



HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR JANEE.
(2) VAN BELANG VIR ANDER REGTERS JANEE.
(3) HERSIEN.
2016/12/01
DATUM
HANDTEKENING

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

Case Number: 27235/2014

In the matter between:

1/12/2016

DR. EBBY BONGANI MKHABELA

Plaintiff

And

MAZWAI XABA

1ST DEFENDANT

JEREMY GORDIN

2ND DEFENDANT

ON THE DOT MEDIA AND MONITORING

3RD DEFENDANT

CC t/a ON THE DOT

PAARL COLDSET

4TH DEFENDANT

JUDGEMENT

NKOSI AJ

INTRODUCTION

1. Plaintiff is Dr. Ebby Bongani Mkhabela, a medical practitioner, who practiced as such in Mpumalanga Province. This is a claim for defamation against the Defendants sued jointly and severally the one paying the other to be absolved: arising from an article published in the Daily Sun dated 26 September 2013 under the heading:
"family sues doctor over botched circumcision"
2. It is common cause that the Second Defendant was the publisher at the time of the publication of the Daily Sun. the Fourth Defendant was the printer for the Daily Sun at the time of the publication.
3. Plaintiff action emanates from this publication and he bore the duty to lead evidence in support of his action.
4. The action was defended and was set down for 3 days. it could not be finalised on these 3 days. It was partly-heard and postponed *sine die* and later set down for another 3 days. On conclusion of the hearing the parties were given an opportunity to file their written heads of arguments by 16 September 2016.

ISSUE TO BE DETERMINED

5. Whether aforesaid publication amounts to a defamation as applied in our legal system and whether an affected party, the Plaintiff in this case can sue for damages. If successful the court can order a fair compensation after a legal consideration of all evidence and submissions by both parties to the action following a due process of the law.
6. The Plaintiff had a duty to prove its case on a balance of probabilities to succeed. The Defendant had corresponding duty to raise its defence by leading admissible and relevant evidence to sustain its defence.

THE PARTIES EVIDENCE AND ARGUMENTS UNDER OATH

7. The Plaintiff is Dr Ebby Bongani Mkhabela testified in person. The Plaintiff claims for an amount of R3 million for compensation resulting from the above-mentioned publication carried out by the Defendants.
8. He testified that he qualified as a medical practitioner after graduation at the Medical University of South Africa (MEDUNSA) and has been practicing as such for a period of more than 13 years. He had acquired experience and learnt a lot in the treatment of HIV/AIDS, circumcision programmes in the country and as a provincial co-coordinator on health issues helped to educate other medical officers in the HIV/AIDS management, mental care use and the well-out of strategies health care. He also ran his own private circumcision clinic and assisted in different hospital.
9. During his tenure as a medical practitioner he did not receive any complaints. He left his position as a provincial manager in the state hospital to pursue his career in private practice at Mkhago with his cousins. That is where he mostly concentrated on circumcision of male patients between the age of 15 years and above, and later accommodated patients of 7 years-14 years old.
10. In the year 2013 he assisted the provincial department of health on a voluntary circumcision project where more than 500 000 patients were assisted.

11. This culminated to him submitting a proposal with the Department of health Mpumalanga Province to assist male patients on male voluntary circumcision project.
12. It was his testimony that on or about 26 September 2013 he got a shock of his life when his sister called him with regard to a newspaper publication about an alleged claim or legal suit of R10.7 million against him.
13. The publication from the newspaper was headed as "family sues doctor over botched circumcision. On his elaboration he stated that it appeared to be a boy who was circumcised at the Barberton hospital where he was employed together with other medical officers in the year 2008.
14. He testified to the effect that he had never been served with summons commencing an action in his entire life and the newspaper publication was unexpected. On further enquiry he recalled the 5 years old Bonginkosi Nhlabathi a patient who was assessed by doctors at the Outpatient Department of Barberton Hospital on the date in question. The necessary administrative procedure was followed including signing of a consent form by his mother. He was admitted and prepared for theatre procedures where himself (Plaintiff), Dr. Motsitsilane and four nurses came on the circumcision.
15. It was his evidence that no complications was experienced before and after the circumcision operation was concluded, except for the slight bleeding referred to as frenulum. This was however attended to by putting a catheter for a short while.
16. After the whole process the nurses made a note in the bed letter and called the ward nurses to collect the child to be seen by a pediatrician. He was monitored and discharged two days later. The parent was advised to take the child to the local clinic, on daily basis, for cleaning

and bandage. He further testified that was the last time he heard about this patient in the year 2008 until it was published by the Daily Sun newspaper in 2013.

17. He vehemently denied that he was ever sued or served with summons for R10.7 million, it was his views that he was singled out by the publication which, to him, amounted to defamation and character assassination. He only worked for the Department of Health during the period of 2008, and the child's operation was done by a group of doctors including himself. He requested for a copy of the summons about a "botched circumcision" but was never sent to him. He further enquired as to whether he was cited as a party to the legal suit or not to no avail
18. He further testified that his company, Mkhago Healthcare Services was unfairly linked to the Barberton case plus 16 other Tonga cases of having botched circumcisions.
19. It was his evidence that the publication was so prejudicial to his reputation and as a result of such his practice started going down and other colleagues could no longer send referrals as a result of the alleged R10.7 million legal suit referred to in the Daily Sun newspaper.
20. He further testified that he operated almost 2/3 of the Mpumalanga Province and this bad publication made him to suffer. This further resulted in him moving his practice and eventually resigned and closing his of practice.
21. Plaintiff caused his legal representative to issue a letter of demand dated 11 November 2013 to the Editor: Eye News Service where it was referred to the published article which stated that:

1. "Dr E. Mkhabela is being sued for more than R10.7 million by the family of a boy who lost the tip of his penis in a botched circumcision"
 2. "Circumcisions have left 18 young men in severe pain after they were circumcised by a government approved facility linked to Mkhabela's company Mkhago Health Services"
 3. "Bad procedures can lead to patients losing their penis"
- 22.** These words were published in Daily Sun of the 26th of September 2013 which was widely distributed in South Africa and read by the general public.
- 23.** The aforementioned wording was described as unlawful, wrongful and defamatory and the Plaintiff suffered damages in this fashion: "1. Dr Mkhabela's integrity and good standing was seen tarnished, no longer has confidence of any patients and stands to lose a potential loss of income of R3 million
2. Mkhago Health Care Service have likewise suffered the loss of patients who have indicated their unwillingness of being treated due to the negative report and have suffered a potential loss of income of R5 million.
- 24.** The letter was directed to African Eye News Services as supplier of news to Daily Sun, amongst others, which made the publication. They were not cited as a party to the proceedings and Mkhago Health Care Services were not joined or cited as a party hereto. Daily Sun accepted the request from African Eye News Agency and went on to publish it.
- 25.** After some interactions the Daily Sun published an article under a "matter of fact v/s Botched Circumcision" which never refer to Dr Mkhabela which was printed on a font smaller than the first publication.

26. The correction or date of the publication was not sent to the Plaintiff. On page 103 of the Plaintiff's trial bundle the Daily Sun dated 3 December 2013 published an articles as follows:

"Matter of facts: on 26 September 2013, Daily Sun published an article entitled: "Family sues doctor over botched circumcision" on page 8.

The story sourced from African Eye News Services, incorrectly reported that Dr. Ebby Mkhabela is facing a R10.7 million lawsuit for a botched circumcision when he worked for the health department in 2008. The family is suing the provincial and national departments of health and not Dr. Ebby Mkhabela or Mkhago Health Care Service.

27. Prior to this article the Plaintiff wrote an email to African Eye News Services dated 23 October 2013 requesting a copy of a summons , date, time and place about the alleged lawsuit and 5 more questions on page 1-12 of the paginated document.

28. One must pause to clear the issue of the 4th Defendant which was no longer in dispute and the 3rd Defendant as a non legal entity. The publisher was not disputed.

29. It was Plaintiff's evidence, further that after this publication and its effect on him losing his reputation he remained jobless and relocated to Limpopo Province and later managed to secure a job in tenting in a Tuberculosis Hospital where he is currently plying his trade as a medical practitioner.

30. On cross-examination by Defendant's counsel first focused on the tender issue awarded to Mkhago Health Care Services. He was questioned about his wife's involvement , as a former director of Mkhago Health Care Services, her investment or possible investment or potential influence on

the tender to Mkhago in issues raised by Corruption Watch in another issue unrelated to Plaintiff's case of defamation.

31. He admitted on further cross-examination that something wrong have happened after circumcision for example the failure to change the bandage. The child was discharged with a normal penis. The child's discharge was written by one Dr. F. Erwee who was working at Barberton Hospital.
32. It was put to him that he refused to be interviewed before the publication and he denied that. He indicated that he was called by Mandla Khoza from the African Eye News Services about the article whom requested to have his questions in writing.
33. It was further put to him that Mandla Khoza did send the written questions on 13 September 2013 and by 16 September 2013 did not have answers not a reply either in writing or telephonically.
34. The publication went through on 26 September 2013 after he had failed to respond.
35. It was further put to him that he only called African Eye News Services on 8 October 2013 for the first time about the publication.
36. On re-examination the Plaintiff cleared the possible causes of a glans falling off that it can be accidental, or if the bandage was too tight stopping the blood flow after the operation or it could be sepsis if the wound was not properly cleaned leading to bacterial infections.

37. Plaintiff closed his case without calling any witness.

38. Defendant's counsel wanted to have an opening address which was refused due to the fact that it cannot be after the Plaintiff has led evidence and cross-examined. The court however accepted to the request in terms of Rule 39 of the uniform Rules of practice to address the court on the pleadings only. Plaintiff had no objection to it.

39. Basically the plea sets out Defendant's denial of almost all averments or material averments by the Plaintiff and that if the court finds that there was defamation defendant relies on privileged occasion in that the publication of the article was reasonable on occasion of the following circumstances:

PRIVILEGED OCCASION

- that Defendants were under a duty, as member of the press and concerned citizens of the Republic of South Africa, to inform the public of the botched circumcision taking place in Mpumalanga and problems emanating from the State's voluntary medical male circumcision programme;
- they were entitled following their role as the press, and acting as a voice of an informed and socially responsible leadership to raise the awareness of the botched circumcision in Mpumalanga;
- the readership of Daily Sun had a corresponding right to be informed of such information, inter alia, in terms of section 16 (1) (b) of the Constitution of the Republic of South Africa 108 of 1996 to receive information concerning the botched circumcision taking place in Mpumalanga and problems emanating from the State's voluntarily

medical male circumcision so as to make educated and informed decisions regarding any circumcision practices to which they may or may not subscribe;

- in the alternative, that the publication was reasonable in that
- the Defendant did not publish the article recklessly or negligently and the Defendant would rely on the following facts:

(a) that the article constituted a fair and balanced account of the interviews, enquiries and investigations conducted into the subject matter of the said articles; the journalist who wrote the article was a suitably qualified and responsible journalist;

(b) the Defendant complied with the standards of investigative reporting applicable in the journalistic profession;

(c) the Defendants could take no further reasonable steps to ascertain the truth and veracity of the information, save for the indepth investigation into the botched circumcisions in Mpumalanga;

(d) the conduct of the journalist, in investigation and in writing the article was reasonable in that he took reasonable steps to establish and/ or investigate the truth of the allegations and made enquiries from persons who in their capacities, would had knowledge of the truth of the allegations;

(e) that the article constituted fair comment and the publication was not wrongful not published with the intention to injure, *animoiniuriandi* and that it was not negligent;

(f) the Defendants denied any liability towards the Plaintiff either as it was alleged or at all nor that he suffered any damages as claimed or at all.

40. APOLOGY

- (a) post publication of the article in the Daily Sun the Defendants were made aware of the error of incorrect report that Plaintiff was facing a R10.7 million on a result of botched circumcision which took place in 2008 when he worked for the Department of Health;

After verification of the aforesaid error, the Departments, without unreasonable delay, published an apology to the Plaintiff on or about 13 December 2013 following a publication dated 26 September 2013; (delay)

The Defendants admitted their error and indicated that any impairment of the Plaintiff's human dignity was restored by the apology and that no damages should be awarded to the Plaintiff and prayed that Plaintiff's claims be dismissed with costs.

The first three days allocated for this matter was consumed by time and the parties agreed to have this matter postponed to another three days after arranging such with the office of the Deputy Judgment President.

- (b) The partly-head matter resumed on 24 August 2016 and the parties were ready to proceed as we did.
- (c) The Defendants called its first witness Dr. Isak van Heerden, who qualified as medical practitioner and as a specialist in urology since 1987 and based at Steve Biko Hospital. He specializes mainly on pediatric urology which involves male genitalia or diseases.

41. He described the *modus operandi* on circumcision and read from the extract or notes of the doctor(s) who conducted the

circumcision at the Barberton Hospital. That circumcision is done under general anaesthetic or under gases and lignocaine anaesthetic. He observed that, on the patient's records, there was a urethral minor distal rupture, a small cut. This led to a small bleeding in the urethra which necessitated the doctors, in Barberton Hospital, to put a catheter to allow the urethra to heal. Normally a catheter is not put on or after circumcision. It was his view that it implied that the catheter was meant to prevent the urine not to go to the bladder but to the catheter or outside.

42. His testimony was based on what happened from a local hospital and the patient was brought to him at Steve Biko Academic Hospital with a cut-off from the penis. This note was properly covered in the court papers. On the written note from the Barberton Hospital the doctor indicated that the mother came with a glans which had fallen-off.
43. This witness's observation was that no infection was discovered and the child could urinate normally. He further testified that the cause of the glans falling-off could be that the blood supply to the penis was affected by a dead tissue: it was not cut-off. This was not a first case in history. It could have been an overzealous deep cut to the urethra impliedly during the circumcision.
44. On his own expert testimony he further observed that there was no negligence on the part of the doctors who operated the child. It was a complicated circumcision. The final diagnosis was to do a penile reconstruction for the amputated penis which was successfully done.

45. He further elaborated that the cause of the problem could have been the bad application of the bandage, though it was not mentioned in the medical hospital note. This could lead to the loss of blood flow to the tip of the penis as a result of a too tight bandage causing a smell and short supply of blood. Sepsis could also be contributing factor. His final analysis was that the patient could urinate properly and could have normal sexual activity (at the right time).
46. On cross-examination by Plaintiff's counsel he could not cast doubt on Plaintiff's ability to do a successful circumcision. He was asked to give clarity on what "botched" is meant in medical language. He indicated that this was not a medical terminology but a layman's referral to trauma as a negative term.
47. He denied ever called by a journalist on this issue and even if he did it was not his practice to give medical opinion on the phone. He conceded that the catheter was put on the patient on 8 July 2009 and removed the next day and from the hospital medical note it was made clear that the child was discharged without bleeding, was able to walk and the mother was taught on healthcare and that if the bandages area, after circumcision, is not kept clean can cause bleeding.
48. Dr. Erstee, who discharged the child from Barberton Hospital on the 9 July 2008 and his work and could not say anyone to have been negligent. He was excused from cross-examination.
49. The 2nd Defendant's witness was Tswarelo Aaron Mokgakane who testified under oath that at the time of the publication in question he was a sub-editor for the African Eye News Service and had vast experience in the field of news syndication agency

training rural journalists and to supply information to main publication of news including but not limited to Daily Sun, Sunday Independent, City Press, on-line news 24 nationally and to zivraphi, Nkomazi Voice and Bushbuckridge regionally the elaborated on his qualifications and the training and experience acquired in the field of investigation reporting and how they sought information from rural journalist assigned on specific projects, interviewing witnesses, asses the information received, checking spelling and grammar before sending to potential events who also have their own editor who will evaluate the stories received.

50. He confirmed that his chief-editor would be the last person to assess information before sent to clients, Daily Sun in this matter, after satisfying himself/herself of the content, and thereafter sent for publication if there is no further enquiry. Amongst his junior staff was Sipiwe Nyathi and Mandla Khoza.

51. He further testified about his involvement in the publication which led to this Legal suit: -

- Gcina Ntsaluba, a senior investigative journalist of an organization called Corruption Watch visited our office on 26 August 2013.
- it was his testimony that Mr. Ntsaluba was on duty or mission to investigate a contract which was wrongly awarded by the Mpumalanga Department of Health and he then invited Mandla Khoza, as a health reporter, to be part of their meeting with Mr. Ntsaluba:
- it was at this meeting where Mr. Ntsaluba gave them a list of 18 males injured on "botched" circumcision.

- this document he received from his sources about septic circumcision from the affected person treated at Tonga with various wounds linked to the investigation he was doing.
- Mr. Ntsaluba was busy with the "corruption" of the tender awarded to a service provider Mkhago Health Care co-owned by Dr. Mkhabela or the Plaintiff which was conducting circumcisions in the area called Mzinti in the Nkomazi region.

52. Mr. Mokgakane did not have a prior knowledge of the Plaintiff until when he met Mr. Ntsaluba. Mr. Ntsaluba gave him the list of 18 males referred to above and informed him and Mr. Khoza that Dr. Mkhabela was involve in botched circumcision in Barberton Hospital and that he was facing R10.7 million and that Dr. Mkhabela's wife was employed by the Department of Health Mpumalanga. It was this information which was under investigation by Corruption Watch for a possible link or influence which might have placed a role in getting a voluntary circumcision tender without following the tender process.

53. He, Mr. Mokgakane, and Mr. Khoza went on to interact with the department of health to sought more information through its spokesperson. On their own further investigation they could not link a legal suit directly to the Plaintiff or Mkhago Health Care (not party to the proceedings). He did not do the investigation himself and could not take the court any further by referring to people who were not going to be called as witnesses to corroborate his testimony except for Mr. Khoza.

54. What is crucially important is that Mr. Mokgakane said in his own words that: "corruption Watch "scooped" us about Mkhago Health Care on-line. he clarified it that they were overtaken by

events by Corruption Watch breaking the story before them and they were disappointed.

- 55.** It was his further evidence that the scoop went on publication by the Sunday Independence newspaper, their client, on 8 September 2013. Corruption Watch published it on 9 September 2013: Saying "Corruption Watch is investigating the Mpumalanga Health Department's decision to award a multimillion rand contract "without a tender" to circumcise 260 000 boys and men in the Province and the Sunday Independence reported on the weekend to "Mkhago Health Care Services, owned by Ebby Bongani Mkhabela, a doctor linked to a circumcision procedure on a 4 year old Mpumalanga boy five years ago, who is the subject of a R10.7 million legal suit.
- 56.** He further indicated that Mr. Mandla Khoza was instructed to work on this story and to give Dr. Mkhabela and his wife an opportunity to comment on this allegation before the publication or publications.
- 57.** The Plaintiff gave Mr. Khoza his email address where he could direct his queries. It was his further evidence that the Plaintiff failed to respond to questions and their information was handed to Daily Sun for publication which took place on 26 September 2013.
- 58.** The Plaintiff started complaining on 17 October 2013 saying that it was untrue that he was sued for R10.7 million in a botched circumcision and wanted the correspondent AENS to retract the article and to apologies.

59. Mr. Mokgakane's exact words on record on this complaint was:
"we are happy to ask the Daily Sun to print erratum that you are not personally sued but the Department of Health."

60. It was clearly spelt out that the exchange of emails was between Mkhago (not a party to these proceedings) and Mr. Khoza. It emerged that other doctors, who took part in the 2008 circumcision operation, were not contacted nor published any article about them. The investigation was all about Mkhago Health Care Services and the alleged "botched circumcision" as a top up.

61. On cross-examination by Plaintiff's counsel he confirmed that Corruption Watch scooped their story on 9 September 2013 and further confirm that Corruption Watch's article did not mention the Plaintiff's name. He did not see any summons commencing on action against the Plaintiff. It was put to him that he ignored the Corruption Watch articles before publishing their article about the Plaintiff.

62. He further acceded that Corruption Watch was probing a dodgy circumcision contract and not a "botched" circumcision. It was further put to him that Plaintiff did not botch any circumcision and it was further put to him that the circumcised child was discharged from Barberton Hospital without a problem or complication. He was brought back to hospital ten days later with a glans have fallen off the penis and not botched.

63. He was further confronted with the question as to what made them as journalist or reporter not to dig more or investigate

where or why the child lost the tip of his penis? Whether on discharge from the hospital or not? Did he establish whether a case was opened against the Plaintiff? Under what case number, from which court and whether summons were served on him before causing the publication by Daily Sun?

64. The period between the published article by Sunday Independence and Corruption Watch on-line publication on 8 and 9 September 2013 and Daily Sun publication on 26 September 2013 could have allowed a reasonable journalist or reporter to investigate before the publication. It was further put to him that rushing to publish a 2008 in 2013 without full investigation was not reasonable. He reacted by saying that we had been "scooped" already.
65. The apology by Daily Sun did not say there was no botched circumcision. He further conceded that he did not see article before its publication by Daily Sun and only saw it after.
66. Defendant called its 3rd witness Mr. Reggie Moalusi who also testified under oath that he is the editor in chief for the Daily Sun and Sunday Sun for a period of two years and has been a qualified journalist with a combined period of 15 years. He has been with reputable media houses holding senior positions.
67. He confirmed that African Eye News Service was a news supplier to Daily Sun for the past 10 years and had a reliable relationship with them. It was his evidence that he did not edit the published story which led to this litigation. It was published by Daily Sun after it was completely checked. On cross-examination he conceded that there was no tangible

evidence on "botched" circumcision, but later stated that they received the information from African Eye News Agency after establishing its accuracy. He did not elaborate what he meant with accuracy. He did not take this matter any further on defence.

68. Mandla Doctor Khoza was the last witness called by the Defendant. He testified that he is a senior reporter employed by African Eye News Services doing investigation on health related issues, public health in hospitals and clinics etc. Before the publication of this matter he reported and published ill-treatments of patients, operations like botched circumcisions both medical and traditional circumcisions on males. He further testified that he reported the deaths of 31 initiates in the Ekangala, Gert Sibande and the Enhlanzeni regions of Mpumalanga Province.

69. It was his evidence that on or about August 2013 he was told of a contract of doing voluntary male medical circumcision to a doctor without a tender process. He got this information from Mr. Ntsaluba who was doing an investigation into this alleged irregular contract on behalf of Corruption Watch. He made his own investigation by calling one Ronnie Masilela who was the department spokesperson by then.

70. He was given a list of 16 boys and two men who were circumcised at Mzinti clinic named Mkhago Health Care Services allegedly partly-owned by the Plaintiff. His evidence was mainly on patients treated at the Mkhago Health Care Services and the questions on the process of the tender allegedly awarded to Mkhago and where Plaintiff's wife

worked before joining the Mpumalanga Department of Health. His questions to the Plaintiff regarding the tender could not be satisfactorily answered between 13 September and 26 September 2013.

71. On cross-examination he conceded that he become aware of the "botched" circumcision on 26 August 2013 from Mr. Ntsaluba from Corruption Watch about a doctor who being sued for R10.7 million.

72. On enquiry whether he was shown proof of the patient's name he could not give an answer except for a note about the patient with the surgeon's name. On further enquiring whether on the medical note, was there an indication of "botched" circumcision the answer was no.

73. The Mzinti's 18 patients did not mention or link the Plaintiff personally or directly to any circumcision which went wrong. Mr. Khoza conceded that there was a deadline to meet in a specific date before publication.

74. The Defendant closed their case without further witnesses. The parties agreed to file their written closing arguments by 16 September 2016.

75. WEIGHING OF THE PARTIES EVIDENCE

(a) The first question that I had to determine is whether there was a case of defamation and what stage did it take place.

(b) It is common cause that a publication of an alleged "botched" circumcision and a doctor facing a legal suit of R10.7 million appeared in the Daily Sun of 26 September 2013. The Plaintiff was the person indirectly referred to as the person facing the legal suit. His *locus standi* was not placed in dispute.

(c) The publication was not denied and the Defendant raised their defence as clearly outlined in their plea, and supplemented by various witness in defence of this action. There was dispute with regard to their *locus standi*.

76. THE CURRENT APPLICABLE LAW ON DEFAMATION

(a) Our court recognizes that: the delict of defamation is aimed at the protection of a person's reputation, that is the public estimation of the worth or value of a person, as opposed to the individual's personal sense of self-worth or self-esteem, and it is an essential element of the delict that the defamation statement is published or was published, or made known, to other person or persons other than the person defamed. LAWSA volume 7 2nd Edition. According to Amler's precedents on Pleadings page 134 of the 6th edition: "The Plaintiff must set out the words alleged to have been used by the Defendants and must prove them. It has been an accepted norm that where publication taken place in a publicly distributed document, it is not necessary to list the name or names of readers because it is factually presumed that publication did take place. See *Pillay v Naidoo* 1916 WLD 151.

- (b) The general rule was further expressed in the case of *SA Associated Newspapers v/s Estate Pelser* 1975 (4) SA 797 (A) at 810: "in every defamation action the Plaintiff must allege and prove that the defamatory words were published of and concerning to him...."
- (c) In *Sindani v/s Van Der Merwe* 2002 (2) SA 32 SCA it was further cleared that the Plaintiff must allege that although the published statement was defamatory, it is a question of law whether the words complained of are reasonably capable of conveying to the reasonable reader of meaning which defames the Plaintiff. The court agrees with this view as it was stated.
- (d) The editor, proprietor, printer and publisher of a newspaper, journal or other document circulated generally may be liable for defamatory statements appearing in the newspaper, journal or document, if there is no acceptable defence.
- (e) In the matter of *Khumalo and other v/s Holomisa* 2002 (5) SA 401 at paragraph 17-20 and 43 the Constitutional Court looked at the principles of the law of defamation and confirmed that the right to reputation or fama in the aspect of personality that was protected by the law of defamation.
- (f) It further re-iterated that once a Plaintiff has established that defendant has published a defamatory statement concerning the Plaintiff it is presumed that the publication was both unlawful and intentional.
- (g) There is no closed list of defences to rebut the unlawfulness but if the publication is true and in the public benefit or constituted fair comments and made on a privileged occasion can sustain the defence. It was held in *Bogoshi v/s National Media Ltd and others* 1998 (4) SA 1196 (SCA) that the Plaintiff is required to allege that the defendant acted

unlawfully and with animus iniuriandi. It further held that the publication of false defamatory allegations of facts 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 the particular way and at the particular time. It was considered as a valid to properly to look at the nature of the information on which the allegations were based and the reliability of their sources as well as steps taken to verify the information. See *Mthembi Mahanyele v/s Mail & Guardian* 2004 (3) ALL SA 511 (SCA).

(h) Defendants can easily escape liability on presentation of positive evidence to support its plea. Bare denial cannot sustain a defence in this type of suit.

77. CONSIDERATION OF EVIDENCE & ARGUMENTS

It was submitted that the Plaintiff have shown on a balance of probabilities that;

(a) The article complained of was wrongful in that it is defamatory per se on the plain reading of the article as a whole and contained the implied meaning that;

- That the Plaintiff was sued for R10.7 million in his personal capacity as a result of a botched circumcision.
- Was the sole cause that the 10 years old lost the tip of the penis.
- Was responsible for the other 18 men being hospitalized as a result of the Plaintiff's conduct.

- Employs bad procedures in the medical circumcisions which lead to patients losing their penises or part thereof.
- That the Plaintiff is generally unprofessional as a healthcare professional.
- Cannot be trusted as a healthcare professional.

(b) When one has regard to the normal dictionary meaning of the word "botched" it means inter alia: unprofessional, incompetent, made a mess, mangle. Objectively this is the meaning of the said word used word used in the heading. This much has also been conceded by every witness for the Defendants. There can reasonably speaking be no other meaning attribute to the word it was submitted.

(c) It was further submitted that there was wide publication of the news articles and that the Daily Sun newspaper is in fact published nationally.

(d) It is further evident that the article only mentions one Doctor's name, being the Plaintiff's name. in this regard the article clearly concerns the Plaintiff personally. Even the heading makes this clear from the start that this is a personal attack on the Plaintiff's dignity.

(e) It was submitted that the article was defamatory in nature as the normal reasonable reader would think less of the Plaintiff after reading the reading the article. The article lowered the Plaintiff reputation in the province and this is supported by the fact that he even had to relocate to Gauteng to find a new job in 2014. When put to the witness of the Defendant if they

would send their child to this doctor for treatment they refused to answer. In this regard the old maxim that no answer is in fact the clearest answer, is applicable in any general discourse.

- (f) It was submitted that the onus then shifted to the Defendants to show some lawful justifications or excuse. In this regard the Defendants raised several defences.

I. FAIR COMMENT (TRUTH AND PUBLIC INTEREST):

(a) The requirements of this defence are: the statement must amount to a comment or opinion and not be a statement of fact, the comment must be fair and free from malice and exaggeration, the facts upon which the comment is based must be substantially true, the facts upon which the comment is based must expressly be stated in the material containing the comment, the comment must relate to a matter of public interest.

(b) In this instance the article is clearly a statement of fact if one has regard to the plain reading of the article and the testimony of the witness. None of the Defendant's witnesses ever merely expressed their opinion. They took the article as being factual and correct.

(c) THE ARTICLE IS NOT FREE FROM MALICE AND CARRIES ADDITIONAL STING IN THAT THE Doctor is vilified and isolated in the articles. The doctor never even conducted circumcisions in Mzinti on the other 18 boys ut yet this is attributed to him. The Plaintiff never botched any

circumcision. The word botched has a very negative connotation and is purely used to sensationalise the unfortunate situation of the young boy. What is even more appalling is the fact that this sensationalism is created purely in an attempt to make the article more attractive to publishers/clients. Not one piece of evidence showed that this circumcision was botched by the doctor. Not even the defendants own expert witness could say this *ex post facto*.

(d) The material facts of the story are simply not true. The Plaintiff never botched a surgery, he was never sued and the young boy did not lose the tips of his penis at the Hospital. No proof of legal suit against him was shown to this court.

(e) The facts upon which the factual statement was made is not stated in the article. It was testified that there was no medical evidence to base this article on. There was only one answer from the Provincial Spokesperson, Ronnie Masilela upon which this article was based, in which Masilela simply stated that the matter is under investigation. He was not called as a witness though.

(f) In the circumstances the defendant did not prove this defence on a balance of probabilities.

ii **PRIVELEGED OCCASION**

(a) The requisites for the defence are that the occasion is privileged, that the communication is relevant to the purpose of the occasion, that the person is not activated by malice. The test is objective, in line with the general criterion of reasonableness. A test of a reasonable man comes into picture not for the first time.

(b) The interest must be legitimate and in this case it is not. The legitimate interest here was to inform the public of the alleged corrupt tender process. Instead the Defendants sensationalise the story and made it a personal attack on the Plaintiff professional competency. In Mr Mokgakane's own words (the Sub Editor of AENS) he stated that the purpose was to:

"show the kind of men who received the contract "

(c) On reading the style, tone and grammar of the article this demonstrates the clear malice and intent towards the Plaintiff. The purpose was not to write a factual correct article informing the public of a "health situation as alleged in fact numerous untruths were published in order to connect the Plaintiff in his personal capacity with a so called botched circumcision. Without the untruths the Plaintiff would not have even been mentioned in the article.

(d) It was clear however that the Defendant's defence was not clear to the issues raised by the Plaintiff.

iii REASONABLE PUBLICATION

- (a) This is the so-called Bogoshi defence that was developed in the Bogoshi case by the SCA.
- (b) This defence was summarised by Hefer AJ as follows "the publication in the press of false defamatory allegations of fact 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 the particular way and at the particular time. In consideration the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations, for which I agree.
- (c) There is however a further qualification that Hefer AJ added "Ultimately there can be no jurisdiction for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.
- (d) In this article there was publication of several untruths as submitted by Plaintiff's counsel. The Plaintiff was never sued by any family. The young boy never lost a tip of his penis at the hospital. The Plaintiff did not botched the circumcision. The doctor did not perform an operation on one of the 18 young mentioned later on in the article.

- (e) The next question that the Defendant then needs to answer is why the Daily Sun published these untruths. This is done by looking at the steps that the Editors took in obtaining and verifying information received from the journalists. The editor is responsible for the final check of grammar and content.
- (f) Mr. Mogakane, the sub-editor of AENS at the time, correctly stated, that the only information the article was based on is one paragraph in a reply to an email by Mr. Masilela. This email is evident on B38 (B refers to the Defendant's trial bundle and 1 to the relevant page). The email was received on 11 September 2013.
- (g) Mr. Mogakane further correctly conceded that the said email does not confirm or deny anything with regards to the botched circumcision or the conduct of the Plaintiff.
- (h) At this point in time Mr. Mogakane was also aware and read the story of Corruption Watch (at page 35 of the Defendant's bundle) where it is patently clear that the Plaintiff was never mentioned by name. Yet he felt no need to check why his so called facts were different.
- (i) One would expect the Editor to at the least try ascertain why his journalist stated that the Plaintiff is being sued. Especially, knowing that Corruption Watch is a well-respected publication.
- (j) The evidence available at trial could also easily have been established before the publication by the Defendant. In this regard the Defendant's witness, Mr.

Moalusi (Deputy Editor of the Daily Sun) correctly conceded, that knowing the facts now they would not have published the article. The Defendant's only saw it fit to get an expert's opinion on the matter in the middle of this trial, that of Dr. Izak Van Heerden.

(k) It is further ironic that the Defendant's expert stated under oath that he would not have been inclined to give his expert opinion on the circumcision in 2013 but yet clearly has no more restriction doing it at trial some three years later. This illustrates the objective fact that the Defendant's should have at the very least attempted to get such an expert opinion before publication. The failure to take steps to acquire such an expert opinion shows the unreasonableness of the Defendant's conduct. If it was possible to get the opinion now, it should have been acquired before publication. Dr. Izak Van Heerden's evidence does not even support the Defendant's case. He admitted that from the records he saw (most of which the Defendant's had before publication) one can simply not say that the Plaintiff botched the circumcision. How Mr. Mandla Khoza then could state that it was botched on the heading of the article is incomprehensible.

(l) It is also important to note the publisher was the Daily Sun Newspaper and not AENS. In this regard the editor of the Daily Sun was extremely argumentative when confronted with the fact that the editor of the publication complained of did not attempt to confirm anything in the article. In fact they simply shortened the article ("sub-edited") and then printed it. They took no steps of their own to verify the

content of the article. Only afterwards did they phone AENS with some questions.

(m) This "I don't care attitude" was done with the full knowledge that the article contained serious allegations and is a direct negative imputation on the Plaintiffs reputation as a respected doctor. Mr. Moalusi admitted under cross-examination that the allegations were serious and that they were dealing here with the reputation of the Plaintiff.

(n) The Defendant testified that they received "B1 (page 1 of the Defendant's bundle) from Mr. Ntsaluba. Yet no attempt was made to ask for the complete medical records, especially the discharge form. If Mr. Ntsaluba could obtain a copy of B1 he could get copies of other documents from the Hospital. The fact that "B1" could be obtained shows that the Defendants were not telling the truth when they testified that the rest of the medical documents could not be obtained due to doctor patient confidentiality. "B1" is part of the medical documents.

(o) No attempt was made to speak to any of the support personnel that were involved in the operation although the information was readily available. In the words Mr. Mogakane expressly stated that he didn't care to speak to them.

(p) No attempt was made to visit the Barberton Hospital or to speak to the personnel there.

- (q) No attempt was made to get an expert opinion on whether the circumcision was botched. In light of Dr. Izak Van Heerden's testimony at trial this clearly was possible.
- (r) The information that the Defendant had were wholly incomplete and inaccurate. The only information that the Editor had sight of before publication was page 1, 27, 37 and 128 (of the Defendant's bundle). These documents can simply never corroborate the serious allegations made in the article against the Plaintiff.
- (s) As Mr. Mogakane conceded that these documents do not confirm that the Plaintiff botched the circumcision or that the young boy lost the tip of his penis at the hospital or that the Plaintiff was sued.
- (t) What is even worse for Mr. Mogakane is the fact that he did not even attempt to phone Mr. Isaac Ngomane, the VMMC programme Coordinator. His name appears at the end of page 30 (of the Defendant's bundle) and he compiled the information.
- (u) Mr. Moalusi stated that the Daily Sun has no limitations and or constraints when they investigate a story. Money is further not an issue, there is no budget constraints.
- (v) In this regard the Daily Sun who published the articles took no reasonable steps to ascertain the truth in this matter.
- (w) The Defendant is however of the view that they afforded the Plaintiff an opportunity to state his side of the story by asking seven questions in an email. These

questions however all relate to one thing namely the contract and tender process, the essence was corruption. The essence of the article was completely different and was an attack on the Plaintiff abilities as a doctor. The story was clearly one sided and not aimed at Corruption.

(x) Not one question in the email relates to the detail of the operation or any complication during the surgery.

(y) The Plaintiff simply never had a chance to respond to the defamatory statements.

iv DAMAGES:

(a) It was submitted that all the witnesses agreed that the Plaintiff is a well-qualified doctor with no complains at the Health Professions Council.

(b) The Plaintiff was jobless for a year to the direct result of the articles. At every interview the article was hanging over him like a dark cloud.

(c) The publication took place nationally and was wide spread.

(d) The Plaintiff had to move to a new province and could only obtain work as a GP. He previously held managerial positions.

(e) The Defendant (the Daily Sun) never attempted to apologies. Only the correspondent attempted to do so, in a very questionable manner. No reference in apology's

heading to the Plaintiff nor for the fact that they said the Plaintiff botched the circumcision. It was merely done in a desperate attempt to avoid liability. Even then after acknowledging under cross-examination that the article is untruthful there is no tender for a proper apology.

- (f) The Defendants showed no respect to the Plaintiff, they acted at all times with the full knowledge of what the effect of this publication would have on the Plaintiff's reputation.
- (g) In this matter it is clear from the evidence and submissions that the Plaintiff was defamed. The publication on the 26th of September 2013 could not be justified by any fact nor supported by any evidence and therefore stands to fall.

Even if the defendant was to rely on the constitutionally entrenched right to freedom of expression it could be hampered by the limitation clause. The manner in which Mr. Khoza reported the situation was filled with fabrication and goes beyond what is permissible in terms of constitutionally entrenched right to freedom to expression. An objective evaluation of the published articles doe have the effect of tarnishing the Plaintiff's reputation as a person and a medical doctor whom members of the public relies on for health related issues and a public figure and that has done something unethical in destroying a young boy's potentially reproductive organ.

The determination on the question of damages is complex. In my view the plaintiff was a good witness; he was consistent in what he told the court. It is clear in my view that the accolades and respect he received to those successfully circumcised cannot be fabricated or destroyed on stroke of a pen.

78. CONCLUSION

Having heard all the parties and their witnesses the court is of the view that the Plaintiff had succeeded in proving its case on balance of probabilities and Defendant's evidence is rejected on the basis that the journalists acted on expediency to cover the story which they felt they were overtaken by the Sunday Independence 8/9/2013 and Corruption Watch 9/9/2013. Their failure to properly investigate the veracity and reliability of the information before rushing to publish was to counter the scoop by Sunday Independence and Corruption Watch. It was my considered view again that should there been no scoop the African Eye News Services reporters/ journalist could not have put themselves into an unnecessary pressure to counter the scoop. It is my finding that the failure to finalise the investigation before publication was unreasonable and could not justify the rush to publish such defamatory article. It could not be found to have been done on a privileged occasion and Defendants defence is dismissed.

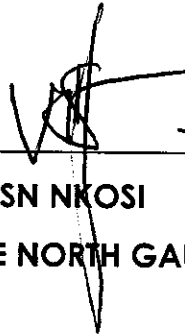
79. Having made a finding on facts and law the court will consider a fair compensation resulting from defamatory publication by the Defendants. There is no exact mathematical calculation of

an amount as compensation to proven defamation. Courts have, over years, done good work depending on similar or almost similar work depending on similar or almost similar precedents or decisions within their jurisdictions. In Gray v Poutsma & Others 1914 TPD 2013 Mason J, by then, that awarding of damages as part of compensation, by way of solatium, to the Plaintiff is and has always been debatable. The court hearing a matter and all submissions will be seized with the powers and discretion to assess reasonable compensation to accentuate the plaintiff from his injured feelings (emanating from the defamation). The time when the wrongful act was done and the time of the conclusion of the trial also plays a role in determining a fair consideration as one of the tools at the courts disposal, amongst the others like the character of the Plaintiff; the extent of the publication in the circulation of the defamation matter as an important factor that may affect the quantum of damages; the nature of the imputation and standing of the Plaintiff in the community; consideration of the apology made by the Defendants: whether it was prompt and received the same prominence as the offending publication. There is no closed list of considerations except that each court is duly-bound to weigh and consider all submissions and evidence presented as I have done in this matter. I am therefore of the view that huge amounts cannot serve a good purpose but a reasonably fair amount can bring closure on this matter.

80. In the premise, the following order is made in favour of the Plaintiff against the Second and Fourth Defendants jointly and severally, the one paying the other to be absolved for,

1. Payment in the amount of R250 000.00;
2. Interest at the rate of 15.5% *a tempore morae*;
3. Cost of suit.

SIGNED AND DATED IN PRETORIA 1st December 2016



VRSN NKOSI
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

PARTIES REPRESENTATIVES

PLAINTIFF'S COUNSEL:

ADV. C. J WELGEMOED

BRIEFED BY WIEKUS DU TOIT ATTORNEYS

DEFENDANT'S COUNSEL:

ADV. C.C BESTER

BRIEFED BY JURGENS BEKKER ATTORNEYS