

**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

CASE NO: **EL448/2015 / ECD848/2015**

Date heard: **11 to 13 September 2018**

Date delivered: **20 September 2018**

In the matter between:

MZUKISI SOYI

Plaintiff

and

DAILY DISPATCH

First Defendant

MAMELA GOWA

Second Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] In this matter Plaintiff brings an action against First Defendant, the Daily Dispatch newspaper, and Second Defendant, a journalist in the employ of First Defendant, claiming to have been defamed in an article published by First Defendant written by Second Defendant, which appeared in the newspaper on 22 July 2013, a front page cover story with the headline “*BCM land sold off for R300 a plot*”. Whilst the entire article was annexed to the particulars of claim, although not specifically referred to as such, there are several specific complaints set out in the particulars of claim.

- [2] In essence against the headline, which describes Plaintiff, amongst other things, as a member of the committee *“in charge of selling the plots”*, Plaintiff complains that his picture adjacent to the article in the form and with the words, *“IT’S YOURS: Mzukisi Soyi from G–G informal settlement ‘sold’ the Daily Dispatch team a shack for R300 and promised to deliver three more sites”*, were defamatory of him, and had been published out of malice presenting Plaintiff to be a corrupt and irresponsible community leader who was illegally selling sites and unlawfully taking advantage of desperate people.
- [3] Plaintiff claims damages in the sum of R1 million.
- [4] First and Second Defendants admitted publication of the article and the contents thereof, but denied that the content was defamatory of Plaintiff, in the alternative pleading that if it was defamatory, that there were two grounds of justification, being truth in the public interest and justifiable publication without negligence the, so-called Bogoshi defence.
- [5] At the commencement of the trial, counsel for Defendants indicated that for the purposes of the trial they would accept that the article in its context was defamatory of Plaintiff, a concession properly and inevitably made.
- [6] Defendants again acting correctly, accepted the onus of demonstrating one or other or both of the grounds of justification, and the duty to commence the leading of evidence accordingly.
- [7] In order to appreciate what follows it is necessary to set out more fully parts of the newspaper article, it being important that this be read in context in the interests of both litigants.

- [8] The article itself has a large bold heading – *“BCM land sold off for R300 a plot”* and below the heading is the word *“exposed”* and then the following (sections of the article omitted):

“A SCAM in Mdantsane where municipal land is being divvied up and sold for R300 a plot to those desperate for land on which to build a home has been exposed.

Police and Buffalo City Metro (BCM) are investigating – but hundreds of shacks have already been erected on the site at the entrance to the township.

...

“The city police are continuously monitoring the area in order to prevent further expansion,” he said. “A case has been opened with the NU1 police station and is currently being investigated.”

Despite warnings not to build on the land and the occasional demolition of shacks by BCM’s law enforcement agency, a person in the community continues to sell plots.

Last week an undercover Daily Dispatch report paid R300 for a shack. There was no receipt or deed proving ownership.

The reporter was asked to pay a further R200 for an illegal electricity connection to a nearby garage.

The money would cover the cost of restoring the illegal connection wherever the metro removed it.

...

The Dispatch was directed to Mzukisi Soyi, a shack dweller on the land who claimed he was a member of a committee in charge of selling plots.

“This is the land of our forefathers, there is no problem getting a site here,” Soyi told undercover reporters when asked if the sale was legal.

...

The Dispatch on Saturday confronted Soyi and another committee member, identified only as Jazz. Defending his actions, Soyi said ward councillors had failed to deliver services to the people.

“It’s not about selling the land – that money is given to the committee and they attend to the community’s needs.”

- [9] It should be emphasized that there is the persistent statement that land is *“sold”*, on occasions this word used in inverted commas, but usually simply

without same. There is a large picture not only of Plaintiff, but of the area concerned and shacks and again the caption refers to plots being sold “for R300” – it being emphasized that this is land belonging to the Municipality. There is no reference in the article as to what Jazz said, if anything, about “plots” being “sold”.

[10] On a proper reading of the article in its context, there is no doubt whatsoever that the article indicates that this is an unlawful enterprise, a scam, the sites or plots being sold to people desperate for land on which to build a home, in circumstances where this in effect perpetrated a fraud on the people buying the land for the money alleged as a purchase price. “Scam” is defined in the Cambridge Dictionary as “*an illegal plan for making money, especially one that involves tricking people*”.

[11] There is also no doubt that it is alleged that Plaintiff was deeply involved in the selling of such plots.

THE EVIDENCE

[12] Defendants led the evidence of Mr Ngcolomba, an adult male who was a friend of Second Defendant and was taken by Second Defendant to the place where the sites were being sold. She stopped at the motor garage nearby and sent the witness on her behalf to “investigate” what was happening in respect of shacks, as he put it. Second Defendant gave him a recording device which they tested and it was agreed that he would go to the area concerned and ask the people he met for the person that was selling the sites and try to “buy” one. It was clear that he was sent off, already put under the

impression that land was being sold to people who would buy same, with the innuendo that it was being held out to such people that they would get a right to occupy (at the very least). He said that he went to the shacks and met a person asking how he would buy a plot. He was advised to seek out a person bearing Plaintiff's first name, which name he then heard for the first time, and that he did so finding the Plaintiff. He then told Plaintiff that he stayed at NU1 with a friend and was looking for his "*own place*". He said that Plaintiff told him that he could "*organize a site for R300*", the witness saying that he did not have material to build a shack. He said that Plaintiff then showed him a shack and said that he could stay there whilst getting material for his own.

[13] He said that he asked Plaintiff about electricity and was told that he could get a connection for R200 which would be kept for "*wires*". He left saying that he would be back to confirm and that he would return with his R300. He went back to Second Defendant, they checking the recording which he had made, she giving him R300 to go back in order to pay this to Plaintiff.

[14] He returned to Plaintiff, on the same day, who was at his girlfriend's house bathing. He said that when Plaintiff came from where he had been bathing he handed him the R300 and told him that he had an uncle who also required a shack, Plaintiff saying he would be able to arrange one for him at the same price. He emphasized that Plaintiff had taken the R300 and given him his cellphone number.

[15] He said that on another occasion he returned again with Second Defendant posing as his girlfriend and another person who was a reporter posing as his uncle. They met Plaintiff who showed them the shack where they could stay and the site, and showed the "*uncle*" another site for R300. At this stage

while in the shack Second Defendant was taking a video and sound recording with her cellphone.

[16] He was cross-examined and did not come over as a particularly confident witness, though he held up reasonably well, the only real issue in dispute in his evidence being whether or not Plaintiff was offered and accepted the R300 (which Plaintiff disputes). The recording made of the first two meetings accords in the most part with his evidence, although it does not reflect the handing over or receipt of R300, the witness saying that this was at a portion which was not capable of being recorded and transcribed as having been *“indistinct”*.

[17] It was also put that nothing was said about an electrical connection. Importantly it was put that Plaintiff had offered him a shack to stay in whilst his was being erected, out of the goodness of Plaintiff’s heart, and effectively that Plaintiff admitted that he had been assisting him in his hour of need.

[18] It should be said immediately that the recordings were transcribed and accepted as being correct for the purposes of trial as to what had been recorded and transcribed. These relevant to these two meetings generally supported this witness’s evidence (save for the *“indistinct”* portion referred to above) the relevant parts of which I set out below:

First Visit:

“Mzukisi: Listen my brother while you stay in my tin house I’ll organise your site. Do you understand what I’m saying? Some people pay R300 for that, did you hear about that one.

[00:06:46]

Athi: Yes, he did mention something about the money and I'm also aware of that as a result I do have R400 ready. [00:06:56]

Muise: No my brother. [00:07:03]

Tahy: So I must have R300 to get a site of my own? [00:07:04]

Muise: Yes, you must have R300 my friend to get a site. The lady who brought you here knows that I am able to organise something for you. Like I know how to get through to those people. You are in a good chance because I am able to lend you my tin house. Anything that will follow I'll hear it from you, you can go and check it out. Or (unclear) Gcos. You caught me off guard, I was on my way my friend. [00:07:05]

...

Athi: That is great. [00:10:19]

Mzukisi: Yes still here my friend. I can give you a discount on electricity, I won't charge you that bad, you see we connect it down there, but is very cheap. [00:10:20]

Athi: I did not know about that. So this site is also R300? [00:10:30]

Mzukisi: Yes when you are given a site. When you are given a site it's R300, you see. But this one I'll give it to you till you saved enough. Then you know as long as... You see I'm very busy they want me now. (Phone conversation) [Hi Mpama. Yes, listen here man I'll call you when I'm there, because I'm on my way there now, there is something that I forgot in my house, you see. I'm going to call you when I get there and tell you that I'm at home so that we can go. {Silence} Where is the money, in Braelyn? Usekhona]? Ok my friend let me take out those tin sheets for now and put them there by you. Until you are fine. [00:10:34]

Athi: Can I get your numbers sir? [00:11:36]

...

Athi: Yes, Jazz. He said I must look for Jazz. [00:13:03]

Mzukisi: Do you have the R300 now? [00:13:06]

Athi: I was going to see the place and then come back when I get the site and have decided that I will take it. [00:13:08]

Mzukisi: No problem, it's fine my friend. [00:13:13]

Athi: That's why I say I call you at midday then I'll come back again that time you see.

[00:13:16]

Mzukisi: Go well then. Sure. [00:13:19]

Athi: Otherwise the money is ready. [00:13:20]

Mzukisi: Ok sure my brother, the tin house is available, you'll just move these out and move in your own stuff. If you want to buy a carpet, you'll just put in. [00:13:23]

...

Second Visit:

Mzukisi: Is Fodbhofod Nyarha? [00:09:21]

Athi: Yes. [00:09:22]

Mzukisi: That's what I wanted to understand. Oh sure. [00:09:23]

Athi: When will the place be available or maybe when can I move in? [00:09:28]

Mzukisi: No that will depend on you my friend. [00:09:32]

Athi: Whenever? [00:09:33]

Mzukisi: Whenever you will see. It depends on you my friend, as long as I give you a place to stay you can move in my friend. You see. Just come and see me if you need any help. Even when you not around gone for work, you wife can come to Gcobisa here. Yes [00:09:33]

Athi: You are Mzukisi right. [00:09:52]

Mzukisi: Yes I am Mzukisi bra, my surname is Soyi. [00:09:53]

Athi: Soyi? [00:09:56]

Mzukisi: Yes. I'm Soyi sir. I'm from Makwayi clan, the Jola. My mother is from the Ntandeni clan in Ndevana. The Soyi surname is my mother's, I was raised up by my mother's family but I was circumcised in Tsholomnqa, if you remember Tsholomnqa. [00:09:57]"

[19] In summary, there is no dispute between the parties as to what passed between the two on the recordings and as also referred to in the evidence, save effectively two things: whether or not the R300 was paid and received; and the electricity issue. In my view the issues to whether or not the R300

was paid and taken is not, in the final determination, of crucial importance to this matter. It is clear that in order to have a site allocated R300 was requested. It is also clear that Plaintiff was attempting to assist offering up another site which turned out to be that belonging to his brother as interim accommodation. It is also clear that an unlawful electrical connection at R200 was discussed. Finally it is clear that a further site was proposed and discussed at the same sum of R300 in respect of the fictitious uncle. As to whether or not the plots were being “sold” in the context set out at several places in the article, is quite another matter, and a “scam” in terms of which Municipal land was “sold” was not established in those terms on a fair assessment of the evidence thus far. At best for Defendants this aspect of the matter was not discussed in any detail, at the actual purpose of the payment not being explored.

[20] Second Defendant gave evidence in support of the background given by the first witness. She was obviously not present at the first two meetings and can take that aspect of the matter no further, save by confirming having given the first witness the R300, to pay to Plaintiff.

[21] She explained how she had come to institute the investigation as she called it, people were concerned about the mushrooming shack development on what is referred to as Municipal land (known as G-G). She had heard that people obtained sites for R300 and wanted to take the matter further, and also that crime had become a problem and land previously used for initiatives made unavailable.

[22] She described how she planned to go there again after the first witness had attended his first two meetings, and she decided to take with her a reporter to

pose as the uncle, she going as the first witness's girlfriend. She says she recorded the meeting but lost the recording. This was at night, and when introduced to Plaintiff there was a discussion, commencing with the "sale" of a plot to the fictitious uncle. She asked if this was legal and was told that this was their forefathers' land and there was no discrimination and that it was R300 for a site. He showed them the temporary shack that could be accommodated. She took a video recording of the meeting but he stopped her. She said it was clear that it was R300 per site. Again this evidence failed to deal with the issue of whether the plots were, as it was put, part of a scam they being "sold" particularly to those desperate for land.

[23] She then gave evidence of a further meeting, attended by herself, the first witness and her reporter colleague, referred to in the third recording, the relevant portions of which are as follows:

"Mzukisi: Eh, so you want to see one of the members of the competence court? [00:02:24]

Mamela: Yes. [00:02:28]

Mzukisi: Yes sure, you can get one of them, Jazz. [00:02:29]

Mamela: Aren't you a member of the committee? [00:02:32]

Mzukisi: Yes I am, and Jazz is a member too. [00:02:33]

Mamela: Is he in the committee as well? [00:02:35]

Mzukisi: Yes. [00:02:37]

Mamela: Is he available now, can we meet him? [00:02:37]

Mzukisi: Yes I think, I'll call him to come. [00:02:39]

...

Mzukisi: We are... Ok he is calling. Hi Jazz man can you please come down here my brother, by Yako. Ok sharp, sure. Like yesterday before I went to town, another guy from Daily Dispatch came. I spoke to him, like I asked him why he is interested to know about this place. He did not respond. [00:05:42]

...

Mamela: But brother that does not justify for you to sell the land of the municipality, do you understand that. [00:07:56]

Mzukisi: It's not as if we are selling it or something like that. Like ok we do give a person a site... [00:08:00]

Mamela: Where does the money go? [00:08:07]

Mzukisi: They say it goes to the committee. Like it takes care of something like taps if there are no taps available. They also use it to buy water pipes for the one tap that is there, do you understand. So that the people can be able to have water. Do you understand what I'm saying? [00:08:08]

...

Mamela: You are ruining, everything. [00:11:53]

Mzukisi: Yes I hear you, but that matter needs you and your team to go to the committee so that it can be brought to the people's attention. Not I myself alone. [00:11:54]

Mamela: That is why I was saying I wish Jazz was also here to hear his side of the story, you see. [00:12:05]

Mzukisi: You see what I mean. Because now I take you as if you came here to investigate me. [00:12:09]

Mamela: Yes I am here to investigate but we would like to talk to the committee as a whole, that's why I asked you where is the committee so that we can get their views because it's not your issue alone, you do understand. It's not as if because we only know you, then it's your issue, no it's not at all. [00:12:15]

...

Mamela: Mh, ok. Ok Jazz let me ask, is there a way possible that you can let us talk to the committee and sit down with you, you make understand the reason behind doing everything that you did you see? As a person who is in the committee is that why are giving people for R300? Why are you connecting electricity illegally through izinyoka? Now you are getting closer to Mtsotso, these are problems that are coming from this place, you see. I'm not sure whether you can answer me about those things, why are you selling land for R300? Where does this money go? [00:23:13]

Jazz: No, we do not sell to anyone for R300. [00:23:50]

Mamela: What do you do? [00:23:51]

Jazz: A person come looking for a place, and we give them as they ask. And then a person is given a site, you see, and then they give a tip to the people who clear the site for the first time, you see. He/she thanks them with whatever amount or they ask for a certain amount based on their work, you see, they say because the grass was so much, we expect this amount. And people build for him and charge him, and they have to, you know. It's not that the land is sold; we do not sell land. [00:23:53]

Mamela: Ok, listen Jazz..... [00:24:25]

Jazz: And if we were selling, there was going to be something written down then a person will have a receipt that says this thing was sold to me. And firstly squatter camps are illegal. But squatter camps are forcefully erected, that is why we occupy municipality land because

we notice that as this small group, they do not care for us, councillor Lwandile Vika does not care for us, he is sending us from pillar to post. [00:24:26]

Mamela: Ok, you see that is what I want to hear that there was a small group here, do you understand. [00:24:53]

Jazz: Yes that is why we occupy the municipality space, because we want to be seen, be attended to, be seen and be attended to. [00:24:57]

Mamela: Ok. But do you hear yourself when you say you are clearing municipality land for people? We have no right to do that, do you understand that. [00:25:05]

Jazz: Yes I understand that. [00:25:11]

Mamela: But why are you doing it? [00:25:12]

Jazz: The reason why we did this is...and firstly, the reason we built the squatter camps we have, - people who were going to the initiation schools, there were initiates here who died killed by their keepers in the initiation schools, you see. The run and die in the community, and then we also get hurt because of the initiates. And people when you go to Ristonia you via here (unclear), you see. People going to the firms pass here. They are mugged and get hurt here, we cannot defend them because we are staying on the top side. (Unclear) we are on the top side (unclear). And then when we come to the township we are mugged made to drink paraffin, made to drink soap and made to eat uncooked mealie meal. That is why we thought we are not seen here in Jiji, let's try and make this place open and wide. [00:25:14]

Mamela: Ok, so you continue opening it so that it is visible and wide? [00:26:02]"

[24] Since her evidence accorded with the recording it would serve no purpose to repeat same. It was clear at this meeting that both Plaintiff and Jazz were members of the relevant committee and that they both took the stance that they were not selling the land and that the money provided would go to the committee. Jazz explained that the money went to the people who cleared each site as a "*tip*" – emphasizing that this was not the sale of land. He carefully explained the reason for what they were doing which had to do with crime control and providing places where those who did not have land upon which to live could build a simple shack. There was no question from this meeting that the Plaintiff and committee's involvement was not fully explained to Second Defendant from their perspective. She ended the evidence by

stating that she believed the article was true and correct and founded on the meetings and transcript.

[25] The cross-examination did not take the matter much further, it essentially being the line of cross-examination that the properties were not being sold and that this had been fully explained. It was also put that Plaintiff was singled out from the committee and his role highlighted in the article. It was put that the article imputed a criminal offence, which was denied.

[26] Defendants having closed their case, Plaintiff gave evidence and was supported by his co-committee member Jazz. The evidence can be simply summarized. It was explained that both witnesses stayed at this particular place referred to as GG. Plaintiff said that he had previously been an employee at Cecelia Makiwane Hospital, security division, but lost his job as a result of the article (not pleaded). Plaintiff denied receiving R300 for the site and disputed the recording only in this regard and none other. In essence then what passed between the parties including himself and Jazz is common cause but for the above. Plaintiff was clearly deeply hurt by the article, and expressed his anger and embarrassment and the fact that this was particularly so as he was attempting to help the investigators who approached them. He attempted to steer clear of the electricity issue but denied that he had anytime held out that he was selling sites.

[27] In cross-examination Plaintiff struggled to substantiate his claim concerning his loss of employment on the back of the article. He was cross-examined on the purpose of receiving or asking for R300 and had some difficulty in this regard, though in my view the transcript in any event deals with this for the purposes of this matter sufficiently.

[28] Jazz (John Ndungani) similarly gave evidence which more or less accorded with the transcript. He gave a clear explanation of the transaction in accordance with what he had said to Plaintiff and as appears from the transcript. His cross-examination understandably took the matter little further.

THE LEGAL ISSUES

[29] This matter raises the two defences referred to above.

[30] Truth and public benefit is accepted as a ground of justification in respect of the publication of defamatory material which is true and for the public benefit. It was not contested in this matter that the publication was in the public benefit, the question of the truth thereof however being in issue. Further and whilst malice was pleaded, this was not dealt with in any detail and need not be considered for the purposes hereof.

[31] Defendants bear the full onus in this regard.¹

[32] If relying on truth, in this context, the Defendant must prove that the defamatory statement complained of was “*substantially true*”. It has been said that what must be proved is the “*sting of the charge*” or the “*gist of the defamation*”. Exaggeration on its own in the language used does not necessarily deprive the defence of its effect.² It is worth noting that Van Der Walt and Midgley in *Principles of Delict*³ state as follows: “...except where *fraud, dishonesty or criminal conduct is attributed to the Plaintiff, defamatory*

¹ ***Khumalo v Holomisa*** 2002 (5) SA 401 (CC).

² ***Independent Newspapers Holdings Ltd. v Suliman*** [2004] 3 ALL SA 137 (SCA) 154-155.

³ (Fourth Edition) para 126

material need not be true in every respect, however, provided that the gist of the information is true, some exaggeration is accepted".⁴

[33] As to the second defence – reasonable publication – this was dealt with extensively in ***National Media Limited v Bogoshi*** ⁵.

[34] In essence the Supreme Court of Appeal set out a new defence to rebut unlawfulness in defamation as follows:

"..publication in the press of false defamatory statements will not be regarded as 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 that particular time."

[35] As pointed out by Midgley⁶:

"The court thus created a defence of reasonable publication. Although the statement refers to false statements published in the press, it should, it is suggested, apply to all defamatory publications, irrespective of where they are published, and whether or not they are true. This is clearly the way in which the constitutional court interpreted the Bogoshi decision." ⁷

[36] In ***Bogoshi*** the Court held the following:

"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 (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E), 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 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

⁴ ***Kemp v Republican Press (Pty) Ltd*** 1994 (4) SA 261 at 264-5.

⁵ 1998 (4) SA 1196 (SCA)

⁶ in *Principles of Delict (supra)* at para 132

⁷ ***Khumalo*** (*supra*) Para 43.

published in a newspaper. Professor Visser is correct in saying (1982 *THRHR* 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community. (*Münchener Kommentar zum Bürgerlichen Gesetzbuch* vol 5 at 1679.)”

- [37] As to the relevant factors that need be considered relevant to this defence, the Supreme Court of Appeal said the following in ***Mthembi-Mahanyele v Mail & Guardian***⁸:

“But where publication is justifiable *in the circumstances* the defendant will not be held liable. Justifiability is to be determined by having regard to all relevant circumstances, including the interest of the public in being informed; the manner of 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 to be defamatory); and whether the person defamed has been given the opportunity to comment on the statement before publication. In cases where information is crucial to the public, and is urgent, it may be justifiable to publish without giving an opportunity to comment.”

- [38] LAWSA⁹ , para 256 puts this as follows:

“256 Media privilege In *National Media Ltd v Bogoshi* the Supreme Court of Appeal accepted that publication of a defamatory statement by the press may, even in the absence of stereotyped defences excluding wrongfulness (for example truth for public benefit, fair comment and privilege), be lawful if the publications was reasonable. What would be regarded as reasonable in any given case is dependent on all the circumstances of that case. However, since the defence deals with defamatory statements that can cause great harm and that are likely to be false, it is to be applied with great caution and restraint. The requirement of reasonableness demands a high degree of circumspection from editors and editorial staff on account of the nature of their occupation, the powerful position of the media and the credibility which it enjoys amongst large sections of the community. Although no definitive

⁸ [2004] 3 All SA 511 (SCA)

⁹ (Second Edition) Volume 7

list of potentially relevant factors is possible, the test of reasonableness includes, according to *Bogoshi's* case, considerations such as:

- (a) the nature, extent and tone of the defamatory allegations;
- (b) the severity of the consequences of publication;
- (c) the nature of the information on which the allegations were based and the reliability of their source;
- (d) the steps taken to verify the information, including the opportunity given to the person concerned to respond; and
- (e) the need to publish before establishing the truth of the allegations in a positive manner.”

THE ANALYSIS

[39] It must be remembered, that in considering truth and indeed the thrust of the statement complained of, what constitutes the “*gist or sting*” is ascertained through the lens of the reasonable reader of ordinary intelligence.¹⁰

[40] As already adverted to above it has not been contested, and correctly so, that the statements made in the newspaper article, in their context, was certainly defamatory of Plaintiff imputing to him a major role in a “*scam*” which involved effectively selling plots to the unsuspecting for R300, it being insinuated that those purchases were unaware of the “*scam*”. Had the article, approach the matter on the basis that the sites or plots were being provided or allocated by the committee at the request of an indigent person requiring a site upon which to build a meagre shack, and that R300 was paid to facilitate this and not to “*purchase*” a plot being “*sold*”, things would have been different. That would have been a responsible and balanced approach to the entire issue, and

¹⁰ *Modin v Minister of Safety and Security* 2011 (6) SA 370 (SCA) para 13.

whilst the occupation was unlawful, as also the electrical connection, this was not on a balanced approach a “*scam*”.

[41] Viewed through the lens of the reasonable reader, there can be no question, in my view, that the article conveyed factors relevant to unsuspecting purchasers and sellers not having the entitlement to pass permanent right of possession or occupation to those buying, and that this was an unlawful scam, a money making scheme perpetrated by *inter alia* Plaintiff – effectively a fraud described as a “*sale*”.

[42] In judging whether this was the truth, regard must be had to the entire series of interviews, and exchanges referred to above. Viewed on a balanced basis in context, there is in my view, no doubt that Plaintiff was not purporting to be, or holding himself out to be, the seller of property conveying a permanent right of occupation, whether for a the sum of R300 or any sum at all, but rather, that sites were being allocated (albeit unlawfully) on Municipal land by a committee for the benefit of indigent persons, which albeit these could not be lawfully occupied, were cleared and made suitable for the building of a shack for a sum paid for work to be done. The article in no way conveyed the interviews in a balanced manner, the articles whilst referring briefly to the fact that Plaintiff said that it was not about selling the land, failed to mention Jazz, the Committee Chairman's careful explanation, persisting in the sale version. The Plaintiff's picture and thrust of the article and caption was such as to present this as a criminal scam of selling property, to uninformed and misled purchasers without giving the other side of the story. No one else was interviewed and certainly not even one real “*purchaser's*” views explored, which seems an obvious route to follow.

- [43] This version was in no way shown to be substantially true and the defence of truth and public benefit cannot be established.
- [44] As to reasonable publication, and whilst the fact that the statement was not true is not conclusive, the question arises as to whether it was, upon a consideration of all the circumstances of the case, reasonable to publish the particular facts in that particular way and at that particular time. In so considering I have had regard *inter alia* to the circumstances referred to in ***Mthembi–Mahanyele*** (*supra*). It is true that the public had an interest in being informed about the shack settlement origin and development, but this must be balanced against the manner of publication as already analyzed above. Not only was the tone of the article unfortunate describing this as a “scam” and criminal conduct beyond merely the unlawful use of Municipal land for shack building and residence, but the sting was pointed at the Plaintiff with an inaccurate heading and notation, imputing to him dishonest conduct *vis-a-vis* occupation and exploitation of desperate indigent people. This goes far beyond simply making available and assisting in the occupation and taking over land unlawfully being Municipal land.
- [45] The reliability and/or version of the source, Jazz was thoroughly underemphasized, and notwithstanding his careful explanation of what was really happening, Second Defendant seems to have established in her mind at an early stage that the properties were being “sold” and a “scam” was in place, she choosing stubbornly to ignore or downplay his version. Whilst she took some steps to verify the truth of the information, she then either ignored or downplayed what she discovered when inconsistent with her preconceived idea. Whilst Plaintiff was given an opportunity to comment generally on the

allegations, but not on the article specifically, what he said was again downplayed, ignored or simply not believed, and unjustifiably so.

[46] Again I should mention that Second Defendant apparently did not consider interviewing or even attempting to interview other shack dwellers in the area as to how and in what manner they had acquired land, and whether this was a scam, and gives no reasons for not having done so.

[47] As pointed out above, in the face of publication on the front page of the newspaper with photographs of the Plaintiff moreover, there was potential for great harm if false, and bearing in mind that the defence is applied with great caution and restraint, it is far from established in this matter.¹¹

[48] In the result neither defence is established in my view.

DAMAGES

[49] In the result, and as the defamation is established in the absence of any defence, Plaintiff must be awarded damages accordingly.

[50] This constitutes an award of general damages to compensate Plaintiff for the infringement upon his dignity and reputation.

[51] The Court has a wide discretion in determining the award of general damages having regard to the circumstances of the matter and prevailing attitudes of the community.

[52] Any thought of punitive damages has been rejected in our law by the Constitutional Court.¹²

¹¹ LAWSA (*supra*) para 256.

¹² **Dikoko v Mokhatla** 2006 (6) SA 235 (CC). *Fose v Minister of Security* 1997 3 SA 786 (CC) and **Le Roux and Others v Dey** 2011 (3) SA 274 (CC).

- [53] It is clear in our law that it has been held that robust awards have a chilling effect on free expression, but recognizing that a person's dignity has unlawfully been impugned deserves appropriate financial recompense to assuage his or her wounded feelings.
- [54] In considering the damages to be awarded I have had regard to the nature of the defamatory statements; the nature and extent of the publication, which I accept was substantial although no evidence was led hereon; the reputation, character and conduct of Plaintiff, it to be remembered that although subject to a serious defamation, Plaintiff was nevertheless party to unlawful conduct making available and promoting the unlawful use of Municipal land and electricity; and the motives and conduct of the defendants, who justifiably sought to get to the bottom of a rapidly developing shanty development. It is common cause that this was unlawful in its context and understandably desirable that this all be brought to the public notice.
- [55] Of course there was no question of an apology being offered, and clear that the Second Defendant acted out of a sense of duty. I also take into account that there has been persistence in the advancing of the unsuccessful defence of truth in the public interest.¹³
- [56] The defendants pointed to the paucity of similar matters as to quantum and correctly pointed out that our Courts have not been generous in the award of solatia. Contrary to this, Plaintiff's attorney sought an award of R250,000 having claimed R1 million.

¹³ *Mogale v Seima* 2008 (5) SA 637 (SCA)

- [57] Either of those sums would be completely out of step with recent decisions and the approach to defamation awards in recent years.
- [58] In my view, an award of damages in the sum of R20,000 would be more than adequate in all the circumstances, especially having regard to Plaintiff's role in what must certainly be regarded as the encouraging of unlawful land occupation, let alone reference to encourage unlawful electrical connection.
- [59] As to costs, in the past and in respect of small awards of damages which could be brought in a Magistrates Court, our Courts have on occasion awarded High Court costs nevertheless. More recently our courts have cautioned that this approach has become outdated.¹⁴ In my view, and in the circumstances of this matter, it should always have been apparent that at the very best a small award of damages would be achieved and this matter should not have been moved in the High Court, Magistrates' Court costs thus to be awarded.

THE ORDER

[60] Accordingly, I order as follows:

1. First and Second Defendants are jointly and severally to pay to Plaintiff the sum of R20,000;
2. First and Second Defendants are to pay Plaintiff's costs on the Magistrates' Court scale.

¹⁴ **Mogale v Seima** (*supra*) and **Mithimunye v RSP Media** 2012 (1) SA 199 (1) 27.

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Plaintiff: Mr Mquqo
Instructed by: Mquqo Attorneys, East London

Obo the Defendant: Adv D de la Harpe
Instructed by: Cheadle Thompson & Haysom Inc, Braamfontein
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