



IN THE GAUTENG DIVISION HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED ✓
05/12/2014 DATE SIGNATURE

Case No: A816/2013

In the matter between:

5/12/2014

MOTSEPE, NTELE CECIL

APPELLANT

and

THE STATE

RESPONDENT

and

THE FREEDOM OF EXPRESSION INSTITUTE
ASSOCIATION OF INDEPENDENT PUBLISHERS
CENTRE OF HUMAN RIGHTS
COMMITTEE TO PROTECT JOURNALISTS
HUMAN RIGHTS WATCH
MEDIA LEGAL DEFENCE INITIATIVE
MEDIA MONITORING AFRICA
M&G CENTRE FOR INVESTIGATIVE JOURNALISM
PAN AFRICAN HUMAN RIGHTS DEFENDERS NETWORK
PEN INTERNATIONAL
PDMSA
PROFESSIONAL JOURNALISTS ASSOCIATION OF SA
RIGHT TO KNOW CAMPAIGN
SANEF
WORLD ASSOCIATION OF NEWSPAPERS
AND NEWS PUBLISHERS

FIRST AMICUS CURIAE
SECOND AMICUS CURIAE
THIRD AMICUS CURIAE
FOURTH AMICUS CURIAE
FIFTH AMICUS CURIAE
SIXTH AMICUS CURIAE
SEVENTH AMICUS CURIAE
EIGHTH AMICUS CURIAE
NINTH AMICUS CURIAE
TENTH AMICUS CURIAE
ELEVENTH AMICUS CURIAE
TWELFTH AMICUS CURIAE
THIRTEENTH AMICUS CURIAE
FOURTEENTH AMICUS CURIAE
FIFTEENTH AMICUS CURIAE

JUDGMENT

**CORAM: MOLEFE J
JANSE VAN NIEUWENHUIZEN J**

[1] The appellant was found guilty of criminal defamation and sentenced to a fine of R 10 000,00 or 10 months imprisonment wholly suspended on certain conditions for a period of five years. This appeal is, with leave of the court *a quo*, against conviction only.

[2] At the inception of the hearing, the first to fifteenth *amici curiae* sought leave to intervene in the appeal, which leave was granted. Their participation relates to their concerns regarding the negative effects of criminal defamation laws on the freedom of the media and the constitutionality of criminal defamation laws. I will firstly deal with the appellant's appeal.

FACTS

- [3] The following facts are common cause between the appellant and respondent:
- (i) the appellant is a senior journalist at the Sowetan newspaper;
 - (ii) the appellant was the author of an article titled "*Spot the difference*" , which article appeared in the Sowetan on 10 December 2008;
 - (iii) the article deals with two sentences, respectively imposed by Magistrate Serfontein ("the magistrate") in the Meyerton Magistrate's court, on a black male and a white female for the same offence;
 - (iv) in the article it is incorrectly alleged that the magistrate imposed a heavier sentence on the black male;
 - (v) in the article, the appellant reported the following remark by Godfrey

Machimana, a lawyer, in respect of the two sentences imposed by the magistrate *"These two cases are a clear indication of the magistrate's bias. There is no consistency in the way he applies the law when dealing with people of different colours."*

CRIMINAL DEFAMATION

[4] Prior to dealing with the evidence led in the court *a quo*, it is apposite to have regard to the elements of the crime of criminal defamation.

[5] The definition of the crime of criminal defamation has recently been re-stated by the Supreme Court of Appeal in *S v Hoho* 2009 (1) SACR 279 SCA at para [23] as follows:

"I, therefore, conclude that the crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation."

[6] In examining the requirement of intentional publication, the court in *S v Hoho* held as follows at 287b:

"Intentional publication also requires proof that the accused knew that he was acting unlawfully or that he might possibly be acting unlawfully. As in any other criminal case the degree of proof required is proof beyond reasonable doubt."

EVIDENCE

[7] Due to the fact that the publication of the article is common cause and on a proper reading, clearly injures the reputation of the magistrate, only the evidence pertaining to intention and unlawfulness will be examined.

[8] The appellant testified that he was assigned by the news editor, Mr Mkala, to investigate cases involving the magistrate. The contact person was Mr Machimana, who was introduced to the appellant as a lawyer.

[9] He attended court with Mr Machimana on several occasions and published a series of articles involving cases presided over by the magistrate.

[10] During his investigation he was told by a court official that there are two cases involving the magistrate, that might interest him. He proceeded to the office of the court official in the company of Mr Machimana. The records of the two cases were mainly in Afrikaans and as the appellant is not conversant in Afrikaans, he relied on the court official and Mr. Machimana to interpret the facts to him.

[11] He, furthermore, relied on Mr Machimana to explain the legal aspects of the two sentences to him as he was not *au fait* with legal principles.

[12] Having been informed that the black male received a heavier sentence than the white female for the same offence and after obtaining copies of the court records, the appellant proceeded to the magistrate's office in order to elicit his response in

respect of the allegations of racism against him.

[13] He had prior dealings with the magistrate and as a result of the articles previously published by the appellant, the magistrate had apparently received an instruction not to engage with the appellant.

[14] The magistrate, nevertheless, had regard to the two records and said words to the following effect to the appellant:

"You have the facts. Just publish the facts correctly."

[15] Without verifying the veracity of Mr Machimana's version of the contents of the court records, the appellant published the contentious article.

[16] In his defence, the appellant testified that he relied, without any reservation, on the information received from Mr. Machimana. He had done so in the past, without any repercussions. The appellant testified that he did not realise at the time, that the information was incorrect and would injure the reputation of the magistrate.

[17] In view of the aforesaid evidence, I turn to deal with the question of intention.

INTENT

[18] The appellant was clearly negligent in not taking further measures to ensure that the information he received from Mr Machimana was correct. There were various resources available to the appellant to utilise in this respect.

[19] The court *a quo*, however, made the following finding in respect of the appellant's intention to injure the reputation of the magistrate:

"He acted recklessly he reconciled the fact that it may not be the truth but because of his preconceived idea of racism and clearly the eagerness to expose the complainant, he threw all caution overboard and proceeded nonetheless, not caring for the possibility that he maybe wrong."

[20] The finding is not supported by the facts. There is no evidence on record that the appellant reconciled himself with the fact that the information may be wrong. The court *a quo* is correct in its finding that the appellant acted hastily and had thrown all caution to the wind. In this regard, the finding that the appellant acted recklessly is correct. Recklessness does not however equate to intention.

[21] From the evidence it appears that the appellant relied on the truth of the statement and deemed it in the public interest to publish the facts. Once a person thinks that the published words are covered by one of the recognised defences to a claim for defamation, such person lacks the necessary intention required for a conviction on criminal defamation [See: ***Maisel v Van Naeren 1960 (4) SA 836 C at 840***].

[22] In the premises, I am of the view that the State failed to proof intentional publication beyond a reasonable doubt and the conviction cannot stand.

AMICI CURIAE APPLICATION

[23] The first to fifteenth *amici curiae* are a series of prominent organisations dealing with freedom of the media and freedom of expression. They include both South African and international organisations. Their participation in this matter relates to their concerns regarding defamation laws on the freedom of the media and the constitutionality of criminal defamation laws. Their submission insofar as it pertains to the media is that the common law crime of defamation is not consistent with the Constitution and amounts to an unjustifiable limitation on the right to freedom of the media. The *amici curiae* request that this Court should develop the common law to limit the crime to the publication of defamatory statements by persons who are not members of the media.

[24] The respondent is opposing the Court ruling requested by the *amici* and submits that such ruling might have adverse consequences.

[25] *Amici's* counsel¹ submits that the common law can be brought into line with the Constitution in one of these two ways:

25.1 the common law can be subjected to direct constitutional attack which, if successful would lead to a declaration of invalidity in a manner similar to a declaration of invalidity in respect of a statute. (**National Coalition for Gay and Lesbian Equality and Another v Minister of Justice & Other 1999 (1) SA 6 (CC)** at par 90 – 98).

¹ Advocate S Bundlender

25.2 the common law can be developed to ensure consistency with the Constitution whenever it deviates from the spirit, purport and objects of the Bill of Rights. (**Masiya v Director of Public Prosecutions, Pretoria and Another 2007 (5) SA 30 (CC)** at paras 31 – 33 and 70).

[26] Counsel for the *amici* further submitted that the obligation to develop common law is not purely discretionary and in this regard referred the court to **Carmichele v Minister of Safety and Security and Another**² at para 39 where the Constitutional Court explained:

“It needs to be stressed that the obligation of courts to develop the common law, in the context of Section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a general obligation because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties”.

² 2001 (4) SA 938 (CC)

[27] *Amici's* counsel considered the SCA decision in *Hoho v The State 2009 (1) SACR 276 (SCA)* wherein the SCA held that the crime of defamation was consistent with the Constitution. The *amici's* view is that *Hoho* was incorrectly decided and that it failed to properly apply the provisions of the Constitution. However, the *amici* accept that this Court is bound by the *ratio decidendi* in *Hoho* and is not at liberty to depart from it.

[28] The criticism of *Hoho* by the counsel for the *amici* is that:

27.1 the appellant was not a member of the media;

27.2 the SCA did not address the effect of criminal defamation on the media specifically;

27.3 no attention was given by the SCA to the difference between defamatory statements published by members of the media and defamatory statements published by members of the public, including the practical and constitutional consequences of this distinction.

It is therefore counsel's argument that the decision in *Hoho* poses no bar to this Court deciding that criminal defamation is unconstitutional insofar as it applies to members of the media.

Freedom of Expression

[29] Section 16 of the Constitution provides as follows:

"16(1) Everyone has the right to freedom of expression which includes –

a) freedom of the press and other media;

b) freedom to receive or impart information or ideas;

- c) *freedom of artistic creativity; and*
- d) *academic freedom and freedom of scientific research.*

2) *The right of subsection (1) does not extend to –*

- a) *propaganda for war;*
- b) *incitement of imminent violence; or*
- c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.*

[30] The special role played by the media has been repeatedly emphasized by our highest Courts. In **Mail and Guardian Media Ltd and Others v Chipu N.O. and Others**³ the Court held that “*the media plays a key role in society and is not only protected by the right to freedom of expression but is also a key facilitator and guarantor of the right*”.

[31] The special position of the media is created for the benefit of the public, as the SCA has explained in **Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)**⁴:

“It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interest of the press. As pointed out by Anthony Lewis, in a passage that was cited by Cameron J in Holomisa v Argus Newspapers Ltd: ‘Press

³ 2007 (1) 523 (CC) at par 24

⁴ 2007 (5) 540 SCA at para 6

exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine’. The constitutional promise is made rather to serve the interest that all citizen have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself’.

[32] There can be no doubt that the right to freedom of the media is of critical importance and the media stands in a distinct position relative to the general right to freedom of expression.

The Effect of Criminal Defamation on Freedom of the Media

[33] Counsel for the *amici* contends that the effect of criminal defamation laws on the media has been dealt with by the United Nations as well as foreign courts. They have expressed concern about the ‘*chilling effect*’ of such laws, with many urging for the abolition or restriction of such laws.

[34] The *amici’s* counsel refers to various international instruments and international case law to support the argument of the repealing of the criminal defamation laws against the media. Counsel referred the Court to *inter alia* the following;

34.1 A specific resolution by the African Commission on Human and Peoples Rights in 2010 which stated that:

“- - - criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role

of the media as watchdog, prevents journalists and media practitioners to practice their profession without fear and good faith”.

It consequently called on all states parties (including South Africa) to repeal criminal defamation laws or insult laws which impede freedom of speech.

34.2 In a Joint Declaration, the authorities responsible for the protection of the right to freedom of expression of the United Nations, the Organisation of American States and the Organisation for Security and Cooperation in Europe stated that:

“Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws”.

Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression adopted 10 December 2002.

34.3 The Inter-American Commission on Human Rights had held that:

“[T]he State’s use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions.

Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and though guaranteed in Article 13 [protecting the right to freedom of expression], and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic,

democratic way of life”.

Inter-American Commissions of Human Rights, Chapter V:

Report on the Compatibility of Desacato Laws with the American Convention on

Human Rights, 17 February 1995.

34.4 The European Court of Human Rights has taken a similar approach. In

Cumpana and Mazare v Romania (2004), it held at paras 113-114 in respect of the chilling effect:

“Investigative journalists are liable to be inhibited from reporting on matters of general public interest-such as suspected irregularities. In the award of public contracts to commercial entities-if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.

The chilling effect that the fear of such sanction has on the exercise of journalistic freedom of expression is evident - - -”.

It is the *amici*’s argument that the civil remedy for defamation provides adequate means to deter and prevent defamation by the media.

[35] Counsel for the respondent⁵ disagrees that the remarks by the SCA regarding the media in *Hoho* were only *obiter*.

It is respondent’s submission that the SCA mentioned the media to make a crucial

⁵ Advocate Marika Jansen van Vuuren assisted by Advocate Christopher Burke

point that criminal defamation is constitutional because the publication of false statements in a national newspaper would be more harmful than publication anywhere else. The SCA found that “- - - [o]nce bersmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever - - -” [See *Hoho supra*, par 30].

[36] Section 10 of the Constitution provides:

“Human Dignity

Everyone has human dignity inherent dignity and the right to have their dignity respected and protected”.

In my view, *Hoho* must be interpreted in light of other findings by our highest court of the right to freedom of expression of the press not being unrestrained and that it must yield to the individual’s right not to be unlawfully defamed.

[37] Section 36 of the Constitution provides:

“Limitation of rights

36 (1) The rights on the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

- a) the nature of the right;*
- b) the importance of the purpose of the limitation;*
- c) the relation between the limitation and its purpose; and*
- d) less restrictive means to achieve the purpose.*

2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights*".

[38] I agree with the respondent's counsel that *Hoho* must be interpreted in light of other findings by our highest courts of the right to freedom of expression of the press not being unrestrained and that it must yield to the individual's right not to be unlawfully defamed as well as the individual's right to dignity. In *Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at par 26* Judge O'Regan quoted *Argus Printing and Publishing Co Ltd and Others v Essellen's Estate 1994 (2) SA (A)* where the Appeal Court stated at 25 B-E the following:

"The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed".

[39] In my view, the *amici's* request that the criminal defamation be declared unconstitutional undermines the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act. Almost all the international instruments and international case law referred to by the *amici* in support of their argument of the repealing of criminal defamation laws involve the condemnation of extreme situations of governmental abuse of journalists. In my view, these examples do not find application in South Africa where journalists and citizens enjoy the benefits of the law and the Constitution.

[40] Freedom of expression does not have a superior status to other rights under the Constitution. The Constitutional Court has found that freedom of expression must sometimes take a back seat and may be legitimately “chilled” when it intersects with the “foundational” Constitution value of dignity. See Dikoko v Mokhatla 2007 (1) BCLR 1 (CC) at par [141] – [142].

[41] Every person has a right not to be defamed. However, in the field of defamation and more especially criminal defamation, one is faced with two competing interests of great importance: on the one hand, the right not to be defamed, and on the other hand, freedom of expression and of the press. (See *John van der Berg ‘Should there be a Crime of Defamation’* (1989) 106 SALJ p 279).

[42] The law of defamation has to find a workable balance between various rights and interests. A balance must be struck between freedom of expression and protection of reputation. An eloquent example is that of Innes CJ in Farrar v Hay⁶:

“On the one hand, it is our duty to see that the private character and personal honour of every citizen are protected against unjust attack. On the other hand, we must be careful not unduly to hamper the right of full and fair discussion upon matters of public interest which is so important to the welfare of the community”.

⁶ 1907 TS 194 at 199-200

[43] The question before this Court is whether the existence of the criminal defamation in South African law restricts media freedom because it creates a potent chilling effect in investigative, public journalism.

[44] O' Regan J in **Khumalo supra** held that the importance of the right of freedom of expression in a democracy has been acknowledged by our Courts. It is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible decisions and to participate effectively in public life would be stifled. The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate⁷.

Although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality⁸.

[45] It has long been recognised in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the reputation or good name. As Corbett said in **Argus Printing and Publication Co Ltd v Esselen's Estate** **1994 (2) SA 1 (A) at 25 B-E:**

⁷ Ibid at para [22]

⁸ Ibid at par [25]

"I agree and I firmly believe, that freedom of expression and of the press is potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another say about you, the law has devised a number of defences, such as fair comment, justification (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory".

[46] I do agree that a criminal sanction is indeed a more drastic remedy than the civil remedy but that disparity is counterbalanced by the fact that the requirements for succeeding in a criminal defamation matter are much more onerous than in a civil matter. Thus the essential elements of the crime of defamation flowing from the definition are the (i) unlawful (ii) intentional (iii) publication (iv) of matter defamatory of another⁹.

The onerous requirements in the case of criminal defamation are probably the reason for the paucity of prosecutions for defamation compared to civil defamation actions. There is a heavier burden of proof resting on the state in a crime of defamation.

⁹ Milton South African Criminal Law and Procedure 3ed (1996) 525

[47] Having considered the competing interests and the hurdles that have to be overcome in order to secure a conviction on a charge of criminal defamation, the SCA in *Hoho* concluded that the criminalisation of defamation is not inconsistent with the constitution:

“Although it is important to recognize the right of the person defamed to sue for monetary damages it is equally if not more important that society discourage the intentional publication of lies calculated to expose another individual to hatred and contempt. . . . Defamatory libel can cause long-lasting or permanent injuries to the victim. The victim may forever be demeaned and diminished in the eyes of her community. . . . The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained” (par [73]).

[48] The Privy Council in *Worme v Commissioner of Police of Grenada [2004] UKPC 8 par [42]* also emphasized that the need for the criminal sanction for libel was in no way undermined by the existence of the civil law remedy:

“Of course the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that the crime of theft is unnecessary”.

[49] In my view, having regard to the above-mentioned, prosecution of the media journalists who committed a crime of defamation is not inconsistent with the constitution. In exercising their rights under section 16 of the Constitution, the media should also guard against rights of others as freedom of expression is not unlimited. It must be construed in the context of other rights such as the right to human dignity.

[50] I am accordingly inclined to the view that the *amici* failed to make out a case for the decriminalization of defamation. Even though the defamation crime undoubtedly limits the right to freedom of expression, such limitation is reasonable and justified in an open and democratic society and consistent with the criteria laid down in Section 36 of the Constitution.

[51] In the premises, I propose that the following order be made:

51.1 the appeal is upheld and the conviction is set aside;

51.2 the common law crime of criminal defamation insofar as it pertains to the media is consistent with the Constitution.



D.S. MOLEFE
Judge of the High Court



N. JANSE VAN NIEUWENHUIZEN
Judge of the High Court

I agree

APPEARANCES:

Counsel on behalf of Appellant	:	Adv. T. Ngcukaitobi
Instructed by	:	Webber Wentzel Attorneys
Counsel on behalf of Respondent	:	Adv. M. Jansen van Vuuren and Adv. C. Burke
Instructed by	:	State Attorneys
Counsel on behalf of Amicus Curiae	:	Adv. S. Budlender
Instructed by	:	Freedom of Expression Institute
Date Heard	:	06 October 2014
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