

SOUTH AFRICA MEDIA LAW UPDATE

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NO BLANKET IMMUNITY FOR DEFAMING CABINET MINISTERS

Background

[241] In *Mthembi-Mahanyele v Mail and Guardian Ltd and Another*,² a former Minister of Housing had unsuccessfully sued the first respondent, a weekly newspaper, and the second respondent, its editor, for defamation. The publication she complained about was an article in the newspaper to the effect that she had awarded 'a massive housing contract to a close friend.' Such words, the appellant alleged, signified that she was a person of 'base moral standard; that she was dishonest, and would thus dishonestly award a massive housing contract to a close friend, that she was incompetent and unable to deliver as a minister; and was not worthy of holding public office'.³

In turn, the respondents pleaded that as a minister, the appellant had no *locus standi* to sue for damages for defamation; that the words did not convey a defamatory meaning; that the words were at least substantially true; and that it was in the public interest that the facts were published. A further alternative plea was that the statement was published reasonably (without negligence) and in the genuine and reasonable belief that it was true.⁴

The decision in the court *a quo*

The court *a quo* dismissed the claim and found for the respondents, holding that the appellant, as a cabinet minister, did not have *locus standi* to sue for defamation where the statement complained of related to the performance of her work as a member of government and was made without malice.⁵

[242] The decision by the Supreme Court of Appeal

Lewis J expressed the issue before the Supreme Court of Appeal as follows:

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² 2004 (11) BCLR 1182 (SCA).

³ Ibid [3].

⁴ Ibid [4].

At issue in the appeal is the balancing of two fundamental rights, both protected by the common law and enshrined in the Constitution: freedom of expression, on the one hand and dignity, including the right to protect one reputation, on the other. Should one right, in certain circumstances, prevail over the other? In particular, when dealing with freedom of expression in a political context (political speech) should a member of government's right to protect her reputation be eclipsed by the need for robust criticism and comment in a democratic State where the public's right to be informed, and to free debate, is vital?⁶

Having set out the background to the saga,⁷ the first issue the court dealt with was whether the words complained of ('Her award of a massive housing contract to a close friend...continues[s] to haunt the public perception of her'⁸) were defamatory. The test for determining whether a statement is defamatory is whether the reasonable person of ordinary intelligence would have understood the words to convey a meaning defamatory to the claimant/plaintiff.⁹ However, the application of the standard of the reasonable person is dependent on the circumstances of each particular case. Hence an inquiry into what 'the ordinary reader of the particular publication would understand from the words complained of' — the ordinary reader being the reader of *the Mail and Guardian*.¹⁰ Lewis J concluded that the reference to the 'award to a close friend' [her emphasis] would result in the ordinary reader's understanding of the words to mean that the appellant was guilty of corrupt behaviour. The words were thus defamatory of the appellant.¹¹ This conclusion by Lewis J countered the view of the court *a quo* which was to the effect that the reader of the paper would have been familiar with the allegations that were made in respect of the award of the housing contract and that 'the appellant's reputation had already been tarnished'.¹² She held:

[243] The finding that the words complained of had no defamatory effect in that they did not cause the readers of the M & G to have a lesser opinion of the appellant is, in

⁵ Ibid [5] and *Mthembi-Mahanyele v Mail and Guardian Ltd* 2002 (12) BCLR 1323 (W).

⁶ Ibid [6].

⁷ Ibid [7]–[24].

⁸ Ibid [27].

⁹ Ibid [25] with reference to Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 20E–G.

¹⁰ Ibid [26]. In this regard the judge referred to *Channing v South African Financial Gazette Ltd* 1966 3 SA 470 (W) 474A–C.

¹¹ Ibid [28].

¹² Ibid [5].

my view, not correct. The logical consequence of this reasoning is that the more a plaintiff is defamed the less likely it is that he or she will have an action. ... [T]he extent to which a plaintiff's reputation has already been tarnished should be taken into account only in assessing the quantum of the damages to be awarded.¹³

The next three questions the court addressed all related to the defences raised by the respondents. The first question was whether members of cabinet, including public officials ('representatives of government generally') were by virtue of their role in government deprived of the protection normally afforded to persons by the law of defamation. Secondly, even if a cabinet minister were not precluded from claiming damages merely by virtue of his or her status, there was nonetheless a special defence attaching to comment or information about members of government: that is, whether political speech must be treated differently. Thirdly, the question was whether the respondents' conduct had been reasonable in all the circumstances.¹⁴

Lewis J observed that the first question before the court resolved into whether a class of people ('members of government') lost the right to the protection of their dignity and reputation in the interest of public information and debate.¹⁵ The court *a quo* answered this first question (the right of a member of cabinet to claim damages for defamation) in the negative. The court *a quo* argued in effect that the appellant had

¹³ Ibid [31]. She referred with approval to Dario Milo, 'Cabinet ministers have no right to sue for defamation: *Mthembi-Mahanyele v Mail & Guardian Ltd*' 2003 *South African Law Journal* (SALJ) 282, 289 and his critique on the judgment of the court *a quo*. Milo remarked: 'What Joffe J ... appears to be saying ... is that, given the context of previous media attention and the target audience, the report card was not defamatory. But this seems absurd: taken to its logical conclusion, it means that the more defamatory articles that are published about the plaintiff, the better the chances for the publisher of a later article escaping liability on the ground that his article is not defamatory, given what came before' (at 289). Note that Johann Neethling, one of South Africa's leading academics in the field of defamation law, in his discussion (in Afrikaans) of the decision entitled 'Die *locus standi* van 'n kabinetsminister om vir laster te eis, en die verweer van redelike publikasie van onwaarheid op politieke terrein' [Translated freely as: 'The *locus standi* of a minister of cabinet to claim for defamation and the defence of reasonable publication of falsehood in the political sphere' 2005 (68) *Journal for Contemporary Roman-Dutch Law* 320] has said (again translated freely) that in the case of defamation the question is not whether the complainant's good name has indeed (factually) been tarnished, but whether the words had the predisposition or purport to defame (at 322) — a question of the likelihood of prejudice rather than real prejudice. If one views the matter in this way, the question whether the readers of the paper really thought less of the applicant as a result of the disparaging observation becomes irrelevant. Should words purport to defame, as was *in casu* the case, it is simply accepted 'that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense' (ibid referring to *Sutter v Brown* 1926 AD 155, 163).

¹⁴ Ibid [33].

¹⁵ Ibid [33].

forfeited her right to claim damages for defamation because there should be a general immunity in so far as criticism and reporting of a cabinet minister's performance of her work is concerned — this was political speech.¹⁶ The court *a quo* found the basis for its decision in *Die Spoorbond and Another v South African Railways and Another; Van Heerden v South African Railways*¹⁷ where the Appellate Division stated clearly that the government (or state) cannot sue for defamation.¹⁸ However, a distinction should be made between members of government acting as a corporate body, and individual members of government (since the *Spoorbond* decision did not preclude such a distinction). Lewis J found justification for such a distinction in the decision in *South African Associated Newspapers Ltd v Estate Pelsler*.¹⁹ In that particular decision the position pertaining to an individual minister was set out as follows:

[244] I might add that, in my opinion, it cannot be said that the reputation of an individual Minister has those 'robust and universal' characteristics which, in the case of the Government (as a separate entity), render it invulnerable to criticism of a defamatory nature. His reputation is, indeed, a 'frail thing', capable of suffering injury by the publication of defamatory matter regarding this conduct in the management of State affairs.²⁰

Although Lewis J conceded that the particular decision had met with much criticism, particularly the 'potential chilling effect on freedom of speech' to which the particular decision has given rise,²¹ she nonetheless also pointed out that 'a blanket immunity for defaming cabinet ministers would undermine the protection of dignity'.²² The effect would be to give the public, and the media in particular, a 'licence to publish

¹⁶ Ibid [34].

¹⁷ 1946 AD 999.

¹⁸ Ibid 1008. Watermeyer CJ held: [T]he Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages ... Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature' (Ibid). See too Jonathan Burchell, *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 143–5.

¹⁹ 1975 (4) SA 797.

²⁰ Ibid 808B–D. Neethling, above n 13, 323 refers to *McNally v M & G Media (Pty) Ltd* 1997 4 SA 267 where this particular sentiment was echoed in relation to the new South African constitutional dispensation as follows: 'I do not think that in a culture of human rights a person, be he politician or public figure or not, should be denied the right to protect his dignity and reputation by suing for defamation. The element of unlawfulness and the application thereof in practice, in my view, adequately provides for the criticism of public officials.'

²¹ *Mthembu-Mahanyele v Mail and Guardian* 2004 (11) BCLR 1182, [38] (SCA).

²² Ibid [40].

defamatory material unless the plaintiff can prove malice.²³ She held:

The decision of the court below in denying to a cabinet minister *locus standi* to claim damages for defamation is, with respect, incorrect. It does not give sufficient weight to the right to dignity and to not having one's reputation unlawfully harmed. It elevates freedom of expression above that of dignity when there is not, and there should not be, a hierarchy of rights. It denies to a class of people the ability to protect their reputations, save where defamatory statements are made with malice.²⁴

What was required was to strike and maintain a balance between freedom of expression of the public in general and the press in particular, on the one hand, and the right to dignity of members of cabinet on the other.²⁵ Exactly how such a balance between the right to dignity and the right to freedom of expression 'in a democratic state [is] to be struck when dealing with 'political speech'' was the next question the court dealt with.²⁶

Lewis J found such a balance ('the proper approach to finding the appropriate balance') in the recognition that 'in particular circumstances, the publication of defamatory statements about a cabinet minister (or any member of government) may be justifiable (reasonable) in the particular circumstances and therefore not unlawful'.²⁷ In short, she found such balance in a defence of 'reasonable publication' which excludes unlawfulness of any defamatory statement. This defence was recognised in the decision *National Media Ltd v Bogoshi*.²⁸ In the *Bogoshi* decision Hefer JA formulated the defence as follows:

Publication in the press of false defamatory statements of fact will be regarded as lawful if, in all the circumstances of the case it is found to be reasonable; ... protection is only afforded to the publication of material in which the public has an interest (ie which it is in the public interest to make known as distinct from material which is interesting to the public ...²⁹

²³ *Ibid.*

²⁴ *Ibid* [42].

²⁵ *Ibid* [40].

²⁶ *Ibid* [43].

²⁷ *Ibid.*

²⁸ 1998 (4) SA 1196 (SCA).

²⁹ *Ibid* 1212A–C.

Thus, as to whether the respondents' conduct had been reasonable in all the circumstances, the *Bogoshi* decision had the effect that the press will 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 actions against the press is negligence rather than intention to harm'.³⁰ To which Lewis [245] J added:

However, fault need not be in issue at all if in the particular circumstances anterior inquiry shows that the publication is lawful because it is justifiable. *Bogoshi* indicates that the reasonableness of the publication might also *justify* it. In appropriate cases, a defendant should not be held liable where publication is justifiable in the circumstances — where the publisher reasonably believes that the information published is true. The publication in such circumstances is not unlawful. Political speech might, depending on the context, be lawful even when false provided that its publication is reasonable ... This is not a test for negligence: it determines whether, on grounds of policy, a defamatory statement should not be actionable because it is justifiably made in the circumstances.³¹

Lewis J next addressed the question that arose *in casu* 'whether special principles should be invoked to protect the press, or for that matter individuals, when they make defamatory statements about a member of government'.³² For an answer to this question she turned to an investigation of the situation in other jurisdictions, paying particular attention to decisions in the United Kingdom, Australia and New Zealand. (She paid particular attention to the decision of the High Court of Australia in *Lange v Australian Broadcasting Corporation*.³³) She also referred to the decision of the European Court of Human Rights in *Lingens v Austria*³⁴ and quoted the following observation made by the latter:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of every word and deed by both

³⁰ *Mthembu-Mahanyele v Mail and Guardian* 2004 (11) BCLR 1182, [46] (SCA).

³¹ *Ibid* [47].

³² *Ibid* [52].

³³ (1997) 189 CLR 520.

³⁴ (1986) 8 EHRR 407.

journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) [of the European Convention of Human Rights] enables the reputation of others — that is to say, of all individuals — to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighted in relation to the interests of open discussion of political issues.³⁵

Lewis J reached the conclusion that the cases she referred to provide compelling reasons for the recognition for finding that there should be a ‘special defence attaching to political information, such that the publication of defamatory matter in circumstances where it is justifiable (reasonable) is not actionable’.³⁶ She continued and explained as follows:

Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. Accountability was of the essence of a democratic state...

[246] The State and its representatives, by virtue of the duties imposed upon them by the Constitution, were accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice.

That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations...³⁷

But where publication is justifiable *in the circumstances* the defendant will not be held

³⁵ *Mthembu-Mahanyele v Mail and Guardian* 2004 (11) BCLR 1182, [63] (SCA) quoting [42] of the ECHR decision.

³⁶ *Ibid* [64].

³⁷ *Ibid* [65]–[68].

liable. Justifiability is to be determined by having regard to all relevant circumstances, including the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information (this factor would play an important role too in considering the distinct question whether there was negligence on the part of the press, assuming that the publication was found to be defamatory); and whether the persons defamed has been given the opportunity to comment on the statement before publication. In cases where information is crucial to the public, and is urgent, it may be justifiable to publish without giving an opportunity to comment.

Applying the test to the facts, Lewis J found that the respondents' publication of the defamatory statement was, in all the circumstances, justifiable.³⁸ Even if the report were to have conveyed the impression that appellant had personally made the award and signed the contract, the conduct of the writer and editor was reasonable in the circumstances.³⁹ Neethling drew attention to her remark earlier in the judgment that 'fault need not be in issue at all if in the particular circumstances anterior inquiry shows that the publication is lawful because it is justifiable' and observed that her inquiry into the 'reasonableness of the respondent's belief and the issue of fault' was in effect not necessary at all.⁴⁰ Accordingly the appeal was dismissed with costs since both unlawfulness (since the publication of the defamatory article was justifiable in all the circumstances) and negligence were absent resulting in the defamation being not actionable.⁴¹ (Howie J, President of the court, concurred in the judgment.)

Ponnan AJ concurred with the judgment of Lewis J as well, but for different reasons.⁴² His reasons were largely in agreement with those of the court *a quo*. The judge concluded that the words complained of were no more than a reference to the role the appellant had played in the matter as revealed by the information already in the public domain. So construed, the appellant had not been disparaged by the words complained of.⁴³

³⁸ Ibid [69]–[71].

³⁹ Ibid [72]–[74].

⁴⁰ Neethling, above n 13, 329.

⁴¹ *Mthembu-Mahanyele v Mail and Guardian* 2004 (11) BCLR 1182, [75, 77] (SCA).

⁴² Ibid [78]–[87].

⁴³ Ibid [85].

The dissenting judgment of Mthiyane J

Mthiyane J found himself unable to agree with either judge's conclusion and wrote a dissenting judgment.⁴⁴ He agreed with Lewis J that the ordinary reader of the *Mail & Guardian* would have understood the words complained of to mean that the plaintiff was guilty of corrupt behaviour.⁴⁵ However, '[s]uch serious accusation cannot, in my view, be regarded as mere political criticism. In my view, that conclusion was reached without any factual basis. Accordingly, having failed to show that the allegations are true, the respondents can only escape liability if their conduct is publishing the [247] defamatory statement can be brought within the *Bogoshi* defence'.⁴⁶ As to how the test should be applied, Mthiyane J quoted Hefer J who said:

Ultimately there can be no justification for the publication of untruths, and members of the press should not be given the impression that they have a license to lower the standards of care which must be observed before defamatory matter is published in a newspaper.⁴⁷

After a careful analysis of the action taken by the respondents (amongst other things, whether the respondents had checked the facts properly and considered all the facts available to them) Mthiyane J concluded that the respondents 'failed to bring themselves within the *Bogoshi* defence'.⁴⁸

Finally, Mthiyane J expressed doubt about whether a special defence of 'political privilege' in relation to the publication by the media of untrue allegations in the political sphere should be established — 'the question whether special principles should be invoked to protect the publisher of defamatory statements about members of government'.⁴⁹ He expressed his doubt as follows:

I agree with Lewis JA (in para 64) that publication of political information which is

⁴⁴ Ibid [88]–[121].

⁴⁵ Ibid [109].

⁴⁶ Ibid.

⁴⁷ Ibid [110] and [1211] of the *Bogoshi* decision.

⁴⁸ Ibid [116].

⁴⁹ Ibid [117]. Neethling, above n 13, 328 expressed the same doubt. He argued that surely the *Bogoshi* defence is wide enough to accommodate the political sphere. As a matter of fact, Hefer JA identified 'greater latitude is usually allowed in political discussion' in *Bogoshi* as a factor a court has to consider in determining the reasonableness or unreasonableness of an untrue publication. As a result the recognition of a special defence of 'political privilege' is in principle unnecessary: *ibid*.

defamatory in circumstances where it is justifiable (reasonable) is not actionable. Although this court has hitherto not dealt with the practical workings of the defence of reasonableness in political speech, I do not, however, consider this to be a special defence outside of or in addition to what was said in *Holomisa* [a defamatory statement which relates to free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all circumstances of its publication, it was unreasonably made] and ultimately endorsed in *Bogoshi*. As it was stated in *Bogoshi* (see paragraph 110 above) 'greater latitude is usually allowed in respect of political discussion'. With such recognition, political speech is, in my view, adequately catered for in the defence of reasonableness introduced in *Bogoshi*.⁵⁰

CONCLUSION

Professor Neethling fully subscribed to the view of Mthiyane J. However, he suggested that the comprehensive defence articulated in *Bogoshi* should be rendered as 'media and political privilege'.⁵¹ The decision by the Supreme Court of Appeal represents an acknowledgement that members of cabinet (and other members of government) should not be left in the cold in the face of sometimes stinging media reportage on their action. However, the court also recognised the danger inherent in any chilling of freedom of expression. Hence the acknowledgment of a defence of 'political privilege' at the disposal of the media.

⁵⁰ Ibid [117].

⁵¹ Neethling, above n 13, 329.