IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Reportable

Case No.: 11961/2006

In the matter between:

ANGELA WELLS	Plaintiff
and	
ATOLL MEDIA (PTY) LIMITED	First Defendant
WILL BENDIX	Second Defendant

JUDGMENT: 09 November 2009

DAVIS J:

Introduction

[1] Acting in her capacity as guardian of her minor child, T, plaintiff launched an application against defendants for a claim of damages in the amount of R500 000, allegedly arising out of the publication of a photograph of T in a magazine in respect of which first defendant is the owner and publisher and second defendant is the editor. Further, it is contended that defendants caused the offending photograph to be displayed on national television.

[2] The cause of action has been based, firstly, on defamation and further on an invasion of the privacy of T.

The Factual Matrix

[3] T was twelve years old at the time that the photograph was taken and the picture published in the Zigzag magazine. Zigzag magazine is a surfing magazine which has been published in South Africa for the past thirty-three years. According to second defendant, the editor of Zigzag magazine, it has a readership of between thirty thousand

to forty thousand.

[4] The particular photograph, which has given rise to the present dispute, was published in the April 2006 edition of the magazine, without plaintiff's authority or consent. The photograph was also flighted on national television in the program "Super Sport", a copy of which advertisement was provided to the Court.

[5] The photograph, as it was published, was stamped bearing the word "filth" as well as a description at the foot of the photograph "all-natural Eastern Cape honey". The following statement appeared on the cover of the magazine: "100% pure filth photos inside".

[6] The photograph appears in a section of the magazine entitled "dishing up the photo feast". In smaller print, the following caption purports to describe the photograph further: "only the freshest, ripest images go into our photo features. Handpicked with no artificial flavourants or additives we guarantee you 100% pure serving filth or your money back".

[7] Initially, a dispute arose as to whether these photographs was that of T. This issue was no longer in dispute by the time the case was heard.

[8] The key questions for determination by this court are, whether T could be recognised by reasonable readers of the magazine, whether the language used to describe the photo "pure filth" bears a non defamatory meaning and whether the defendants acted *animo iniuriandi.* The dispute also extended to whether T's dignity and rights to privacy had been infringed and finally to the amount of damages which she had suffered.

The Evidence

[9] Plaintiff called two witnesses, namely T and plaintiff, who is her mother. T testified that

she was on holiday at Cape St Francis in January 2006 with her family and some friends. While on holiday, she was informed that there would be a photographer on the beach who had taken photographs of surfers. She assumed that it was on this day that her photograph was also taken. She learnt of the photograph after her sister called her a few months later, in April 2006, and told her that she had appeared in the magazine. Initially she thought "it was great to be in the magazine". However, as time went by, she received a number of MXit messages, which is a cellular phone message system similar to 'facebook'. It was clear from these messages that she had been identified as the girl in the magazine. She later heard that she was referred to "as a slut" and "PE's little porno star", manifestly disparaging remarks which upset her greatly. She was also distressed when she saw the picture of herself at a craft store at the boardwalk casino complex where it had been pasted on the wall behind the owner's till. Further, she heard that her photograph had been hanging on the walls of Grey High School, a boy's school in Port Elizabeth.

[10] She was examined on her knowledge of the expression "pure filth" and as to whether she understood these words to mean "something of great quality" or words which bore a positive connotation within the surfing context. She testified that neither her friends no her family had understood these words in this context. To the contrary, she testified that the words "pure filth" had "destroyed her". She testified further that similar insults continued some three and a half years later.

[11] Mrs Wells testified that, when she saw the photograph, she was immediately upset. According to her, the photograph "robbed T of her innocence".

[12] Her distress was compounded when she went to East London to play hockey. One of the male hockey players confirmed that he had seen the photograph and indeed paged back to look at it a few times. She was disgusted that her daughter was now being

depicted as "a pin-up girl". She was also informed by her friend that T had become the focus of attention at Collegiat College and at a boys school, Grey High School. As Port Elizabeth was a small community, with an even smaller surfing community, T was well known and easily recognised by her friends as the girl in the photograph. She accepted, under cross-examination, that T may have been flattered by the photograph but said that this was a typical reaction of a twelve year old child. She also testified that she never heard nor understood the words "pure filth" to connote something positive. Neither her son nor her ex-husband, who were surfers, understood these words in this way. Mrs Wells testified that when she approached her attorney she would have been happy if an apology had been forthcoming from the defendants. However, she never received such an apology.

[13] The defendant called one witness, Mr Bendix, the editor of the magazine. He testified that the photograph of T had been acquired through a freelance photographer Al Nichols. These photographs had not been commissioned by the magazine. The picture of T was considered to be "a girl shot". He never thought that she was twelve years old. Under cross examination as to whether he would have used the photograph, had he known that it was that of a twelve year old child, he said "it was always easier to look at it in hindsight. It is more than likely that I would not have used it".

[14] Mr Bendix testified that the words "pure filth" had a specific meaning within the surfing community; that is of something of good quality and was a phrase which was complementary, either of a wave or of a young woman. In support thereof, he referred to a number of definitions in dictionaries which appeared to have been taken from the internet and which defined the word 'filth' in this positive fashion.

[15] On the basis of the evidence, the key issues which were raised in argument were the following.

1. Whether T was identifiable from the photograph.
2. The meaning of the word "filth".
3. Whether the defendants acted *animo iniuriandi.*

Recognition

[16] Mr Fagan, who appeared on behalf of defendants, submitted that no part of T's face was visible on the photograph. The photograph was taken from her back, right hand side. Her face was obscured, both as a result of the angle and by her long hair. No part of her front was at all visible. He further referred to the evidence provided by both T and by plaintiff as to the defining factors to be taken into account in the identification of T. The first was that the bikini worn by the girl in the photograph was a bikini which belonged to T, secondly that T tied the top of her bikini at the back towards the side rather than in the middle and thirdly, that she often wore her hair band (or pony) on her wrist.

[17] In short, Mr Fagan submitted these so-called defining features revealed that T could be recognised only by people who knew her well, being her family, close friends, perhaps others who were present with her at Cape St Francis at the time that the photograph was taken. Mr Fagan conceded that there had been a further identification after the publication of the photographs by way of MXit and word of mouth. This had ensured that a number of school children identified T as being the girl in the photograph. However, in his view, there was no allegation about the further dissemination in the particulars of claim and the claim was not premised on the foreseeability as to such further dissemination. No editor in the position of Mr Bendix could reasonably have been expected to foresee such further dissemination.

[18] On the basis of this premise, Mr Fagan focused his argument on the following problem for plaintiff. The only people who recognised T would have been her close friends and family. They would not associate her with the word 'filth' as it was defined in the Oxford English Dictionary. By contrast, the only people who may have associated the girl in the photograph with the traditional meaning of 'filth' would have been people who would not have known the identity of the girl in the photograph.

[19] The evidence reveals, however, that T was identified by a number of people as being the person in the photograph. That itself is not surprising for, as Mrs Wells testified, she was a member of a small community. The photograph was prominently featured in a widely read magazine, Zigzag, and would be the subject of conversation and rumour mongering. Hence, as both T and Mrs Wells testified in evidence, which was uncontested, a range of people acquired knowledge of her identity as the girl in the photograph.

[20] In my view, it was certainly foreseeable that taking so provocative a photograph of a young girl who is a member of a small community would result in her being the subject of both speculation and identification; particularly a photograph which was described as "a pinup photo". That is exactly what occurred in this case, with unfortunate results for T.

Filth in context

[21] In a recent defamation case, Tsedu and others v Lekota and another 2009 (4) SA 383 (SCA) at 377F - 378E Nugent JA said the following:

> *"Much has been made of the unqualified statement in the headline that the respondents 'spied' ... But words that are used in a newspaper heading must not be read in isolation - the ordinary reader must be taken to have read the article as a whole albeit without careful analysis. A clearexpression of the reason underlying that rule is to be found in*

Charleston and Another v News Group Newspapers Ltd and another [(1995) 2 All ER 313 (HL)], in which the question whether a defamatory headline, isolated from the text of the article, is capable of founding an action for defamation, was confronted directly by the House of Lords. It held that the adoption by the law of a single standard for determining the meaning of the words - the standard of the ordinary reader - necessarily leads to the conclusion that it could not found an action. Lord Nicholls of Birkenhead expressed it as follows:

> *'I do not see how, consistently with this single standard, it is possible to carve the readership of one article into different groups: those who will have read only the headlines, and those who will have read further. The question, defamatory or no, must always be answered by reference to the response of the ordinary reader to the publication.'*

.....

Even it the article was read only fleetingly I think that the imputation in the headline that the respondents had spied (in the ordinary sense of the word) would soon have been dispelled when the reader commenced reading the text and any lingering doubts would have been put to rest once the article had been read to the end."

[22] In relation to the requirement that words must be read in their context in order to establish whether they are defamatory, Mr Fagan submitted that two different contexts had to be taken into account. The first concerned the context of a sixteen page photo spread in the relevant addition of Zigzag magazine. The second was the fact that Zigzag magazine was a surfing magazine.

[23] On the first page of the sixteen page photo spread, the following caption appeared: "only a 100% pure surfing filth". The design was intended to replicate a stamp guaranteeing the quality of a particular food item, similar in a way to a manufacturer's "seal of approval" which appears on a range of food products. The stamp was used throughout the photo spread and, according to Mr Bendix, it was pure chance that the part of the design which appeared on the page of the photograph of T contained the word 'filth'. As the theme of the photo spread was food, the word 'honey' had also been used in the caption to the photograph of T.

[24] In Mr Fagan's view, a reasonable reader would not have opened the magazine for the first time at the page containing the photograph of T but instead read the magazine from the front. This would have provided a clear context for the "filth" caption. In addition, all the other photographs were impressive photographs of waves and intricate moves performed by surfers on waves. No one viewing these photographs could reasonably believe that the magazine's intention was to convey anything other than a positive view of surfing culture.

[25] Turning to the second aspect, Mr Fagan submitted it was clear that this was a surfing magazine which employed words in a particular context. A cursory reading of its editorial supported this conclusion. The following passage is illustrative:

> *"And as the ashes were thrown into the air and the great circle tossed its hands skywards with groms, adults and old-timers all clapping and hooting widely, another image was filed right along with all those stacked horizons. A frozen instant now joined by a fresh cyclone swell imploding onto epic sandbars, melting together into one of the many extended snapshots that define our surfing lives. Snapshots that keep us looking back, moving forwards, but always planted firmly in the moment."*

In Mr Fagan's view, the ordinary reader of this particular publication would thus have understood the meaning and context of the word 'filth' as it was employed in the magazine.

[26] Ms Buikman, who appeared on behalf of plaintiff, submitted that the primary, ordinary meaning of the meaning "filth" was defamatory, in that it meant "dirty, unsavory and obscene". Therefore, Ms Buikman submitted that, in relation to a girl posing for a photograph, the use of the word "filth" clearly had a sexual connotation, suggesting that she was a person of loose morals, without any self respect.

[27] These competing submissions reduce, in essence, to an examination of the comprehension of the ordinary reader. In this context Prof Burchell, *Personality Rights and Freedom of Expression* at 187 writes:

> *"The ordinary meaning of words is not necessarily the dictionary meaning. It is the meaning which an ordinary or reasonable reader would attributed to the words and this ordinary meaning must be looked at in the context in which the words were used. In determining the per se or ordinary meaning of words the courts "must take account not only of what the words expressly say, but also of what they imply."*

[28] The concept of the reasonable reader was qualified in Channing v South African Financial Gazette Limited and others 1966 (3) SA 470(W) at 474, to mean the ordinary of reader of the particular publication in which the words were employed. This approach has found favour with the Supreme Court of Appeal in Mthembi-Mahanyele v Mail and Guardian Ltd and another 2004 (6) SA 329 (SCA) at para 26-27, in which Lewis JA, in dealing with an article in a particular newspaper, defined the question as what the ordinary reader of that newspaper would have understood when reading the particular statement in question.

[29] Mr Fagan submitted that, as Zigzag was a surfing magazine, in which particular surfing jargon was employed throughout the publication, a reasonable reader of that publication would have understood the particular context in which the word "filth" was employed.

[30] In evaluating this submission, account must be taken of these judgments which clearly enjoin a court to examine the nature of the words complained of as being defamatory within the context of the publication and the general category of readers who may read a particular report and appreciate the context in which it is located.

[31] The word 'filth' in any primary context, to any reader of ordinary intelligence, must hold a negative connotation. To the extent that the words have a particular positive connotation, it is because they may bear a secondary meaning; that is a meaning other than the ordinary meaning which derives from the special circumstances. Where a defendant wishes to contend that the statement, as in this case, holds a secondary meaning which is not defamatory, it is for the defendant to plead the innocent meaning and hence the circumstances which take the words out of their ordinary, primary meaning. National Union of Distributive Workers v Cleghorn and Harris Limited 1946 AD 984 at 992.

[32] Mr Bendix was the only witness led by defendants with the view to informing the court of the positive connotation of the word "filth". He was not qualified as an expert and the best he was able to do was to refer the court to various international websites, including two web pages from an Australian magazine, Outside magazine, twenty four web pages from the Cranky Kids website, which included surfers slang, an Hawaiian slang dictionary and a further list of surfer slang from Harms Archief Knol. These 'dictionaries' all included, in the definition of filth, "a filthy chick" which means a 'cool chick'. A further dictionary was provided from the Riptionary website which contains surfing language but did not include

the word 'filth' or 'pure filth'. Further editions of the Zigzag magazine and a printout from the Surfhead website were also provided to the court which indicated that the word 'filth' had been used but, in this case, only within the context of the description of waves.

[33] In my view, the evidence provided by Mr Bendix is manifestly insufficient to establish a secondary meaning of filth which would connote a positive image of a girl, such as T, within the context of a South African readership. In other words, the defendants have not placed before this court adequate evidence to show that the word has an unusual secondary meaning which could only be attributed to it by a reader, having knowledge of the special circumstances. See Ngcobo v Shembe and others 1983 (4) SA 66 (D and CLD) at 69. Simply placing a number of internet pages before a court, without the benefit of an expert, does not pass evidential muster.

Animus iniuriandi

[34] Mr Fagan submitted that Mr Bendix's evidence was uncontroverted; that is that, in the context of a surfing magazine, "filth" held no negative connotation. It was solely used as a surfing synonym for excellence. Hence, there could be no question of the existence of the requisite *animus injuriandi.*

[35] To recapitulate: this case deals with a magazine which has been in publication for some thirty- three years and, according to Mr Bendix, has a readership of between thirty to forty thousand. It is therefore a case dealing with the media. In this connection, the South African law of defamation has changed dramatically over the past decade. The unfortunate jurisprudence of Pakendorf v Deflamingh 1982 (3) SA 146 (A) at 156-158, which replaced the concept of *animus iniuriandi* with strict liability for the media has been discarded as part of our authoritarian past. In National Media Limited v Bogoshi 1998 (4) SA 1196 (SCA) particularly at 1210 -1211, the court found that the adoption of strict

liability in Pakendorf and subsequent cases was clearly wrong, because it was in conflict with the democratic imperative, meaning that the public interest is best served by a free flow of information, a task which, to a considerable extent, is best performed by the mass media.

[36] The court however did not revert to the common law position of liability based upon the *animus iniuriandi* because, in short, it found that it would have been to easy for the media to raise an absence of an awareness of wrongfulness as a defence. The court therefore decided to recognise negligence as the basis of liability of the mass media for defamation. Bogoshi at 1211.

[37] This approach was succinctly expressed by Lewis JA in Mthembi-Mahanyele, *supra* at para 46:

> *"The press will thus not be held liable for the publication of defamatory material where it can show that it has been reasonable in publishing the material. Accordingly, the form of fault in defamation against the press is negligence rather than intention to harm".*

[38] Conceptually the test as outlined in Bogoshi and later confirmed by the Constitutional Court in Khumalo v Holomisa 2002 (5) SA 401 (CC), has created something of a conflation between reasonableness at the level of unlawfulness and an absence of negligence at the level of fault. See Dario Milo, *Defamation and Freedom of Speech* at 196.

[39] Mercifully, for the purposes of the present dispute, it is unnecessary to fully unravel this conundrum, although some engagement is necessary. For an exposition of this debate, see Neethling, *The conflation of wrongfulness and negligence; is it always such a*

bad thing for the law of delict? 2006 (123) SALJ 204 particularly at 213 - 214: See also t*he contrasting* view of R W Nugent (JA) 2006 (4) SALJ 557: and, in a somewhat different context, A Fagan 2007 (124) SALJ 285.

[40] But if a measure of conceptual clarity is to be maintained, then a distinction must be drawn between an absence of fault due to a reasonable mistake and the particular use of unreasonableness that is central to the enquiry about wrongfulness; that is a policy enquiry into the reach of the law and hence the scope of the action. What appears to be clear from the *dictum* in Mthembi-Mahanyele, *supra* and Khumalo, *supra* at para 20 is that the form of fault, in the case of the media, that must be shown to be present is that of negligence.

[41] According to Khumalo the defence of reasonable publication can be determined thus:

> *"Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in Bogoshi's case (supra), a proper application of constitutional principle would have indeed required the development of our common law to avoid this result.*

However, the defence of reasonableness developed in that case does avoid a zero-sum result and strikes a balance between the constitutional interest of plaintiffs and defendants. It permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if the publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable. In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in

fostering a transparent and open democracy. The defence for reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity.' Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to doe so." para 43

> We now arrive at the conceptual problem created by these cases. If this form of defence proves successful, it is extremely difficult to see how the publisher can be found to be negligent; that is acting below the standard of a reasonable person in the position of a publisher. But, as noted earlier, it is not necessary to unravel this conundrum given the manner in which this case was pleaded.

[42] In this case, the court was not asked to engage in what Lewis JA in Mthembi-Mahanyele, *supra* at para 47 classified as the "anterior enquiry", namely whether the publication was lawful because it was justifiable. The thrust of the dispute in the present case was whether the magazine was at fault. Hence, the question arises as to whether defendants were negligent and in turn, the enquiry must then shift to whether the publication of the photograph was reasonable in the circumstances of this case. See also in this connection, Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 571.

[43] In the present case, Mr Bendix, the editor of Zigzag, chose to publish a photograph of a girl in a bikini, posing provocatively, whose consent he had not obtained. Reluctantly, he was forced to concede under cross examination that the words "pure filth" could have been read and understood by readers of the magazine in their primary sense. Although he was extremely reticent to concede the point, he did say that 'it was more likely than not that he would not' have published the photograph, had he known that it was of a twelve

year girl.

[44] The photograph was not one which captured happy holiday makers on a glorious South African beach, the type of photograph that appears from time to time in daily newspapers. Nor was it similar to the fleeting image of an attractive woman caught on television by the perennially sexist camera crews, recording a cricket match on a hot South African summer's afternoon but whose crowd shots are invariably of scantily clad young women as opposed to studious cricket spectators. In this case, the court is confronted by a photograph, to which a full page was devoted which was clearly designed to be a pinup shot. The manner in which the photograph was published without any regard to the context or implications for a twelve year old girl like T does not, in my view, satisfy the test of reasonable publication. Accordingly, applying the Bogoshi test, the requisite intention for liability, being negligence, has been properly proved in this case.

[45] I am fortified in this conclusion by reference to section 28(2) of the Republic of South Africa Constitution Act 108 of 1996 in which it is provided that a child's best interests are of paramount importance in every matter concerning the child. To publish so provocative a photograph of a twelve year old child, without any attempt to obtain consent and with the clear purpose of including it to increase the attraction of a commercial publication, constitutes a failure of the standard of the reasonable publisher in the position of defendants.

[46] Strictly that is the end of the matter and I am not required to deal with the further leg of plaintiff's case, namely the alleged infringement of T's right of dignity and privacy. To the extent however that the arguments were connected and that it may help to focus on the nature of defendants conduct, I propose briefly to make a few further observations.

[47] To recapitulate: the photograph in the magazine was correctly described as a 'pinup photo'. It may have been but one such photograph in a spread of photographs dealing with waves but it constitutes a photograph of a young girl provocatively taken and used apparently "to spice up" the magazine.

[48] In Grutter v Lombard and another 2007 (4) SA 89 (SCA), at para 8 Nugent JA, in a most carefully researched judgment, noted that it was generally accepted academic opinion that features of a personal identity are capable and indeed deserving of legal protection.

[49] In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.

Damages

[50] Plaintiff has brought an action for damages totaling R500 000. Manifestly this is an excessive sum when viewed within the context of the case. Indeed, it appears from plaintiffs evidence, that, had an apology been forthcoming from defendant, the matter would not have proceeded to court.

[51] The evidence certainly indicates that T was extremely upset by the consequences which flowed from the publication of the photograph. To be called a 'slut' and a 'porno star'

is an humiliating and degrading experience for anyone, but even more so for so young a person. The court therefore has considerable sympathy with plaintiff's description of the consequences of the publication; that is T's innocence was taken from her.

[52] In Esselen v Argus Printing and Publishing Company Limited and other 1992 (3) SA 764 (T) at 771 Hattingh J said the following:

> *"In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways - as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conducts may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a* solatium." This *dictum* was approved by Harms JA (as he then was) in Mogale and others v Seima 2008 (5) SA 637 (SCA) at para 11. In his judgment, Harms JA also warned against the granting of a generous amount in the form of a *solatium* in order to teach the errant publisher a "lesson". In general, factors which determine the *quantum* include the seriousness of the defamation, the nature and extent of the publication, the reputation, character and conduct of the plaintiff and the motives and conduct of the defendant.

[50] When these factors are taken into account, it appears that the purpose of the award is to vindicate the plaintiff in the eyes of the public. Generosity of amount is perhaps less important than the principle that damages have been awarded because plaintiff has been wronged. I have taken account of this purpose, particularly because plaintiff correctly seeks an authoritative assertion that her daughter was wronged by defendants' conduct.

[51] In the event I make the following order:

1. The picture of T together with the words contained in the Zigzag magazine of April 2006 are wrongful and defamatory of T as a result of which she was defamed which caused damage to her good name and reputation.

2. Defendants, jointly and severely the one paying the other to be absolved are ordered to pay the amount of R10 000. 00, together with costs.

DAVIS, J