

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2680/2004

In the matter between:

MOGALE WINSTON STANFORD MODIRI Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY 1st Defendant

SUPERINTENDENT ADAM WIESE 2nd Defendant

THEMBA KHUMALO 3rd Defendant

(in his capacity as the Editor of
DAILY SUN NEWSPAPER)

MEDIA 24 LIMITED 4th Defendant

(in its capacity as the owner, printer and
Distributor of DAILY SUN NEWSPAPER)

DEON DU PLESSIS 5th Defendant

(in his capacity as the publisher of
DAILY SUN NEWSPAPER)

YOLISWA SOBUWA 6th Defendant

HEARD ON: 3 & 4 MARCH 2009
20, 21 & 23 OCTOBER 2009

JUDGMENT BY: HANCKE, J

DELIVERED ON: 5 NOVEMBER 2009

[1] This is a defamation action in which the plaintiff claims from
the defendants an amount of R4,2 million being:

- R600 000,00 in respect of past lost of income;

- R3,6 million in respect of general damages, occasioned by the alleged negative publicity that resulted from an article published in Daily Sun Newspaper on Wednesday, 3 March 2004.

The action is based on an article written by the sixth respondent (Yoliswe Sobuwe) a journalist and published by the fifth defendant (Daily Sun Newspaper) under the title “The Mangaung Crime Crackdown” and had as its subject matter, the ongoing efforts of the police in reducing crime in the Mangaung area.

[2] In the said article the following was stated:

“*Daily Sun* readers in the area are asked to help the police in catching Stanford Modiri, who is allegedly involved in drug dealing, cash-in-transit heists and car theft.

Wieser said: ‘We will catch him, but it would be great to have some help. The problem is that he uses other people to do his dirty work for him.’”

[3] Mr. Phalatsi, on behalf of the plaintiff, conceded that the plaintiff did not prove that the second defendant made any

defamatory statements; therefore he also conceded that the first and second defendants cannot be held liable for defamation against the plaintiff. In view of this concession I do not propose to deal with the merits of the plaintiff's claim against the first and second defendants.

[4] The defences relied upon by the third to sixth defendants in their amended plea are as follows:

1. The said words, in the context of the article, were substantially true and published in the public interest.
2. The contents of the article were fair comment.
3. The publication of the article was reasonable.
4. The statements complained of were made on a privileged occasion in that:

4.1 The said defendants, acting as members of the press and concerned citizens of the Republic of South Africa, were under a duty to assist the police in combating crime and in particular were under a duty to inform members of the public of the plaintiff's alleged involvement in the crimes mentioned in the article.

4.2 The readers of Daily Sun enjoyed a corresponding right to be informed of such information, *inter alia*, in terms of section 16(1)(a) and (b) of the Constitution and to receive any appeal for assistance and explanatory information.

5. The article concerned a matter of public interest.

[5] I can just mention that no criticism was levelled against the witnesses called by the first and second defendants. In contrast the plaintiff's evidence was unconvincing in several respects, he contradicted himself and he did not impress me as a witness. It is therefore not necessary to analyse their evidence in detail. The credibility of the witnesses in this case does not play an important role, save with regard to the quantum of damages, if applicable.

[6] Where in defamation proceedings, the publication of a defamatory statement is proved, as in the present case, two presumptions arise, namely that the publication was unlawful and that the defendant acted *animo iniuriandi*. The onus is then upon the defendant to establish either some lawful

justification as excuse, or the absence of *animus iniuriandi*.¹

The question is whether the evidence led during the course of the trial establishes a basis for one of the said defences to rebut the unlawfulness of the publication or reason to accept the absence of *animus iniuriandi*.

- [7] The press can be held liable for non-intentional but negligent mistakes. Neethling *et aliae*, **Law of Delict**, 5th ed (2006) summarise the legal position in this regard as follows on p. 317:

“Although *animus iniuriandi* is traditionally required for defamation, negligence has in the course of time been accepted as the fault requirement for certain forms of defamation.”

The authors then refer to cases dealing with the liability of the press and mass media as examples where liability has been based on negligence.²

¹ **The Law of South Africa**, vol 7 par 245.

² **SUID-AFRIKAANSE UITSAAIKORPORASIE v O'MALLEY** 1977 (3) SA 394 (A) at 407; **MTHEMBI-MAHANYELE v MAIL & GUARDIAN LTD AND ANOTHER** 2004 (6) SA 329 (SCA) at 349 – 350; **NATIONAL MEDIA LTD AND OTHERS v BOGOSHI** 1998 (4) SA 1196 (SCA) at 1210 – 1211.

[8] As far as the defence of truth and public interest is concerned, it is not required of the press to establish literal truth, but merely that it is substantially true or that the gist of the charge was true.³ It is also permissible to make “mistakes here and there” as long as it makes no substantial difference to the quality of the libel or in the justification pleaded for it.⁴ It is therefore important to decide whether the report was substantially correct in view of the fact that, according to the evidence of the second defendant he never asked the assistance of the community to “catch” the plaintiff.⁵

[9] I agree with Mr. Bester, counsel for the third to sixth defendants, that it was not necessary for them to demonstrate the guilt of the plaintiff in respect of any of the crimes mentioned in the article as would be the case during

³ “It would not have to prove every allegation provided that it is able to prove that the general charge is substantially true... or at least that it is reasonable in a sense that the facts relied upon were properly sourced.” (Cachalia J in **LIEBERTHAL v PRIMEDIA BROADCASTING (PTY) LTD** 2003 (5) SA 39 (W) at 47 H – I).

⁴ **SUTHERLAND v STOPES** 1925 AC at p. 79, quoted with approval in **SMIT v OVS AFRIKAANSE PERS BPK** 1956 (1) SA 768 (O) at 772 H – 773 H.

⁵ “We are then to consider the evidence and say whether it is substantially correct... Hence the courts have modified the general rule by saying that the defendant need only justify the main charge or gist of the libel, – ‘he need not justify immaterial details or mere expressions of abuse which do not add to its sting and would produce no different effect on the mind of the reader than that produced by the substantial part justified’ Gatley p. 496).” (Wessels J A in **JOHNSON v RAND DAILY MAIL** 1928 AD 190 at 205 – 206).

criminal proceedings, but rather to show that the plaintiff is alleged to be involved in serious criminal activities and that he used others as instruments in the commission of crimes.

[10] It is important to note that the article does not make a definitive statement of fact holding that the plaintiff was involved in these crimes but merely stated that he was *allegedly* involved in drug-dealing, cash-in-transit heists and car theft.

[11] As far as the plaintiff's alleged involvement in criminal activities is concerned, it is necessary to have regard to the evidence led during the trial. Senior Superintendent Gerber testified that he knew about the plaintiff's alleged involvement in criminal activities since 1991 at which time he was stationed at the vehicle theft unit. The plaintiff was a well-known figure in criminal circles, that his history spoke for itself. Gerber had information at his disposal at a time showing the plaintiff's alleged involvement in criminal activities. The plaintiff had several criminal charges pending against him at the time dating back a number of years and he was the kingpin of his criminal organisation.

[12] Gerber prepared a report in motivation of the registration of project Bulindlela under the auspices of the Organised Crime Intelligence Unit Bloemfontein. According to this report plaintiff was involved in numerous instances of vehicle theft, fraud, money laundering and other activities including corruption. Gerber testified that prior to the arrest of the plaintiff (that culminated in the bringing of a number of charges against the plaintiff relating to armed robbery and violations of the Prevention of Organised Crime Act, 121 of 1998) and others suspected of involvement in his organisation during September 2005, approximately 130 vehicles were stolen on a monthly basis. Subsequent to the arrest, the number of vehicle thefts in and around Bloemfontein decreased to about 60 instances of theft per month. Gerber also testified that some of the charges that were pending against individuals that worked with the plaintiff, pertain to racketeering and could be linked to the plaintiff. According to his evidence these individuals did not act in isolation but under the guidance and supervision of the plaintiff and with his approval. He confirmed that conventional policing methods in securing the arrest of the

plaintiff and his associates had been unsuccessful and had appeared to be futile.

[13] According to the testimony of Superintendent Mayiki, from the Office of the Provincial Police Commissioner at the time of the publication of the article, the plaintiff had been suspected of being involved in criminal activities at the time of the publication of the article, that his name had come up from time to time during crime intelligence meetings, that he had attended and that he has no reason to doubt the accuracy and correctness of the statements made in Wiese's letter addressed to Superintendent Boning dated 18 February 2002 in which it was noted that the plaintiff is well-known in criminal circles and that he is involved in armed robbery, motor theft and drugs.

[14] It appears from the evidence of the second defendant, Superintendent Wiese, that the plaintiff was well-known in criminal circles, that the police had unconfirmed reports that the plaintiff was involved in various crimes and that he was suspected of being involved in armed robbery, theft of motor vehicles and drugs due to information which had come to his

attention during the course of his time as station commissioner of the Kagisanong Police Station.

- [15] Although no evidence was adduced by or on behalf of the third to sixth defendants the evidence led during the course of the trial established that the plaintiff was allegedly involved in the crimes or similar crimes referred to in the article. Apart from the fact that the plaintiff has three previous convictions (one for assault in 1983 and two for theft in 1986, the evidence also demonstrated that the plaintiff was suspected by the police of being involved in crimes not mentioned in the article such as corruption and racketeering. The information about the plaintiff's alleged criminal activities was obtained from three sources in the police that operated within the police's formal structures over a number of years but completely independent from one another and out of different offices: Wiese (Station Commissioner of Kagisanong Police Station), Gerber (Captain in the Organised Crime Investigation Unit) and Mayiki (Communication Officer). Also important is the evidence of Wiese to the effect that Bahumi of the National Intelligence Agency had made it plain that the plaintiff was involved in criminal activities.

- [16] The net result of project Bulindlela was that the plaintiff was ultimately arrested during September 2005 and charged on five counts of motor vehicle theft and one charge of racketeering in terms of POCA. There is no reason to doubt that the suspicion of the police was genuine and not feigned.
- [17] It appears from the foregoing that sufficient factual grounds exist for concluding that the plaintiff was allegedly involved in the crimes referred to in the article and that his associates often perpetrated crimes on his behalf.
- [18] There is no doubt that considerable *public interest* in the police apprehending persons suspected of criminal activities exists.⁶ More so where the police have made little headway in convicting persons suspected of criminal activities as the arrest of such persons will further the safety and security of society at large. The public interest is furthered in the publication of material that might render assistance to the police in apprehending persons suspected of criminal activities. It is in the public interest that Daily Sun inform its

⁶ “Where the person publishing the defamatory matter is under a legal, moral or social duty to do so or has a legitimate interest in so doing, and a person to whom it is published has a similar duty or interest to receive it, then the occasion of the publication would be privileged.” (**EHMKE v GRUNEWALD** 1921 AD 575 at 581. See also **DAVIS v JACOBS** 1914 TPD 220 at 224.

readers of persons that the police suspect of being involved in drug-dealing, cash-in-transit heists and car thefts and in respect of which the police certainly would have welcomed assistance in their apprehension. The third to sixth defendants had a legitimate interest in making the publication while readers of Daily Sun certainly had a right to receive the information about the plaintiff. The media is in a special position in modern society, namely to serve and further the public interest.⁷ Having regard to the circumstances of the case the third to sixth defendants have rebutted the unlawfulness of the publication.

- [19] Even if I am wrong in reaching this conclusion, the third to sixth defendants have other defences available. As far as *fair comment* is concerned, it is important to note that in making public statements about the plaintiff's involvement in various crimes, the third to sixth defendants were not making factual assertions but rather engaging in comments and the expression of an opinion based on what sixth defendant learned from the discussions that took place between second

⁷ The general principle is whether public policy justifies the publication and requires that it be found to be a lawful one. As the test is an objective one it involves an application of the 'general standard of reasonableness' but it relates to the sense of justice prevailing in South Africa as opposed to that in other countries and systems." (Coetzee J in **ZILLIE v JOHNSON AND ANOTHER** 1984 (2) SA 186 (W) at 195 C – D)

defendant and Bahumi. Despite the fact that the sixth defendant was not called as a witness I am of the view that enough evidence was led during the course of the trial to establish both the truthfulness of what was contained in the comments and the public interest in publishing the comments.⁸

[20] The third to sixth defendants also pleaded that the publication of the article was reasonable. The question is whether they have availed themselves of the defence of reasonable publication as was stated by Hefer J A in **NATIONAL MEDIA LTD AND OTHERS v BOGOSHI**, *supra*, at p. 1212 H – I:

“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.”

- [21] It is important to note that the format and comment contained in the article was not unreasonable while the tone of the article was cast in neutral terms as evidenced by the fact that the sixth defendant was careful enough to employ the word “allegedly” in reference to the crimes which the plaintiff was said to have been involved with. The objective facts as discerned from the article itself make it plain that there was no unnecessary sting contained therein. It is also important that the article appeared somewhat inconspicuously on page 7 of the 3rd March 2004 edition of Daily Sun while nothing about the headline made mention of the plaintiff or was directed at stimulating reader interest in him by referring him either directly or indirectly. Any reference to the plaintiff was a subtheme of the article which appeared in only the final two paragraphs of the article, which dealt with the ongoing efforts of the police in reducing crime in the Mangaung area.

[22] Insofar as the nature of the information on which the allegations were based and the reliability of the sources, the sixth defendant was entitled to regard Wiese and Bahumi as reliable sources in the context of disclosing sensitive information of this nature, especially in view of the respective offices they held having been privy to the exchange of information gathered in respect of plaintiff's alleged criminal activities. The position of Wiese was already discussed above. As far as Bahumi is concerned, according to the evidence he was employed by the National Intelligence Agency at the time of the article's publication. Both were therefore inherently reliable sources. Under the circumstances there was therefore no obligation on the part of the sixth defendant to verify the information beyond what had been told to her by either Wiese or Bahumi.

[23] It follows from the foregoing that the publication of the said article was neither unlawful nor negligent on one or more of the grounds discussed above. The plaintiff's claim can therefore not succeed.

[24] There is another matter outstanding. Both first/second defendant and third to sixth defendants filed a notice of motion in terms of Rule 47(3) of the Uniform Rules of Court, applying for an order against the plaintiff to provide security for their costs of suit. Both applications were based on the fact that the plaintiff was in a dire financial position in view of the fact that he was currently unemployed with no fixed income and his inability to satisfy a writ of execution issued in respect of a court order. The law is clear that as a general rule the inability of the plaintiff who is an *incola* to satisfy a potential costs order against him is insufficient to justify an order that he furnish security for his opponents' costs. Something more is required.⁹ In this regard the defendants relied on the fact that the plaintiff's claim was vexatious and unsustainable. The application was brought at a stage when the matter was partly heard. At that stage I was unable, and it would be inappropriate for me, to make a finding on the merits. Counsel for the defendants did not advance any submissions in this regard. Both these applications were unfounded and are to be dismissed with costs.

⁹Erasmus, **Superior Court Practice**, B1 - 341

[25] Accordingly the following orders are made:

1. The plaintiff's action is dismissed with costs.
2. The defendants' applications in terms of Rule 47(3) are to be dismissed with costs and the defendants are ordered to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved.

S.P.B. HANCKE, J

On behalf of the plaintiff:

Mr. N.W. Phalatsi
Instructed by:
Phalatsi & Partners
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On behalf of first and second
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