[36] I have already alluded to the fact that the award of damages to the respondent is excessive. In my view, bearing in mind all the circumstances of this case, an appropriate award should have been in the order of R40 000. That the respondent was awarded R80 000 makes that award to be startlingly disparate from the award that I consider would meet the dictates of justice in this case. That being so, interference with the award of the High Court is justified. The appeal against the award must accordingly be upheld. I did not understand counsel to be averse to this court itself determining the quantum of damages rather than remitting the case to the High Court for that purpose. (See, for example, *Neethling v Du Preez* at 302 A-J where this court said that the determination of the award of damages by itself might have been an expeditious course than remitting the case for damages to be fixed by the trial court. And that such a course would avoid further delays and additional costs and eliminate the possibility of a second appeal to this court following upon a determination of damages by the trial court.)

[37] It remains to consider the question of costs. The appellants appealed against the whole of the judgment and order of the High Court, inclusive of the amount of the award. They have succeeded in relation to the latter aspect but are unsuccessful in relation to liability. The net effect of this partial success is that their success is not substantial to a degree that they would be entitled to the costs of the appeal. Neither should the respondent be entitled to the costs of appeal because of his successful defence of the High Court's judgment in relation to the aspect of liability. In effect, each of the parties has achieved a measure of success. Accordingly, an appropriate order is that each of the parties should pay their own costs of appeal.

[38] In the result the following order is made:

1 The appeal is upheld to the extent set out below and the order of the High Court is set aside and substituted by the following:

'There will be judgment for the plaintiff against the first and second defendants jointly and severally the one paying the other to be absolved in the sum of R40 000 and costs of suit.'

2 Each of the parties shall pay their own costs of appeal.

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JUDGE OFAPPEAL

APPEARANCES:

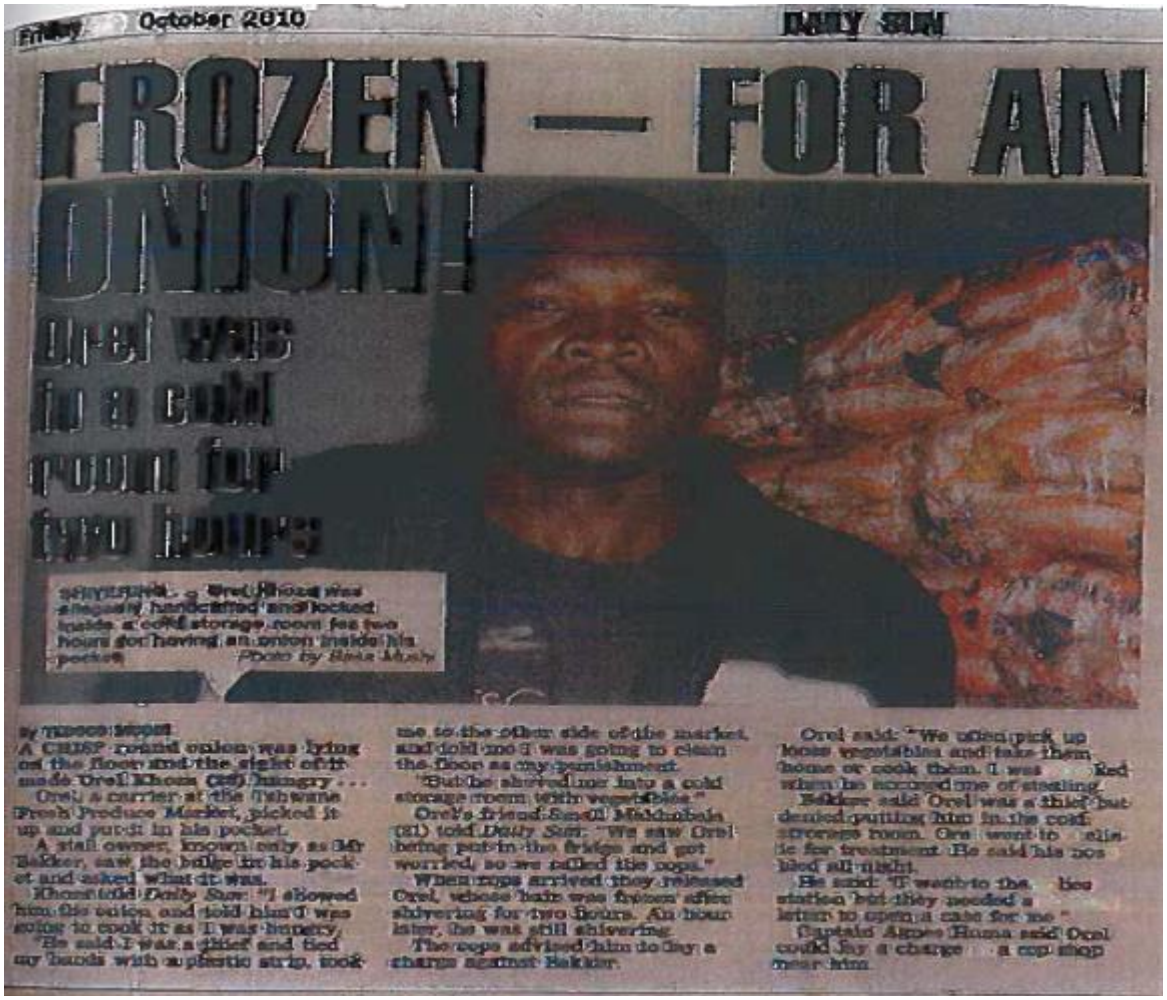
For the Appellant:	C Bester (with L Mtukushe) Instructed by: Jurgens Bekker Attorneys, Bedfordview. c/o Rossouws Attorneys, Bloemfontein
For the Respondent:	S W Davies (with M P Fourie) Instructed by: Hendrik Haasbroek Attorneys, Pretoria c/o Honey Attorneys, Bloemfontein

ADDENDUM A

FROZEN – FOR AN ONION!

Orel was in a cold room for two hours

SHIVERING . . . Orel Khoza was allegedly handcuffed and locked inside a cold room for two hours for having an onion inside his pocket.



Friday October 2010 DAILY SUN

FROZEN — FOR AN ONION!

Orel was in a cold room for two hours

Orel Khoza was allegedly handcuffed and locked inside a cold storage room for two hours for having an onion inside his pocket. Photo by Reka Mashi

by TEBOGO MOOBI

A CRISP round onion was lying on the floor and the sight of it made Orel Khoza (28) hungry . . .

Orel, a carrier at the Tshwane Fresh Produce Market, picked it up and put it in his pocket.

A stall owner, known only as Mr Bekker, saw the bulge in his pocket and asked what it was.

Khoza told *Daily Sun*: "I showed him the onion and told him I was going to cook it as I was hungry.

"He said I was a thief and tied my hands with a plastic strip, took me to the other side of the market and told me I was going to clean the floor as my punishment.

"But he shoved me into a cold storage room with vegetables."

Orel's friend, Small Makhubela (21) told *Daily Sun*: "We saw Orel being put in the fridge and got worried, so we called the cops."

When cops arrived they released Orel, whose hair was frozen after shivering for two hours. An hour later, he was still shivering.

The cops advised him to lay a charge against Bekker.

Orel said: "We often pick up loose vegetables and take them home or cook them. I was shocked when he accused me of stealing.

Bekker said Orel was a thief but denied putting him in the cold storage room. Orel went to a clinic for treatment. He said his ... hed all night.

He said: "I went to the ... ber station, but they needed a letter to open a case for me."

Captain Agnes Huma said Orel could lay a charge ... a cop shop near him.

ADDENDUM B

By TEBOGO MOOBI

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Bekker said Orel was a thief but denied putting him in the cold storage room. Orel went to a clinic for treatment. He

said his nose bled all night.

He said “I went to the police station but they needed a doctor’s letter to open a case for me.”

Captain Agnes Huma said Orel could lay a charge at a cop shop near him.