TSODILO SERVICES PTY LTD t/a SUNDAY STANDARD AND OTHERS v TIBONE 2011 2 BLR 494 CA

Citation: 2011 2 BLR 494 CA

Court: Court of Appeal, Lobatse

Case No: civ app no 71 of 2009

Judge: Ramodibedi and Foxcroft JJA and Newman AJA

Judgement Date: 29 July 2011

Counsel: G M Budlender SC with him D Bayford for the appellantsrnA Redding SC with him T Dalrymple, D MakatiMpho and B S

Flynote

Defamation—Damages—Award—Government minister accused in newspaper report of having corruptly awarded a tender—Claims of freedom of speech and public interest to be weighed against right to dignity—Politicians required to display greater degree of tolerance to criticism.

Headnote

The appellants appealed against an award of damages made against them in an amount of P400 000 for having defamed the respondent, a government minister,2011 (2) BLR p495by suggesting in a newspaper report that he had been guilty of corruption in awarding a tender to a foreign company. The High Court, in making the award, had pronounced the claimed damages of P3 million as ridiculously high but had used as a yardstick an earlier case in which a judge had been defamed and allowing for inflation and the fact that, unlike the present case, there had been an appropriate apology, calculated the damages at P400 000.Held: (1) The first step in reaching an appropriate award was to balance the competing considerations of freedom of speech and public interest on the one hand, and the rights to individual dignity on the other. This did not appear to have been done in this case.Dibotelo v Sechele and Others[2001] 2 B.L.R. 588 compared.(2) In not properly considering the competing claims of freedom of speechand personal dignity, and in treating a cabinet minister as being in a comparable position to a judge, the court a quo had misdirected itself. The award was in any event out of kilter with previous awards in this country and the court was therefore at large to determine an appropriate award.(3) Politicians were undoubtedly required to display a greater degree of tolerance to criticism than private individuals. Freedom of expression was animportant tool in holding governments to account. What was more, a cabinet minister had ready access to many public opportunities to defend him or herself when criticised and the respondent's honour had to an extent been vindicated when the government issued a press statement in his defence. An appropriate award would be P250 000.

Case Information

Cases referred to:Basner v Trigger1946 AD 83Cassell & Co Ltd v Broome[1972] UKHL 3; [1972] AC 1027; [1972] 2 WLR 645; [1972] 1 All ER 801 (HL)Dibotelo v Sechele and Others[2001] 2 B.L.R. 588Esselen v Argus Printing and Publishing Co Ltd and Others1992 (3) SA764 (T)Fose v Minister of Safety and Security1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC)Kgafela v Maoto[1992] B.L.R. 256, CALingens v Austria(1986) 8 EHRR 407Lynch v Agnew1929 TPD 974Mogale and Others v Seima2008 (5) SA 637 (SCA)Mthembi-Mahanyele v Mail and Guardian Ltd and Another2004 (6) SA 329 (SCA); [2004] 3 All SA 511 (SCA)Mzwinila v CBET (Pty) Ltd t/a Midweek Sun and Others[2010] 3 B.L.R. 736National Media Ltd and Others v Bogoshi1998 (4) SA 1196 (SCA)Reynolds v Times Newspapers[1999] UKHL 45; [1999] 3 WLR 1010; [1999] 4 All ER 609 (HL)Sebele v Dikgang Publishing Company (Pty) Ltd(Civ Case 2779/04), unreportedTibone v Tsodilo Services (Pty) Ltd t/a Sunday Standard and Others[2009] 2 B.L.R. 311Trustco Group International Ltd and Others v Shikongo2010 (2) NR 377 (SC)2011 (2) BLR p496Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others2001 (2)SA 242 (SCA)Ward-Jackson v Cape Times Ltd1910 WLD 257APPEAL against the award of damages for defamation in the High Court. The facts are sufficiently stated in the judgment.G M BudlenderSC (with himD Bayford)for the appellantsA ReddingSC (with himT Dalrymple,D Makati-MphoandB Semere)for the respondent.

Judgement

FOXCROFT JA:At the start of this appeal hearing, Mr Budlender confirmed what had beenindicated in his heads of argument dated 11 July 2011: the appeal on the merits had been withdrawn since the appellants now accept that the

published articles in theSunday Standardwere defamatory in material respects. This appeal is therefore concerned only with the quantum of damages sustained as a result of the admitted defamation.The respondent's action for defamation arose from two articles which appearedin theSunday Standardweekly edition (14–20 January 2007). These articles covered a parliamentary debate on a Bill presented in Parliament in December 2006. The exchanges which led to the articles occurred on 19 December 2006 when the respondent was presenting the Rural Electrification Project (Nordic Investment Bank Loan Ratification) Bill 2006 for its second reading. During thedebate some members, covered of course by parliamentary privilege, suggested that the award of the contract without any tendering process might have been tainted with corruption.The respondent alleged that certain statements in the newspaper articles were written and published concerning, about and pertaining to him. The front page of the weeklySunday Standardfeatured an article under the headline 'Tibonecaught out in P272 million questionable tender controversy' and on pp 6 and 7 of the same edition under the headline 'Fingerprints on the till' alongside a large photograph of the respondent there appeared an article with an introductory paragraph in large print claiming:'Sunday Standard reporters take you inside how Charles Tibone misled parliament in an attempt to cover up apparent corruption in the award of a P272million tender to a Swedish company, which closed out citizen companies.'The juxtaposition of the words 'Fingerprints on the till' and the above summary clearly suggest that the respondent, Charles Tibone, was implicated in a cover up involving corruption and theft of public funds. The wording, possibly deliberately chosen to suggest that 'fingers in the till' was not being said, was atworst a shabby pretence and at best shoddy journalism. The imputation remains, whatever the motive of theSunday Standardin setting up the page as it did might have been.On 17 January 2007 the Ministry of Minerals, Energy and Water Resources issued a press release in reply to the two articles published in theSunday Standardon 14 January 2007. The true facts of the matter were set out, in particular that2011 (2) BLR p497FOXCROFT JAthe loan agreement with the Nordic Investment Bank had followed the same procedure used in the electrification of all the villages where funding from Nordic countries was used. An open and transparent process involving two ministries, the Attorney-General's Chambers, the Botswana Power Corporation, the Swedish Embassy, the Botswana Embassy in Sweden, the Nordea Bank, the Nordic Investment Bank and the contracting firm EL TEL had been carried out.The appellants denied that the statements made in the articles pertained to the respondent, and in the alternative pleaded fair comment, unawareness of any falsity in any of the statements, absence of negligence or recklessness in publishing, truth and public interest.The respondent replicated, inter alia, that the appellants were motivated by malice in publishing the said articles. In his argument for the respondent, MrRedding emphasised this submission.The first defence raised — denial of reference to the respondent — was groundless on the evidence, (see judgment of court a quo, reported asTibone v Tsodilo Services (Pty) Ltd t/a Sunday Standard and Others[2009] 2 B.L.R. 311) and the only possible defences raised were qualified privilege and faircomment. Such defences attach to fair and accurate reports in a newspaper of parliamentary proceedings in the public interest. It is trite that the protection afforded by qualified privilege is conditional upon the statement complained of having been made with an honest purpose. Since it is conceded in this matter that the articles in theSunday Standardwere 'defamatory in material respects', it follows that it is accepted that, as far as the defence of qualified privilege isconcerned, malice must have defeated the 'defence'. Malice may of course be present where no personal spite or ill-will is present, but where the occasion reported on is used for some indirect and wrong motive. As Schreiner JA said in South Africa inBasner v Trigger1946 AD 83 at pp 95-96, the use of the term absence of animus injuriandi in this connection is misleading and 'it seems preferable to say that privilege is defeated by proof of malice, and by that alone.'In the present appeal there is no proof of actual spite or ill-will, but there was at least a lack of bona fides, as correctly found by the court a quo.As far as the possible defence of fair comment is concerned, what must be shown is that a statement published was a fair comment on a matter of public interest. A plea of fair comment will cover a personal attack upon the moral character of the plaintiff if the facts truly stated warrant the imputation, and ifthe facts commented upon are true and in the public interest. In South Africa, the Supreme Court of Appeal inNational Media Ltd and Others v Bogoshi1998 (4) SA 1196 (SCA), and after a sojourn in the area of strict liability, held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. The failure of the appellants to interview any other members of parliament apart from those who had made comments adverseto the respondent in parliament; the fact that the press release of the Permanent Secretary in the Ministry of Minerals, Energy and Water Resources was not published; that the press release of the DCEC was not published; and that no mention was made of the explanation in parliament of the relationship between the government and EL TEL all point to either deliberate ill-will, arrogance, or recklessness. In my view, the appellants certainly did not demonstrate that they were not negligent in printing what they did, and were therefore correctly held liable in damages to the respondent.2011 (2) BLR p498FOXCROFT JAQuantum of damagesMr Budlender submitted that as an apology had been tendered by the appellants 'in a suitable form', an appropriate order of this court would include an order that appellants apologise to the respondent and retract the offending articles in theSunday Standardin a prominent publication. Mr Redding's response was that in the words of the learned judge a quo the appellants haduntil now spurned every effort on behalf of the respondent to publish an apology or to retract the article, and that more than two years after publication in theSunday Standard, the article continued to be published on the Internet with the plaintiff's photographs in tandem. Mr Redding added, correctly in my view, that the offer of apology and retraction — tendered, not made and only to be made upon order of this court — does not comply with the principle enunciated inWard-Jackson v Cape Times Ltd1910 WLD 257 at p 263, by Curlewis J. Thereit was said that the essence of an apology is that it should contain an unreserved withdrawal of all imputations wrongly made and an expression of regret that they were ever made. The apology and retraction should be neither reluctant nor grudging, but should be prompt and prominent. In the present matter these criteria have not been met.InMogale and Others v Seima2008 (5) SA 637 (SCA) Harms JA dealt with an appeal against an award of damages only, as is the situation in casu. Holding that a Court of Appeal would interfere with the quantum of sentimental damages awarded by a trial court only where there was a palpable or manifest discrepancy between the amount the Court of Appeal would have awarded and the amount awarded by the trial court, or

where the trial court had materiallymisdirected itself, the court reduced an award of R70 000 to R12 000. The matter concerned a report in theSowetan Sunday Worldthat the plaintiff, a member of the Pretoria Bar, had smacked his girlfriend in public. A letter from the defendant the day before the trial conceded that the article was defamatory and ended with a tender of an apology and retraction to be published which would include a specific retraction of the defamatory 'allegation that your clientstruck Ms Molatlou, express regret for the publication and apologise for it.' The tender was not accepted, and the apology therefore not published.Harms JA echoed the sentiments of many earlier judges that the determination of sentimental damages is inherently difficult, requiring the exercise of a judicial discretion, more properly called a value judgment, by the judicial officer concerned. The South African Constitution, like that of Botswana, places greatvalue on human dignity and reputation, and emphasises the right to the freedom of expression.'These two rights have to be balanced, a somewhat delicate and difficult exercise.'Harms J A added at p 640 that the freedom of expression also impacts on theright to dignity in the determination of an appropriate award of damages for a defamatory statement, and at p 641A:'... 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.'2011 (2) BLR p499FOXCROFT JAInVan der Berg v Coopers & Lybrand Trust (Pty) Ltdand Others2001 (2) SA 242 (SCA) at p 60, Smalberger JA also expressed himself on the problem of determining the proper amount of an award in a defamation case. He added at p 260G that:'Care must be taken not to award large sums of damages too readily lest doingso inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation.'It is generally recognised that comparisons with previous awards in damages cases serve a very limited purpose. What they do is to reflect the norms of the society in which these earlier awards were made, and broad trends. The simpleapplication of an inflationary factor will not necessarily lead to an acceptable result since awards must always depend upon the facts of each case, against the background of prevailing attitudes in the community which the court serves.The first step in reaching an appropriate award is to balance the competing considerations of freedom of speech and public interest on the one hand, and the right to individual dignity on the other. This does not appear to have been donein this case. Once the learned judge a quo correctly held that the claimed sum of P3 million was ridiculously high he turned to the case ofDibotelo v Sechele and Others[2001] 2 B.L.R. 588 for his yardstick. Deducting P50 000 from the notional figure of P300 000 (which he had considered awarding) because there had been an apology in that matter, Chatikobo J awarded P250 000 to theplaintiff. Allowing then for inflation, and the 'obvious parallels' between that case where a judge had been defamed and the Cabinet Minister in casu, the learned judge a quo awarded the sum of P400 000 to the respondent.It is clear from the judgment at p 327 that the figure of P400 000 was arrived at by increasing the award inDibotelo v Sechele(supra) by P100 000 to allow for eight years of inflation since 2001. In not properly considering thecompeting claims of freedom of speech and personal dignity, and in treating a Cabinet Minister as being in a comparable position to a judge, the learned judge misdirected himself. Even if he had not, the amount of the award was so 'out of kilter', as Mr Budlender put it, with previous awards in this country and so different from what this court would have awarded, that this court is at large to determine an appropriate award.Mr Budlender submitted that in very many jurisdictions, holders of political office are regarded as being in a special position, having chosen to enter the hurly-burly of political life with its attendant controversy. He referred to the finding of the European Court of Human Rights inLingens v Austria(1986) 8 EHRR 407 para 42 that:'The limits of acceptable criticism are accordingly wider as regards apolitician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt, article 10(2) enables the reputation of others — that is to say, of all individuals — to be protected, and this protection extends to politicians too, even when they are not acting in their private capacities;but in such cases the requirements2011 (2) BLR p500FOXCROFT JAof such protection have to be weighed in relation to the interests of opendiscussion of political issues.' (my emphasis).It was this weighing which did not occur in the present matter. This passage from the European Court was approved by the South African Supreme Court of Appeal inMthembi-Mahanyele v Mail and Guardian Ltd and Another2004 (6) SA 329 (SCA) and by Lord Steyn, albeit in the minority, in the House of LordsinReynolds v TimesNewspapers[1999] 4 All ER 609 (HL) at p 635 F–H. No difference appears in regard to this passage in the majority judgments in theReynoldscase, and the judgment of the presiding judge begins with the words:'My Lords, this appeal concerns the interaction between two fundamental rights: freedom of expression and protection of reputation.'While the remarks cited were concerned with liability for defamation and not quantum of damages, it has often been pointed out that similar considerations apply to quantum.Politicians are undoubtedly required to display a greater degree of tolerance to criticism than private individuals. Freedom of expression is an important toolin holding governments to account. What is more, a Cabinet Minister has ready access to many public opportunities to defend himself or herself when criticised. The respondent's honour was to an extent vindicated when the government issued a press statement in his defence, and when it became known that:'on re-presentation, the Bill was passed without further ado.'A judge is in a very different position. He or she must remain distant from public controversy and not participate in any way in politics. He is therefore particularly vulnerable to personal attacks upon him or her to which, traditionally, he or she may offer no response. A judge is conditioned by long experience in the law, as a practitioner, to accept that one cannot descend into the arenaof political conflict either on a personal or professional level. No government department will issue any defending statement on his behalf. Nor should it do so. The most he or she can hope for is that the Chief Justice of the country may issue a statement to correct palbable wrongs done to him or her in the course of the judicial function. To equate the position of a vulnerable judge to that of a minister who has his Cabinet to support him, was a clear misdirection.InMogale v Seima(supra) at 641 Harms JA discussed the misconception in some early cases that damages awards in defamation cases could serve a punitive function. As Didcott J explained inFose v Minister of Safety and Security1997 (3) SA 786 (CC), at p 830.'Past awards of general damages in cases of defamation,injuriaand thelike 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 of2011 (2) BLR p501FOXCROFT JAproducing some punitive or exemplary result, have never on the other hand been authoritatively recognised in modern South African law.'Damages for solatium of wounded feelings must always be focused on the victim, not on the wrongdoer. Egregious behaviour on the part of a wrongdoer may well increase the award, but that is because the harm to the victim has beenaggravated.It has frequently been said that punishment and deterrence are functions of the criminal law and should not form part of the law of delict.InMogale'scase (supra) at p 642 para [12] Harms JA referred to the view of the judge a quo in that matter that newspapers ought to be 'taught a lesson' howto behave. This is of course entirely unjustified.Harms JA also referred with approval to the remarks of Hattingh J inEsselen v Argus Printing and Publishing Co Ltd and Others1992 (3) SA 764 (T) at p 771G–I where the learned judge a quo concluded that:'... it is not the function of a civil court to anticipate what may happen in the future or to "punish" future conduct (cfLynch v Agnew1929 TPD 974 at 978and BurchellThe Law of Defamation in South Africa(1985) at 293.'What Krause J said inLynch v Agnew1929 TPD 974 was that the magistrate had been wrong to say that 'such damages [must be] given as to protect the plaintiff from further molestation of this sort.' The learned judge added at p 978 that, it was quite wrong for the magistrate to have regard to possible furthertransgressions by the defamer in future:'... because only such damages can be awarded as are the natural and probable consequences of the appellant's words. A defendant is mulcted in damages in respect of his past conduct and the amount should not be increased to act as a deterrent in respect of his future conduct.'Courts are obviously faced with a dilemma. The award must not be so low as to be meaningless to a publisher with a large circulation, yet not be so high that it appears to be an attempt to deter repetition of the defamatory conduct. Deterrence is not the object of the award and attention must always be focused on the victim and the extent to which he or she must be compensated as asolatium for the wrong done.Burchell inThe Law of Defamation in South Africa(Juta & Co Ltd Cape Town 1985) at p 293 says that even the critics of punitive damages would accept that factors aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or toact as a solatium:'The emphasis must therefore be on compensating the plaintiff, not on making an example of the defendant.'(This was the remark of Lord Reid inCassell & Co Ltd v Broome[1972] AC 1027 (HL) at p 1127 G).Burchell (op cit) concludes by suggesting that South African law would have done well to follow the Scottish rather than the English path:2011 (2) BLR p502FOXCROFT JA'Exemplary or punitive damages form no part of the law of Scotland; thegoal of compensation is paramount, although aggravated damages may be awardedÉ . An emphasis on aggravated rather than punitive damages, if nothing else, serves to highlight the contemporary function of the civil law of defamation-compensation for the injured plaintiff.'Persistence in the plea of justification may be taken into consideration as anaggravating factor, as is repetition of an offending statement or persistence over a long period of time in the injurious conduct.The recent South African cases, particularlyMogale v Seima(supra) andFose v Minister of Safety and Security(supra) demonstrate that modern South African law is certainly on the path of compensation rather than 'making an example of a defamer'. Decisions in this division reflect a similar approach.InSebele v Dikgang Publishing Company (Pty) Ltd(Civ Case 2779/04), unreported a former senior civil servant said to be 'deadwood' was awarded the sum of P80 000. Newman J referred to the remarks of Schreiner J A in this court inKgafela v Maoto[1992] B.L.R. 256, CA, that:'Care must be taken not to award large sums of damages too readily lest doingso inhibits freedom of speech or encourages intolerance to it and thereby foster litigation.'In a more recent case in the High Court,Mzwinila v CBET (Pty) Ltd t/a Midweek Sun and Others[2010] 3 B.L.R. 736, Kirby J, as he then was, reducedthe registrar's assessment of P265 000 to P100 000. The learned judge held that direct malice was not proved in that matter but that the reporter involved probably believed, although mistakenly, in the truth of his report. Publication had been reckless and the defamation persisted in up to a very late stage. The victim was a member of parliament said by theMidweek Sunto have 'gone missing' and to have been remanded in custody in Johannesburg.A similar approach is apparent in Namibia where a recent judgmentof O'Regan AJA inTrustco Group International Ltd and OthersvShikongo2010 (2) NR 377 (SC) resulted in the reduction of an award of N$175 000 to N$100 000. The Mayor of Windhoek, according to the tabloid newspaperInformantŽ,had been involved in an underhand land deal with a 'Broederbond Cartel' resulting in an expected loss to the city of Windhoek of some N$4.8million for which the mayor was responsible.In determining a proper award after dismissing the appeal on the merits, O'Regan AJA held that the defamation was very serious, but that the sum awarded was significantly higher than the highest previous award in Namibia of N$100 000.A consideration of these and many other cases reveals that the award of thecourt a quo in this matter was indeed out of kilter with awards in this, and neighbouring countries.Having balanced the conflicting considerations relevant to the quantum of damages in defamation cases, I am satisfied that an appropriate award to the respondent in this case is the sum of P250 000.It is accordingly ordered as follows:2011 (2) BLR p503FOXCROFT JA(a) The appeal is upheld with costs in regard only to the quantum of damages awarded in the High Court.(b) The order of the High Court is set aside and replaced with the following order:(i) Judgment is granted against the defendants jointly and severally, the onepaying the others to be absolved, in the amount of P250 000 together with interest at the rate of 10 per cent per annum from the date when this award should have been made, that is the date of judgment in the court a quo — 3 November 2009.(ii) Defendants, jointly and severally, are to pay the costs of the action in the High Court.(c) In the event of any taxation of a bill of costs, the attention of the taxingmaster is directed to the fact that the appeal on the merits of this matter was withdrawn on 11 July 2011, 11 days before the hearing of this appeal on 22 July 2011. The respondent was obliged to prepare for this appeal on the merits, and should be compensated by the appellants for such wasted costs in this regard as the respondent may be able to prove.Ramodibedi JA and Newman AJA concurred.Appeal upheld.2011 (2) BLR p503