THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 715/07

MATHATHA TSEDU	**1st Appellant**
WONDER HLONGWA	**2nd Appellant**
MEDIA 24 (PTY) LIMITED	**3rd Appellant**

and

GERALD PATRICK MOSIUOA LEKOTA	**1st Respondent**
JOEL SIBUSISO NDEBELE	**2nd Respondent**

Neutral citation:	*Tsedu v Lekota* (715/07) [2009] ZASCA 11 (17 March 2009)
Coram:	HARMS DP, MTHIYANE, NUGENT, VAN HEERDEN JJA and LEACH AJA
Heard:	19 FEBRUARY 2009
Delivered:	17 MARCH 2009
Summary:	Defamation – whether report defamatory – quantum of damages.

ORDER

On appeal from: High Court at Johannesburg (Tshiqi J sitting as court of first instance)

The following order is made:

1. The amounts reflected in paragraphs 1 and 2 of the order of the court below are in each case substituted with the amount of R100 000.
2. The appeal is otherwise dismissed with costs that are to include the costs occasioned by the employment of two counsel.

JUDGMENT

NUGENT JA (HARMS DP, MTHIYANE, VAN HEERDEN JJA and LEACH AJA concurring)

[1] The front page of the 7 August 2005 edition of City Press – a prominent Sunday newspaper – carried an article under the heading 'ANC top brass spied on one another – apartheid agent'. The article was written by Mr Hlongwa (the second appellant), Mr Tsedu (the first appellant) was the editor of the newspaper, and Media 24 (Pty) Ltd (the third appellant) was the proprietor and publisher.

[2] The respondents were identified by name as the 'ANC top brass' referred to in the heading and their photographs accompanied the article. At the time the article appeared the respondents were both prominent office-bearers of the African National Congress (ANC) and they also held high office in government. Mr Lekota (the first respondent) was the national chairman of the ANC and also the Minister of Defence. Mr Ndebele (the second respondent) was the provincial chairman of the party in KwaZulu-Natal and the Premier of that province.

[3] The respondents sued the appellants in the High Court at Johannesburg for damages, alleging that they had been defamed. Their claims were upheld by that court (Tshiqi J) and damages were awarded to Lekota and Ndebele in the amounts of R150 000 and R112 500 respectively. This appeal is before us with the leave of that court.

[4] The article purported to be a report of what had been said in a book that had been published some three years earlier.[1] In the course of a radio interview about the article shortly after it had appeared, Tsedu remarked to the interviewer that if the respondents 'have problems with [what was said in the book] they should take the author of the book to court and not City Press'. It is evident from that remark that he was under the impression that a newspaper may publish defamatory statements with impunity if they have been originated by someone else. Well, journalists who keep *Kelsey Stuart's*

[1] Riaan Labuschagne *On South Africa's Secret Service: An Undercover Agent's Story* (Galago 2002).

Newspaperman's Guide to the Law[2] by their side know that that is not so from the following passage:

'[a] person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it but so are the editor, printer, publisher and proprietor. So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on only as a rumour, without endorsing it.'

[5] A newspaper that publishes a defamatory statement that has made by another is as much the publisher of the defamation as the originator is. Moreover, it will be no defence for the newspaper to say that what was published was merely repetition. For while the truth of the statement (if it is published for the public benefit) provides a defence to an action for defamation, the defence will succeed only if it is shown that the defamation itself is true, not merely that it is true that the statement was made. The authors of *Gatley on Libel and Slander* (dealing with the tort of libel in English law, which in this and other respects substantially coincides with our law) put that as follows:[3]

'The defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true, even though it was published as belief only. "If I say of a man that I believe he committed murder, I cannot justify by saying and proving that I did believe it. I can only justify by proving the fact of the murder".[4] The same is true if the defendant says that he is only repeating what others have said or that there is a rumour. So if the defendant has written, "A said that P had been convicted of theft", it will be no defence for the defendant to prove that A did tell him so, that he honestly believed what A said, and only repeated it. He must prove as a

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[2] 5 ed (1990) by Bell Dewar and Hall p 43.
[3] *Gatley on Libel and Slander* 10 ed (2004) edited by Patrick Milmo QC and W V H Rogers para 11.4. See, too, Jonathan M Burchell *The Law of Defamation in South Africa* (1985) pp 211-212.
[4] Quoting what was said in *Kerr v Force* (1826) 3 Cranch C C 8 at 24.

fact that P was convicted of theft. "If you repeat a rumour you cannot say it is true by proving that the rumour in fact existed; you have to prove that the subject matter of the rumour is true."[5] This is the "repetition rule".'

[6] There are, of course, circumstances in which the publication of even false defamatory matter is protected – for example, when it repeats what was said in parliament or in a court of law, or 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'[6] – and the fact that the defamatory matter is mere repetition might in some cases be relevant to whether a defence of that kind will be allowed. But that does not arise in this case. The appellants have not sought to advance any defence of that kind, which would in any event have been bound to fail because the statements that are now complained of were not in the book at all. They were fabricated by the author of the article.

[7] No doubt there is considerable potential for slips to be made in a busy newsroom that runs against deadlines. But when alerted to the fact that something might have gone wrong it would be a wise editor who pauses for a moment to reflect on what has occurred. In this case the respondents' attorney wrote to the editor shortly after the article had appeared complaining that it was defamatory and factually incorrect in parts. It seems to me that it would have been an elementary precaution in circumstances of that kind to call for the book and compare it to what had been said in the article. Had that been done it would have been evident that the statements that were said to be defamatory were not in the book. But that was not done

[5] Quoting Greer LJ in *Cookson v Harewood* [1932] 2 K B 478n at 485.
[6] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212G-H.

and instead the respondents' complaints were brushed aside. It was only on the eve of the trial that wiser counsel prevailed and a retraction and apology was belatedly published. That notwithstanding, the appellants persisted in contending that they had done nothing unlawful, pinning their colours to a submission that the fabricated statements were not defamatory.

[8] In answering the question whether the article was defamatory the court below – prompted by the pleadings and the submissions that were made before it – compared the article to the contents of the book and found that the article grossly misrepresented what had been said. That finding was interwoven in the reasons that were given by that court for its conclusion that the article was defamatory. In that respect the court below, and counsel who pleaded and presented the case before the court below, were misdirected.

[9] Whether a statement is defamatory depends upon the imputation that it conveys: it is a separate question whether it was unlawful to make the defamatory statement. I have already indicated that in some cases it might be relevant to the latter issue that the defamatory statement was repetition, but it has no relevance to whether the statement is defamatory. In *Gatley on Libel and Slander* that is expressed succinctly as follows:[7]

'The question "what is defamatory?" relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course, *actionable.*'

[7] Above, para 1.5.

[10] In those circumstances, and bearing in mind that no defence has been advanced that might raise the question of repetition, the fact that the article misrepresented what was said in the book has no relevance to this case, and I need say no more about the book.

[11] The article commenced on the front page of the newspaper and continued on page two. The events to which it refers were said to have occurred shortly before what was called the 'make-or-break' negotiations between, primarily, the ANC and the government of the former regime. Under the heading that I quoted earlier, and accompanied by photographs of the respondents, the article commenced as follows:

'Defence Minister and ANC chairperson Mosiuoa Lekota and KwaZulu-Natal Premier and provincial ANC chairperson S'bu Ndebele (both pictured) spied on the ANC and their own comrades – unwittingly it would appear.

The startling revelations of Lekota and Ndebele supplying confidential ANC information to the apartheid-era National Intelligence Service (NIS) are contained in a book by former operative Riaan Labuschagne.

Masquerading as a journalist and researcher on liberation theology, Labuschagne writes that he infiltrated the ANC to its top leadership circles in KwaZulu-Natal. He made friends with former UDF leaders with the help of Lekota and Ndebele at a time when the two were chairperson and secretary of the ANC in the province respectively. He headed Operation Jaguar, which was designed to penetrate the ANC just before the make-or-break negotiations before April 1994 to spy on its strategies and activities. His activities were stopped by ANC intelligence operative Mo Shaik who raised concerns about his presence.'

[12] No detail was given of the confidential information that was said to have been supplied by Lekota to the 'apartheid agent'. The article detailed some of the information that was said to have been supplied by Ndebele and

went on to report that Ndebele had 'denied that he gave confidential documents [to the agent] saying that they could have been public documents anyway.' The remainder of the article is not material to our decision in this appeal and I need not repeat it.

[13] In deciding whether the statements I have outlined are defamatory the first step is to establish what they impute to the respondents. The question to be asked in that enquiry is how they would be understood in their context by an ordinary reader.[8] Observations that have been made by our courts as to the assumptions that ought to be made when answering that question are conveniently replicated in the following extract from a judgment of an English court:[9]

'The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'

[14] Much has been made of the unqualified statement in the headline that the respondents 'spied', which conveys in its ordinary meaning that the respondents 'kept watch [on their comrades] in a secret or stealthy manner', that they 'kept watch [on them] with hostile intent', that they 'made stealthy

[8] Joubert (ed) *The Law of South Africa* (2 ed) vol 7 'Defamation' by F D J Brand para 239.
[9] Simon Brown LJ in *Mark v Associated Newspapers Ltd* 2002 E M L R 38 para 11.

observations with hostile motives'.[10] But words that are used in a newspaper article 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 clear expression of the reason underlying that rule is to be found in *Charleston v News Group Newspapers Ltd,*[11] 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:[12]

'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.'

But he warned against the idea that a poisonous headline may be published with impunity provided only that an antidote is administered in the text when he went on as follows:[13]

'This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element of which is the layout of the article. Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article. The more so, if the words are on a continuation page to which a reader is directed. The standard of the ordinary reader gives a jury adequate scope to return a verdict meeting the justice of the case.'

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[10] *Oxford Shorter English Dictionary*.
[11] 1995 2 AC 65 (HL).
[12] At 74B-C.
[13] At 74C-D.

[15] Even if 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. The ordinary reader would have been struck immediately by the qualification in the first paragraph that the so-called spies had been 'unwitting'. Naturally that was a contradiction in terms – spying, by its nature, cannot be unwitting – but we are not concerned with the quality of the writing. We are concerned with the impression that the words would have left on the mind of the reader. In my view the ordinary reader would have known from the first paragraph alone, and it would have been confirmed by the facts related thereafter, that the respondents had not acted with the state of mind that I have mentioned.

[16] But what the article also told the reader – and this in unambiguous language – was that the respondents supplied confidential party information to a person who purported to be a journalist researching liberation theology. That the person was in truth an NIS agent reflects upon the effect of their conduct, rather than on the nature of what they had done, and in that sense it is not really material. For I think the ordinary reader would understand that confidential information should not have been divulged at all, even if the person was not an agent. I agree with counsel for the respondents that what the article says of the respondents is that they breached confidences with which they had been entrusted, imputing to them that they lacked the qualities that are required to be entrusted with confidences of that kind.

[17] The question whether an imputation is defamatory is usually answered by asking whether the imputation lowers the plaintiff in the estimation of the ordinary reader.[14] It is not necessary in this case to revisit how that test is to be applied when there are sectors in society that might differ from one another in the view that they would take of the matter.[15] To impute to the respondents, who were both in high office at the time, that they lacked the qualities that are required to be entrusted with the confidences of high office, would indeed tend to lower them in the estimation of people straddling all sectors of our society and was defamatory. No defence to the publication of the defamation has been advanced and it follows that it was unlawful. I turn, then, to the question of damages.

[18] The quantification of damages in an action for defamation falls within the discretion of the trial court and a court of appeal will interfere with an award only if it is tainted by misdirection. It is not altogether clear from the judgment what meaning the court below gave to the article, but there is an indication that the court considered it to impute that the respondents had been spies as ordinarily understood. If that is indeed the meaning that was given to the article the court was misdirected for the reasons I have given. But that apart, I referred earlier in this judgment to the manner in which that court approached the question whether the article was defamatory. It was inevitable from the adoption of that approach that the court below was under a misapprehension as to the nature of the defamation when the damages were assessed. That was a material misdirection in itself and we must assess the damages afresh.

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[14] *LAWSA*, above, para 237 as qualified in *Mohamed v Jassein* 1996 (1) SA 673 (A) at 706H-J.
[15] *Mohamed v Jassein* 1996 (1) SA 673 (A).

[19] I have pointed out that the material statements in the article were fabrications by the author for which no explanation has been given. Counsel for the respondents urged us to infer that his conduct was malicious and to take account of that in assessing damages but I do not think it would be correct to do so. Although there are statements to the contrary in some decided cases counsel for the appellants accepted that the purpose of damages for defamation is not to punish the defendant but to console the plaintiff through compensation for the harm that was caused.[16] What is material for that purpose is not why the defamation occurred but rather what effect the defamation had.

[20] The imputation that was made against the respondents, bearing in mind the offices they held at the time, was serious and deserving of substantial damages. Quite how widely the defamation was circulated does not appear from the record but the allegation in the pleadings that City Press has a 'large readership' was admitted.

[21] What is always material to an award is the extent to which the harm that was caused was mitigated by the defendant. I think I have already made it clear that in this case the response by Tsedu to the complaint that was made by the respondents soon after the article appeared was one of indifference if not contempt. What was published in the edition of City Press that appeared after the complaint had been made was no more than an article reporting that Lekota denied the allegations that had been made (the initial

[16] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 76. See the discussion of the subject by J Neethling 'The Law of Delict and Punitive Damages' [2008] *Obiter* Vol 29(2) 238.

report contained a denial by Ndebele) and adding that 'City Press regrets the possible wrong inference that could have been drawn [from the use of the word 'spied'] that Lekota actively spied on the ANC', and that any 'embarrassment so caused' was 'unfortunate and regretted'. That correction did nothing to mitigate the harm, bearing in mind that the ordinary reader would in any event not have read the article as saying that the respondents had spied.

[22] The editor had a further opportunity for reflection – and once more he chose not to take it – when he was interviewed for radio some three weeks after the article appeared. The only wrongdoing that was acknowledged by Tsedu in that interview was that the word spies had not been placed in quotation marks (though why a 'spy' is not a spy was not explained). That the statements that were said to be defamatory had been fabricated by the author was overlooked.

[23] There the matter rested for almost sixteen months until shortly before the matter came to trial. On 12 November 2006 City Press carried the following retraction and apology:

'The report "ANC top brass spied on one another – apartheid agent" of 7 August 2005, unjustly offends both Minister of Defence, Mosiuoa Lekota, and KZN Premier S'Bu Ndebele, which City Press sincerely regrets.

The report discusses revelations supposedly contained in the book titled "*On South Africa's secret service*" by former national intelligence operative Riaan Labuschagne.

The book does not contend, as incorrectly stated in the report, that: "Defence Minister and ANC chairperson Mosiuoa Lekota and KwaZulu-Natal premier and provincial ANC chairperson S'Bu Ndebele (both pictured in the report) spied on the ANC and their own comrades – unwittingly it would appear".

It follows that the heading "ANC top brass spied on one another – apartheid agent", is similarly incorrect.

The report also contains the following factual errors:

- The book does not state that Lekota and Ndebele supplied confidential information to the apartheid's era National Intelligence Services and the statement in the report that the book contains "startling revelations", to that effect is erroneous.
- The following statements in the book are incorrect as Lekota was in custody from April 1985 until his release from Robben Island on 15 December 1989, namely: "Labuschagne says his association with Lekota gave him considerable access to ANC circles" and "nevertheless, by the middle of 1989 I had established contacts with, and interviewed, most members of the ANC and SACP leadership in Durban and Pietermaritzburg through an unwitting Lekota, wrote Labuschagne."

City Press retracts the incorrect statements in the report and apologises for the embarrassment thereby occasioned.'

[24] I do not think much weight can be attached to that retraction and apology, coming as it did on the eve of a trial that was destined in any event to vindicate the respondents. One might expect that the appellants, having retracted and expressed their 'sincere regret', would then have turned their attention to the monetary value of the offence that they had caused, but that was not to be. Instead they persisted in compelling the respondents to find their full vindication in the courts. There has been nothing, in my view, that the appellants have done to mitigate the harm that they caused, and the respondents are entitled to a full measure of damages.

[25] Monetary compensation for harm of this nature is not capable of being determined by any empirical measure. Awards made in other cases might provide a measure of guidance but only in a generalized form and I do not

think it would be helpful to recite other awards. In my view an award that would meet the justice of this case would be the sum of R100 000 for each of the respondents.

[26] There remains the question of costs. The appellants appealed against the whole of the order of the court below, including the amount of the award, and in the latter respect they have been successful to a degree. Insofar as it relates to the award to Ndebele their success has been negligible and he is entitled to his costs of the appeal. Although their success has been greater in relation to Lekota I do not think that ought to affect the costs for two reasons. First, the costs of the appeal are not capable of being separated as between the respondents. Secondly, the thrust of the appeal, despite the retraction before the trial, was directed at persuading us that the appellant had not acted unlawfully, and the amount of the award has played only a peripheral role. The respondents were compelled to resist the appeal if they were to be vindicated and I think they are entitled to the costs of having done so.

[27] The following order is made:

1. The amounts reflected in paragraphs 1 and 2 of the order of the court below are in each case substituted with the amount of R100 000.
2. The appeal is otherwise dismissed with costs that are to include the costs occasioned by the employment of two counsel.

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R.W. NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	J J Roestorf
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