

SOUTH AFRICA / JUDGMENT

# Madito v Peega (CIV APP MG 18/2018) [2020] ZANWHC 84 (10 July 2020)

**[2020] ZANWHC 84****COURT**

North West High Court, Mafikeng

**BEFORE**

R D Hendricks, J T Djaje

**CASE / FILE NUMBER**

CIV APP MG 18/2018

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****CASE NO: CIV APP MG****18/2018****In****the matter between:**

KGOMOTSO  
MADITO  
Appellant  
and  
BOITUMELO  
MARTHA ADELAIDE PEEGA  
Respondent

**CORUM:**

HENDRICKS DJP et DJAJE J  
DATE  
OF HEARING  
:  
22 MAY 2020  
DATE  
OF JUDGMENT  
:  
10 JULY 2020  
FOR  
THE APPLICANT  
:  
MR. SCHOLTZ  
FOR  
THE RESPONDENTS

:  
ADV. VIVIERS  
ORDER  
(i)  
The  
appeal is dismissed.  
(ii)  
The  
appellant is ordered to pay the costs of the appeal.

## JUDGMENT

HENDRICKS DJP

### Introduction

[1] This is an appeal against an order granted by Magistrate R.B Letsholo on the 01st August 2018, in the Magistrate Court for the District of Wolmaransstad, against the appellant for payment of damages in the amount of R50 000.00, plus interest and costs.

The

### Facts

[2] The facts can be succinctly summarized as follows:

There was animosity between the appellant and the respondent fueled by allegations that the respondent was having an affair with the appellant's husband. During July 2014, the respondent, a prosecutor at the Wolmaransstad District Court, went with Thabo, a stenographer and colleague, to an ABSA bank automotive teller machine (ATM) during their lunch break. She was approached by the appellant who uttered the words: "Bitch let us fight, I told you I will get you."

[3] The appellant then poked and slapped the respondent causing her cellphone to fall to the ground. This prompted the respondent to call the appellant's husband and reported that the appellant is fighting with her at the bank. The incident gave rise to the respondent laying criminal charges against the appellant, resulting in criminal proceedings been instituted against the appellant. The appellant pleaded guilty in a subsequent criminal trial on charges of malicious damage to property and common assault. A fine was imposed as a sentence upon the appellant.

### Grounds of Appeal.

[5] The appeal is premised inter alia on the fact that the court a quo erred or misdirected itself in finding that the statement by the appellant constitute defamation. Furthermore, that the conclusion

reached by the court a quo was wrong in that it relied on inadmissible hearsay evidence or an assumption that there was publication of the words uttered.

### The Evidence

[6] The respondent testified inter alia that when she was approached by the appellant, the appellant called her a bitch and a prostitute. The confrontation by the appellant

resulted in a physical assault on the respondent. The appellant furthermore uttered the following words: “This thing is a prostitute. I want you people to alert your husbands. She is having a tendency of having a relationship or affair with people’s husband.”

[7] The people who were at ABSA bank were screaming to the respondent to ignore the appellant. They said: “Do not answer that person. She is always fighting with people. She was doing the same with the late wife of Captain Madito before she married him.” The people also alerted the respondent that the appellant was coming for her, being armed with a sjambok. They even tried to stop the appellant by saying “Kgomotso no!”

[8] The appellant admitted that this incident occurred wherein she confronted the respondent at ABSA bank. She also admitted that she called the respondent a “bitch”. The exact words according to her was “you are a bitch of a prosecutor”, which she only uttered once in a normal voice, whilst being in close proximity to the respondent. There were members of public present but she can’t say whether they overheard those words. She stated that she did not intent to defame the respondent as it was the truth, according to her, that the respondent was having an affair with her husband.

### The Law

[9] Defamation is defined as the wrongful and intentional publication of defamatory words or conduct which refers to another person. Defamation of character is a factual violation of a person’s right to an untainted reputation when a defamatory statement is communicated by one person to another.

[10] In *Khumalo v Holomisa*

[2002] ZACC 12; 2002 (5) SA 401 (CC) the following is stated:

*“[17] The law of defamation in South Africa is based on the actio injuriarum, a flexible remedy arising from Roman Law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another. One of those personality rights, is the right to reputation or fama, and it is this aspect of personality rights that was protected by the law of defamation.*

[18] At common law, the elements of the delict of defamation are –

- (a) the wrongful and
- (b) intentional

- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff.

It is not an element of the delict in common law that the statement be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention.

Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public

benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion. Most

recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*. In that case, Hefer JA, after a careful analysis of the development of a similar defence in Australia, England and the Netherlands, held that:

*“... 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 considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations.

We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956

- (4) SA 310 (W) at 318 C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides

additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations

were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no

justification 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.” (at 1212G - 1213A).

[28] The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.”

[11] It was submitted on behalf of the appellant that the court a quo erred in finding that there was publication of the defamatory words. This is with reference to the appellant’s plea to the averments in the particulars of claim paragraph [4] of the plea reads thus:

*“Save to admit that what Defendant uttered was uttered in the presence of members of the general public the Plaintiff can not with certainty declare that the members of the general Public heard Defendant’s utterances and puts the Plaintiff to the proof thereof and further Defendant deny that the statement made was defamatory and wrongfully and was made with the intention to defame the Plaintiff and injure her reputation...”*

[12] The magistrate concluded:

*“I am going to adopt the same approach in this matter. Plaintiff says she was called a prostitute and a bitch in full view of the public, the facts which were pleaded and testified upon, some members of the same public even went to say “Aus Tumi, leave her she is always like that” this is surely people who know both plaintiff and defendant, it is clear why they made such a comment, because they could see and hear defendant loud and clear. Prior to this incident she says she was on a number of occasions attacked and insulted by defendant here in Wolmaransstad and the other day at police station where defendant is employed and did not take any action as defendant's husband would tell her the he will address the matter with the defendant, for her not to call for his evidence is understandable because those are defendant's colleagues and may not support plaintiff's case, including constable Jantjies, alternatively may all want to stay away, the court is alive of this fact...”*

[13] The finding of the Magistrate cannot be faulted. The evidence presented is clear that members of the public were present. On the evidence of the respondent, members of the public said to the respondent not to answer the appellant, as she is always fighting with people. They even warned the respondent that the appellant is armed with a sjambok. They even tried to stop the appellant by calling her name and said “Kgomotso no!” The respondent even phoned the appellant’s husband to inform him that his wife is fighting with her at the bank. This is overwhelming evidence of publication.

[14] Publication means the communication or making known to at least one person other than the respondent (plaintiff). In this instance, there was indeed publication. On the appellant’s own version, there were members of the public present when she uttered those words. Hence, the admission in the plea, although she cannot with certainty declare that the members of the general public heard the utterances.

[15] Criticism was also levelled against the fact that Thabo, the stenographer, was not called as a witness. Not much revolve around this and no negative inference can be drawn in this regard as Thabo was not in the presence of the respondent during the crucial time of the utterance of these words. To conclude that the failure to call Thabo as a witness justify an inference that the general public in all probability did not hear the alleged defamatory statement, as was contended on behalf of the appellant, is with respect far-fetched. The Magistrate was correct in concluding that there was publication.

[16] As far as the quantum is concerned, the Magistrate state in paragraph

[47] of the judgment:

*“[47] I have researched the law on the similar facts cases but came to Viviers and Ryan case being the closest in this matter, the only difference is that in this matter plaintiff is a legal professional dealing with the same public before whom she was. belittled, I have considered this and the circumstances under which this case happened, the fact that she is a professional person, the fact that indeed was in the pubic, the words Uttered and the humiliation she might have suffered due to these words, the right violated and the fact that defendant is not a child but an elderly person who should know better and her standing in the society, fact that an award should not be punished with an award, the presence and absence of an apology as none came forth.”*

[17] On behalf of the appellant, it was contended that the court a quo ignored or disregarded the following facts:

*“• That it had been publicly known that the Respondent was involved in an extra marital affair with the Appellant’s husband for a substantive period of time;*

- That there had been several previous public altercations between the parties, similar to the incident at stake, which did not result in any legal consequences. This in itself begs the question as to whether the Respondent's action was not merely as a result of the proverbial 'sour grapes', after the Respondent realised that the Appellant and her husband had reconciled their marriage. The timeline as testified to, coupled with the timing of the summons, which was substantively delayed, supports the aforementioned;
- The Respondent tendering evidence to the extent that the members of the public who were present, or in the vicinity of the incident, were unknown to her;”

[18] I do not agree. There was no evidence tendered to substantiate the allegation that the respondent was involved in an extra-marital affair with the appellant’s husband. Even if there was such an affair, it does not give the appellant the right to take the law into her own hands to assault and insult the respondent. As a police officer, the appellant should have known better. The respondent had the right to legal recourse, which she did take, both criminal as well as civil.

- [19] I do not agree with the contention that the respondent “ought to have a tougher skin, so to speak, than the normal citizen, given the fact that she deals with hardened criminals on a daily basis in her profession as a prosecutor, which she has occupied for approximately 10 years,”
- [20] As a prosecutor, the respondent is a professional person as correctly found by the Magistrate. The incident happened in public. The very public that look up to the respondent as a prosecutor and for whom they (as the public) must have respect. The words uttered was done with the intention to humiliate and degrade the respondent in public. Similarly, the appellant is not a lay or unsophisticated person but a police officer, whose primary duty is to uphold peace and order in society. She cannot, as a police officer, assault and insult a prosecutor in public. The respondent suffered humiliation in public. This is indeed aggravating.
- [21] The appellant referred us to the case of *Checuti v Van Der Wilt* 1993 (4) SA 397 TKGD, in which an award of R15 000.00 damages was made for defamation in 1993, in an attempt to persuade this Court to decrease the amount of damages awarded. This case is however distinguishable on the facts from the *Checuti* case. Even if the *Checuti* case can be used as a yardstick to determine the quantum of damages, Robert. J. Koch in his book entitled “The Quantum Yearbook” indicate that the index value in 2017 was 6754 and the index value in 1993 was 1572. To determine the ratio, the index value in 2017 (now 2020) must be divided by the index value in 1993.

Thus: 6754 (index value in 2017)

÷ 1572 (index value in 1993)

4.29 (ratio)

R15 000 x 4.29 = R64 350.00 (the inflation related value in 2017)

So, even in this regard, the quantum awarded is reasonable.

[22] Reference was also made, on behalf of the appellant, to the case of *S v Sharp* 2002

- (1) SACR 360 CkHC and in particular the dictum in paragraph [13] thereof. Once again, the facts of this case is distinguishly different from the facts of the present case and should also not be taken out of context. The following was stated in *S v Sharp*, supra:

*“[13] In addition to the aforesaid, I am of the view that the dignity of the complainant was, in any event, not impaired. By the very nature of her work as an inspector in the SA Police Services it is more than likely that she had been exposed to situations previously where individuals had used rude or abusive language in her presence and probably even directed it at her. Such language, I dare say, may even have made a sailor blush. One of the meanings in The Concise Oxford Dictionary (10th ed, 1999) ascribed to the word 'bitch' is that it refers to 'a woman who one dislikes or considers to be malicious or unpleasant'. Further, the word 'bitch' is now also part of every day parlance and scarcely raises an eyebrow in conversations. If (as the magistrate claims) the accused had been subjected to a body search*

*at the police station by the complainant it is hardly surprising that the accused called the complainant a 'bitch'. The utterance, it seems, was made in anger and is nothing more than idle abuse by the accused or a forthright, if unflattering, description of the complainant. See in general, Rex v Fuleza 1951 (1) SA 519 (AD), R v Walton 1958 (3) SA 693 (SR), S v Jana 1981 (1) SA 671 (T) and S v Steenberg 1999*

(1) SACR 594 (N).”

[23] Firstly, the onus is different between a criminal case and a civil action. Secondly, the remarks by Ebrahim J (with whom Peko A.J concurred) in the case of S v Sharp was made obiter and is not the ratio decidendi of that case. Thirdly, this Court is not bound to follow the obiter dicta expressed in the case of S v Sharp. Personally speaking, I am holding quite the opposite view. In a democratic society, the rights and values (fama and digintas) of the individuals of society must be respected and protected. Especially the rights of women, which is a vulnerable group of our society. It can never be accepted as a norm of society that a woman can be defamed in public by inter alia being referred to as “a bitch”, with no consequences. This can never be justified. No woman’s dignity should be impaired with impunity.

[24] As alluded to earlier, the Magistrate in the exercise of his discretion awarded an amount of R50 000.00 as damages. The assessment of such damages is always a difficult matter involving the placing of a money value upon abstractions and the damages cannot be gauged with precision or nicety.

See: Checuti, supra.

In my view, the awarding of an amount of R50 000.00 as damages is fair taking into consideration all the factors mentioned, as well as inflation. The appeal should consequently fail. There is also no plausible reason why costs should not follow the result and be awarded in favour of the successful litigant, the respondent.

Order

[25] Resultantly, the following order is made:

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R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

I agree

J T DJAJE

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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