

SOUTH AFRICA / JUDGMENT

Xaba and Another v Mkhabela (A183/2017) [2019] ZAGPPHC 377 (15 August 2019) [2019] ZAGPPHC 377

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, N Ranchod, A Basson

CASE / FILE NUMBER

A183/2017

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Source record**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)****Case number: A183/2017****Date:****In the matter between:**

MAZWAI
XABA
FIRST APPELLANT
JEREMY
GORDON
SECOND APPELLANT
ON
THE DOT MEDIA & MONITORING CC
THIRD APPELLANT
t/a
ON THE DOT
PAARL
COLDSET (PTY)
LIMITED
FOURTH APPELLANT
AND
DR
E B
MKHABELA
RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This is an appeal against the judgment and order granted by the Court a quo in a defamation claim brought by the Respondent against the Appellants. The trial concerned a defamation action wherein the Respondent instituted proceedings against the Appellants following the publication of an article by the Daily Sun newspaper on 26 September 2013, that alleged the Respondent to have been responsible for a circumcision on a young boy that resulted in him losing the tip

of his penis.

[2] Four Appellants were cited in the particulars of claim, Mazwai Xaba, cited as the First Appellant who was alleged to have been the editor of Daily Sun at the time of publication of the article. Jeremy Gordon, cited as the Second Appellant and who was the publisher of the newspaper at the time. An entity described as On the Dot Media and Monitoring CC cited as the Third Appellant and who was alleged to have been the distributor. Finally, Paarl Coldset (Pty) Limited, who was the printer of the Daily Sun and was cited as the Fourth Appellant.

[3] The basis for the citation of these Appellants stems from the fact that it is trite law that the editor, proprietor, printer and publisher of a newspaper can be held liable for a defamatory statement.[1]

[4] The status of First and Third Appellants were placed in issue. The Respondent was advised during September 2014, in an answer to a request for further particulars that the position of editor was vacant on 26 September

2013, consequently the First Appellant, Mr Xaba, was not the editor at the time and Third Appellant, On the Dot Media and Monitoring CC, was never a distributor for the Daily Sun. The Court a quo, correctly did not make any finding against them, but failed to say anything about their costs. Appellants submitted that the Court a quo should have ordered the Respondent to pay their costs. Due to the conclusion that this Court has come to, nothing further needs to be said about this aspect. It will be dealt with in the order that ensues in this judgment.

THE EVIDENCE

[5] The relevant article published in the Daily Sun carried the following heading:

“Family sues doctor over botched circumcision.”

[6] It went further to state that the family sued the doctor for R10 million (ten million

rand), after the boy lost the tip of his penis in a botched circumcision. The Respondent was identified as the doctor who did the

circumcision. The article stated that circumcisions left eighteen young men in severe pain, after they were circumcised by a government

approved facility linked to the Respondent's company, Mkhago Health Services. Appellant was said to be the doctor contracted to run the province's voluntary medical male circumcision programme. The article also stated that two men and sixteen boys from Mzinti outside Malelane had to be hospitalised. It further stated that the health spokesman for the province, Mr Ronnie Masilela said that the department was aware of fourteen cases reported in Emalahleni, two at Tonga Hospital and two at Tekwane Clinic near

Mbombela. Mr Masilela also confirmed that the province was facing two court cases relating to alleged botched circumcisions.

[7] In the particulars of claim Respondent alleged that the allegations, alternatively words, further alternatively the innuendo in the context of the article were wrongful and defamatory.

[8] The Respondent claimed R3 000 000-00 (three million rand) in damages. The Court a quo found that the article was indeed wrongful and defamatory and awarded an amount of R250 000-00 (two hundred and fifty thousand

rand) as damages.

[9] The Appellants admitted publication of the article in the Daily Sun on 26 September

2013. The Appellants denied that the article was wrongful and/or defamatory. In the alternative it was pleaded that the article was published on a privileged occasion, further alternatively that the publication of the article was reasonable. It was also pleaded that the context of the article was substantially true and published in the public interest.

[10] The Appellants pleaded that, after publication of the article, they became aware of an error in the article, namely that it was incorrectly reported that the Respondent was facing a R10 million (ten million rand) lawsuit as a result of a botched circumcision, that took place when he worked for the Mpumalanga Health Department. The Appellant then published an apology on 3 December 2013. The apology was titled "Matter of fact" and reads as follows:

"On 26 September 2013, Daily Sun published an article entitled 'Family sues doctor over botched circumcision.'

The story sourced from African Eye News Service, incorrectly reported that Dr Ebby Mkhabela is facing a R10.7m lawsuit for a botched circumcision that took place when he worked for Mpumalanga Health Department in 2008.

The family is suing the provincial and national health departments, not Dr Mkhabela or Mkhago Health Care Services. AENS is an independent news agency which has long supplied Daily sun and other newspapers with news from Limpopo and Mpumalanga.

As a longstanding client of AENS, Daily Sun accepted the report in good faith. AENS have stated that they apologise for the mistake.”

[11] The Respondent testified during the trial. He said that he was indeed the doctor who performed the circumcision on the boy, who subsequently lost the tip of his penis. At the time of this incident he was still in the employ of the Department of Health, Mpumalanga. He resigned during 2013 and he and his cousin then set the company called Mkhago up which concentrated on male circumcision and which obtained a contract from the Department of Health, to set up a programme to assist with male circumcision in the rural areas. This programme was apparently launched due to the problems experienced in the rural areas, where lay people execute circumcisions as part of cultural practices.

[12] He said that he only became aware of the article when his sister phoned him on 27 September 2013, the day after publication of the article, and told him that she read in an article in the Daily Sun, that he was being sued for R10 million as a result of a botched circumcision, when he was in Barberton in

2008. He then obtained a copy of the previous day's publication of the Daily Sun and read the article.

[13] He testified that he remembered the procedure he performed on the boy. He said that the boy suffered from phimosis, which apparently means that the front part of his penis was closed, which resulted in the child not being able to urinate properly. He performed the circumcision without any complications. He testified that the only part that normally bleeds during a circumcision procedure is the frenulum, which is the lower part of the penis. The normal procedure to deal with the bleeding is to apply a bandage. He placed a catheter, to make sure that the child could urinate, because it would be painful after the surgery. After this the child was woken up. He was happy with the procedure and the child was taken back to the ward. He prescribed painkillers and on day two the child was discharged by another doctor. The child's family was given instructions to go to the clinic on a daily basis to change the bandages. He never heard from the child or the family again. He testified that after the publication of the article his practice started deteriorating as the community no longer trusted him to perform circumcisions. He said that he had to move and shut down his practice. As a result he was unemployed for a year, from 2013 until 2014.

[14] He did not regard the apology as sufficient. He complained about the heading of the article, which only read “Matter of fact” and which did not indicate that it was an apology regarding the article He was of the view that small font was used. The Court a quo in its judgment seemed to share his observation in this regard. However, a perusal of the article indicates otherwise.

[15] He denied being aware of any other publication in similar vein, yet the evidence shows that on 9 September 2013 Corruption Watch published an article about “ ... dodgy circumcision contract” where it was inter alia stated that the Respondent was linked to a botched circumcision procedure on a 4 year old boy, five years before, which was the

subject of a R10 million (ten million rand) legal suit against the provincial and national health departments. On 15 September 2013 an article appeared in IOL News, in which reference was also made to the Respondent as being linked to an alleged botched circumcision, which was the subject of a R10 million (ten million rand) lawsuit. On 17 September 2013 a similar article appeared in The Star. All of the above publications appeared prior to the article that was published in the Daily Sun on 26 September 2013.

[16] Although the Respondent initially complained that he was not given an opportunity to state his side of the story, this was not true and he later conceded that he was contacted by journalists about the circumcision and the contract his company obtained. He also conceded that he refused to answer any questions telephonically and requested that the questions be put to him in writing. He admitted that on 13 September 2013 an email was sent to him by Mr Khoza, a journalist at AENS which contained a list of questions. The one question pertinent for purposes of this judgment reads as follows:

“With the litigation you are facing relating to the botched Barberton circumcision, do you believe you are the right person to run the VMMC program?” Eventually Respondent conceded that he received the questions but did not respond to them.

[17] The Appellants called Dr Van Heerden, an urologist. He was asked to give an opinion about the

circumcision, as he had reconstructed the child’s penis after the aforementioned circumcision. He testified that the circumcision

led to the loss of the glans of the penis. He noted that there was damage to the urethra, which very infrequently occurs with circumcisions. He said this implies that the ventral incision was too deep. He said that this is a well-known complication and can lead to the loss of the glans. Although it is an uncommon complication in circumcisions, this procedure was evidently complicated. He noted from the doctor’s notes that a catheter had to be kept in for two weeks, which was, according to him, also a highly uncommon state of affairs, as catheters are never inserted during circumcisions. He concluded that the loss of the glans was a direct consequence of the procedure, but he also stated that it is difficult to establish whether there was any negligence or whether this was just a complication that occurred during the procedure.

[18] Mr Mogakane (Mogakane) and Mr Khoza (Khoza), the two journalists at AENS who investigated the story testified about their investigation into the problems arising from circumcisions and the contract related to it.

- [19] They explained that, as a news syndication agency, they would, when informed of a story, which they believed to be newsworthy, go about and carry out their own investigation and then sell the story to the various clients including, amongst others, the Daily Sun, the Mail and Guardian, the City Press, and publications forming part of the Independent Group.
- [20] They testified that they were involved in issues inter alia regarding government programmes, corporate social investments, investigative pieces, etc. Khoza had previously written about health matters and circumcisions in particular, which received lots of media attention, due to poor circumcision practices that sometimes even resulted in the death of the circumcised patients. Around the middle of June 2013, Khoza had written a story about thirty initiates who had died in the Gert Sibanda, Nkangala and the Ehlanzeni districts of Mpumalanga, after having undergone traditional circumcisions. Khoza was a senior reporter at AENS responsible for healthcare issues in rural Mpumalanga.\
- [21] On 26 August 2013, Khoza and Mogakane were approached by Gcina Ntsaluba (“Ntsaluba”) from Corruption Watch, a civil society anti-corruption watchdog. Ntsaluba was a former colleague at AENS, who had won awards for investigative journalism. He had a story regarding the alleged irregular awarding of a contract, entered into without a tender process with the Respondent’s company, to circumcise two hundred and sixty thousand men in Mpumalanga. There was also an allegation that the same Respondent had been sued for a botched circumcision he had performed on a four-year old boy in Barberton in 2008.
- [22] Ntsaluba presented them with a hospital record dating back to 2008, which showed the name of the Respondent as having been the surgeon involved and a list documenting the names, ages, diagnosis (reflecting septic circumcisions), as well as admission and discharge dates of eighteen patients who had to be hospitalised, after having undergone circumcisions in Mzinti.
- [23] On the same date Ntsaluba transmitted an email to them drafted by Isaac Ngomane of the Mpumalanga Health Department which confirmed:
- 23.1 that the Respondent’s company, Mkhago had entered into a service level agreement with the Department on 18 June 2013 to perform two hundred and sixty thousand circumcisions under the programme;
- 23.2 in performing the circumcisions, Mkhago was working in three districts, one of which was Ehlanzeni District under which the Mzinti VMMC Clinic fell and where 722 circumcisions had already been performed, during the period from 18 June to 11 August 2013.
- [24] Armed with this information, Mogakane and Khoza decided to investigate the veracity of the story Ntsaluba had shared with them, with a view to explore whether it could become a workable story at a future date. They both agreed that Khoza should investigate the story disclosed to them by Ntsaluba and travel to Mzinti for this purpose. Their investigation followed a line of enquiry that evolved into their own investigations.

- [25] However before the aforesaid, and around 30 August 2013, Khoza made telephonic contact with Ronnie Masilela (“Masilela”), the official spokesperson for the Mpumalanga Department of Health with a view to verify the facts regarding the awarding of the contract, without going to tender, as well as the litigation in respect of the botched circumcision that was said to involve the Respondent.
- [26] Mogakane testified that it was normal practice for journalists to contact the spokesperson for government departments as these individuals were tasked with communicating with the media on behalf of government.
- [27] Masilela intimated to Khoza in their telephone discussion of 30 August that he was aware that the Respondent had been sued for a botched circumcision in Barberton in 2008, but that the case was pending. He further confirmed that the Respondent had been awarded a contract to perform circumcisions under the programme. On the question of how many lawsuits the Department was facing for botched circumcisions, and what cases involving complications with circumcisions had come to their knowledge, Masilela advised that he would respond with the information by email. When he did not respond timeously, Khoza called him around 3 September 2013 to solicit his reply. Masilela eventually replied to Mogakane on 4 September 2013 by email. This was after Mogakane also followed up with him. This evidence was never contradicted by the Respondent.
- [28] Khoza and Mogakane were still not satisfied with the answers provided to them. They decided not to publish the information relating to the Respondent, which they had obtained from Masilela. Rather, they continued to try and establish the facts of the story. Khoza prepared a set of detailed written questions for Masilela which Mogakane settled. These were transmitted to Masilela on 9 September 2013.
- [29] Importantly, Masilela was asked the following with respect to the pending lawsuit facing the Respondent relating to a botched circumcision as question seven of his email of 9 September 2013:

“Did the Department consider the fact that Mkhabela was facing a lawsuit relating to a botched circumcision when he was given the contract?”

- [30] Two days later, and on 11 September 2013, Masilela replied per email to Khoza’s written questions and decided to copy in seven other employees of the Department of Health to his email. As appears from the email, his replies were in a bold font set out below each question. In response to the question formulated as question seven, Masilela did not deny that the Respondent was facing a lawsuit relating to a botched circumcision, but in fact provided Khoza with express confirmation of this fact when he stated:

“The matter referred to here is currently pending litigation and therefore not finalised.”

- [31] Khoza travelled to Mzinti from 4 to 9 September 2013, with a list of approximately eighteen patients to further investigate the allegations against the Respondent. He was able to locate and speak to approximately five of those who appeared on the list and their relatives, where applicable. He identified them as Madonsela Senzo (who was still in hospital at the time), Mhlanga Muzi, Oupa Sibitane, Ntimane Lazarus and Mahlalela Mduduzi.
- [32] Some of the boys were not willing to talk to him as they feared ridicule should their names appear in the newspaper. Khoza was, in each instance, obliged to identify himself and disclose the fact that he was from the media. He did so in each instance which explains the reluctance of persons to come forward.
- [33] He was however able to confirm that the five cases he had tracked down involved boys who were circumcised at Londolozi, in Mzinti, at the Mkhago facility, where the company performed circumcisions as part of the programme run by the Mpumalanga Department of Health.
- [34] He was also able to confirm, from those he was able to talk to, that they had had septic complications and had endured a lot of pain after the circumcision at the facility. The family of Oupa Sibitane agreed to an on the record interview and confirmed that their son had been circumcised at the Mkhago facility, and that he experienced complications thereafter. Their story was published on Ziwaphi news, a local newspaper in that area, with Khoza having taken a photograph of the boy and his mother who was named Rose. She confirmed to Khoza that her son's testicles and penis started swelling after the circumcision, whereafter a smelly substance came from his penis and that after she had taken him to Tonga Hospital, she found ten other boys who were suffering from similar symptoms.
- [35] With the information he possessed after his investigation at Mzinti, and following the receipt of the information from Masilela on 11 September 2013, Khoza then decided to contact the spokesperson for Mkhago, who referred him to the Respondent and provided him with the Respondent's mobile number. After this he deemed it necessary to provide the Respondent an opportunity to respond and give his side of the story before publication.
- [36] Khoza then made contact with the Respondent on 13 September 2013, a fact which in the end was not disputed by the Respondent. It was the Respondent who requested him to put the questions in writing in order that he could give a written response. Khoza testified that he asked the Respondent telephonically whether he was the right person to be awarded that particular tender, as he was still facing a lawsuit regarding a botched circumcision in Barberton, to which the Respondent did not respond.
- [37] The list of questions was sent by email to the Respondent at 11h30 on Friday 13 September 2013. These were followed by a telephone call to the Respondent at 11h31, which was not answered. The Respondent was called again at 12h15 and this time he confirmed receipt of the email and that he would prepare a response over the weekend and revert to Khoza. Khoza called him again on Monday 16 September 2013, but the Respondent did not answer his telephone. Khoza further testified that he thereafter followed-up with repeated

telephone calls to the Respondent, which were never answered. The next step, according to Khoza, in verifying facts around the complications related to circumcisions, was to get an independent opinion from an authoritative figure regarding circumcisions. He accordingly contacted Professor Haffejee, the head of the Department of Urology at the University of the Witwatersrand who explained to him what the various complications would be.

- [38] During both the examination in chief and cross-examination, all the witnesses for the Appellants were clear that they did not just take the word of Ntsaluba and continued on to publish the article. They made the necessary enquiries as is required of them as journalists. They gathered information from Masilela, the spokesperson for the Department of Health in Mpumalanga, who did not deny that the Respondent was sued in respect of a botched circumcision in Barberton. They further undertook investigations at Mzinti, and confirmed that indeed the Respondent had operated at a circumcision clinic in the area, and that the boys named in the list provided by Ntsaluba had actually experienced complications as alleged.
- [39] Respondent waited until 17 October 2013, more than a month after he had first been contacted and more than two weeks after publication of the article in the Daily Sun, to contact AENS. That was the first time that he had taken issue with the allegation that he was facing a lawsuit, something that he should have raised with Khoza upon receipt of the questions.

THE LAW OF DEMAMATION

- [40] The Constitutional Court in *Khumalo and Others v Holomisa*[2] held that the elements of defamation are the wrongful and intentional publication of a defamatory statement concerning a plaintiff.
- [41] Once it is established that the statement is defamatory of a plaintiff, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent.[3]
- [42] As a result, once it is established that the statement is proved to have been published by a defendant of and concerning a plaintiff and is found to be defamatory, it is presumed that the publication was wrongful and took place *animo iniuriandi*. [4]
- [43] Wrongfulness can be rebutted by pleading facts that justify its exclusion as one of the elements of delictual liability.[5] At trial the presumption of wrongfulness is often rebutted by evidence satisfying one or more of the well-established defences which exclude the element of wrongfulness on a balance of probabilities.[6] It is trite that the onus is on the defendant to rebut one or the other presumption on a preponderance of probabilities.[7] The defences available to rebut wrongfulness do not constitute a *numerus clausus* but include the following:[8]
- (a) the publication was substantially true and made in the furtherance of the public interest,[9]

- (b) the statement amounted to fair comment[10],
- (c) or that the statement was made during a privileged occasion.[11]

[44] It is also legally competent for the media to defend a defamation action on the basis that the publication of the article was reasonable (“the reasonable publication defence”). The defence was first developed by the Supreme Court of Appeal in *Bogoshi* with specific reference to the media and so as to strike the appropriate balance between the right to human dignity and the right

to freedom of expression as enshrined in the Constitution.[12]

[45] In the case of the media, the reasonable publication defence excludes the wrongfulness component of the delict and goes hand in hand with the absence of negligence in assessing the fault requirements, the absence of either or both of which would exclude liability in toto.

[46] The reasonable publication defence is of particular importance in the context of this action and was specifically pleaded in opposition to the claim advanced. It is now settled law that the publication of false defamatory allegations of fact are not unlawful, if upon a consideration of the facts of the case, it was found to have been reasonable to publish the facts in the particular way and at the particular time.[13]

[47] The application of this principle with reference to the reasonable publication defence was articulated in the Constitutional Court’s decision in *Holomisa* as follows:

“For it permits a publisher who is uncertain of proving the truth of a defamatory statement nevertheless to publish where he or she can establish that it is reasonable.” [14]

[48] On the basis of the reasonable publication defence, the fact that the article therefore incorrectly states that the Respondent had been sued by the family of a boy who lost the tip of his penis during a botched circumcision does not render the Appellants automatically liable.

[49] The departure point in any defamation action is to firstly determine what the words complained of mean, more particularly, whether they convey the defamatory meaning which a plaintiff seeks to place upon them. In determining the alleged defamatory content of the words of the article, the common law postulates a two fold test,[15]

- (a) firstly, a determination of what the ordinary meaning of the words is, (b) secondly, and once a court has determined the meaning to be attributed to the words, whether that meaning is defamatory.[16]

- [50] In establishing the ordinary meaning of the words complained of, a court is not concerned with the meaning the journalist intended to convey or the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff upon reading the article.[17] The test is objective and one that enquires into what meaning the reasonable reader of ordinary intelligence would attribute to the statement.[18]
- [51] In the application of this test, it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated, but also to what is implied.[19] In determining the first question, the ordinary meaning of the words is not necessarily the dictionary meaning of the words.[20] This stems from the fact that the courts have long accepted that ordinary readers do not necessarily attach dictionary meanings to words used in newspaper articles.[21] In determining the meaning of the words complained of, the test is one conducted as a matter of construction through the lens of the ordinary reasonable reader and not on the strength of the evidence presented.[22]
- [52] It was argued on behalf of the Appellants, that in conducting the exercise, courts are not entitled to approach the matter from a strictly judicial perspective, as is the case when interpreting contracts. Courts must discard their “judicial robes and the professional habit of analysing and interpreting statutes and contracts in accordance with long established principles” and adopt the mind-set of the reasonable lay person. [23] A full appreciation of the influence of context cannot be expected of the ordinary reasonable reader as “the law reports are replete with reminders of the looseness of thought and low level of concentration with which even an eminently reasonable member of society may read newspaper reports”. [24] A Court should avoid the danger of considering itself to be the ordinary reader of the article.[25] Courts must bear in mind that the ordinary reasonable reader has no legal training or other special discipline and is more likely to skim through an article casually and not give it detailed attention or a second reading. [26]
- [53] It was submitted on behalf of the Appellants that the reasonable reader is not a person of “morbid and suspicious mind”, nor is such person “super-critical” or abnormally sensitive and must be assumed to have read the articles as articles in daily newspapers are usually read.[27]
- [54] It seems then that as a result, a Court should avoid an over-elaborate analysis of the article. Courts are obliged to have regard to the general impression made by the article upon them while considering the impact it would have made upon the hypothetical reader, yet without the court taking a too literal approach to its task of giving meaning to the article.[28]

APPLICATION OF THE LAWS OF DEFAMATION

- [55] On the application of these principles, it was submitted that the article as a central message, reported that the Respondent was being sued for having performed a “botched” circumcision on a boy who lost the tip of his penis, and is associated with a company contracted to do circumcisions for the Mpumalanga Health Department under the latter’s voluntary medical male circumcision programme.
- [56] That the Respondent performed the circumcision on the young boy is not disputed. It was also established through the evidence of Dr Van Heerden that the circumcision performed by the Respondent was the most probable cause for the loss of the glans on the boy’s penis. However, Dr Van Heerden was of the view that this was a complicated circumcision and that he could not find any negligence on the side of the doctor who performed the procedure. In the light of these facts it was clearly not a “botched” circumcision on the part of the doctor and the use of this word did not convey the true facts. The boy did indeed lose the tip of his penis as a result of the circumcision, but this was according to Dr Van Heerden, as a result of a medical complication and not necessarily, because the doctor “botched” the procedure. Although one should not over analyse or be confined to a strict dictionary meaning of a word, the word “botched” cannot be interpreted as anything else than a bungled up procedure. The only inference that can be made is that the doctor was incompetent and did not execute his duties professionally. This was then further supported by the fact that it was alleged that he was sued as a result of this procedure.
- [57] In the light of the evidence Appellant should have known better than to use the word “botched” with reference to this circumcision. In my view the reasonable reader would have concluded wrongdoing on the part of the Respondent with regard to this specific circumcision. This would have impacted on his dignity and reputation and is defamatory. A reading of the rest of the article also, indirectly linked the other circumcisions that had gone wrong with Respondent and his company. The article is in my view wrongful and defamatory, and the Court a quo did not err in coming to that conclusion. [I may elaborate a little more about this in due course, after recess!]
- [58] As the apology only impacts on the quantum of damages and due to the conclusion that I have come to I do not deal with the question of whether it was sufficient or not.

THE DEFENCE OF REASONABLE PUBLICATION

- [59] As a result of the finding that the article was defamatory it is accordingly for the Appellant to prove on a balance of probabilities that one of the defences available in law is applicable. Due to the conclusion that I arrived at I only deal with the defence of a reasonable publication.
- [60] The Supreme Court of Appeal’s ratio in *Bogoshi* has made it clear that the publication of false defamatory allegations of fact are not unlawful, if upon a consideration of the facts of the case, it was found to have been reasonable to publish the facts in the particular way and at the particular time.[29]

- [61] Bogoshi opened the door for the media to avoid liability for publishing false defamatory statements, if they acted reasonably in so doing. This, so it was argued, affords the media a degree of protection when reporting matters of public interest. This argument is correct and there is no doubt that the circumcision of young men attracted media interest and is of public interest.
- [62] The defence also avoids the situation, that previously prevailed, under the common law, whereby a media defendant that encountered difficulty in proving the truth of a defamatory statement, was held liable for the failure to establish the truth. This state of affairs, as was recognised in *Holomisa*, caused “a chilling effect” on the publication of information, which prevents the publication of matters which the public clearly has a public interest in knowing about.[30]
- [63] The criteria for assessing the reasonableness of a publication were set out in the *Bogoshi* judgment and were developed further in *Mthembi- Mahanyele v Mail and Guardian Ltd.*[31] In the latter case it was held that fault was not an issue, if the publication was justifiable taking into consideration all relevant circumstances. The criteria are, inter alia, the interest of the public in being informed; the nature of the information on which the article was based; the reliability of the source; the steps taken to verify the information; the opportunity given to respond; the need to publish before establishing the truth; the manner of the publication and the tone of the article which can provide an unnecessary or additional sting. [32] What responsible journalists should avoid is reckless and careless damage to reputations. They should present a fair and balanced article.[33] Therefore, the law as set out in both *Bogoshi* and *Mahanyele* is to the effect that members of the media will not be held liable for publication of false defamatory material, where it can be shown that they had acted reasonably when regard is had to all the circumstances of the case.
- [64] In the present circumstances, the evidence led by *Mogakane* and *Khoza* demonstrated the extent to which great care was taken to first gather the relevant facts, before the story was ultimately published in the *Daily Sun*. They, when informed of the story, which they believed to be newsworthy, went about and carried out their own investigation and contacted the Respondent to get his side of the story. Only then did they sell the story to the various clients including the *Daily Sun*.
- [65] In *Trustco Group International Limited and Others v Mathews Kristof Shikongo*[34] a matter which is distinguishable from the matter before us, the journalist wrote and published a story which was defamatory of the Mayor of Windhoek. He had not taken the requisite steps to ascertain the veracity of the allegations and had failed to give the Mayor the right to respond to the allegations. The Court held that the defence of reasonable publication could not be sustained in that instance, as the journalist in attempting to verify the truth of the facts in the allegations, failed to give the relevant parties, including the mayor, a due right to respond.

- [66] There is no doubt, in the light of the evidence, that Mpumalanga experienced significantly disastrous outcomes regarding the traditional circumcision schools, and it was in the public interest that any attempts by government to address such a calamity be brought to the attention of the communities so affected in a responsible manner. As a result the publishing of an article about problems experienced as a result of circumcisions even in hospitals, was of great public interest.
- [67] In this instance the journalists did not act with an intention to injure the reputation of the Respondent. Both Khoza and Mogakane only believed in the veracity of the information after properly researching the facts. They took all reasonable steps to ensure that the information was supported by the facts, with the result that they had acted without negligence. The Respondent was given an opportunity to respond, which he failed to do.
- [68] The Respondent had the right to lead evidence in rebuttal in terms of Rule 39(14), after the Appellants led their evidence on the application of the reasonable publication defence, but he chose not to do so at his own peril. The evidence led on the Appellants behalf therefore stood unchallenged and became conclusive.[35]
- [69] As a result the Court a quo erred in finding that the Appellants had not brought themselves within the ambit of the Bogoshi defence. The Respondent has no legitimate grounds for complaint regarding the so-called untruths with the consequence that the Court a quo erred in treating same as dispositive to the outcome of the matter.
- [70] In the light of all the facts the Appellants proved on a balance of probabilities that the publication

was reasonable and the Court a quo erred in not finding so. In the light of this conclusion it is not necessary to deal with the other defences of truth or the amount of damages awarded.

[71] In the light of all the facts the appeal should be upheld.

[72] The following order is made:

1. The appeal is upheld, and the order made by the Court a quo is set aside and is substituted with the following:
 - 1.1 The Respondent's claim is dismissed; and
 - 1.2 The Respondent is to pay the costs of the Appellants, which costs shall include the costs of senior counsel.

R G TOLMAY

JUDGE OF THE HIGH COURT

N RANCHOD

A BASSON

JUDGE OF THE HOGH COURT

DATE OF HEARING:

29 MAY 2019

DATE OF JUDGMENT:

15 AUGUST 2019

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ATTORNEY FOR RESPONDENT: WIEKUS DU TOIT ATTORNEYS

ADVOCATE FOR RESPONDENT: ADV C J WELGEMOED

[1] Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 3 SA 394 (A)

[2]

[2002] ZACC 12; 2002

(5) SA 401 (CC) (Holomisa).

[3] Joubert and Others v Venter 1985 (1) SA 654 (A) at 696A-B.

[4] Holomisa at 414.

[5] National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA) at 1202H (Bogoshi).

[6] Mohamed and Another v Jassiem [1995] ZASCA 115; 1996 (1) SA 673 (A) at 709H-I at 709H – I.

[7] Hardaker v Phillips 2005 (4) SA 515 (SCA) at para 14 (Hardaker).

[8] Hardaker at 525A.

[9] Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another 1990 (3) SA 547 (A).

[10] Marais v Richard en 'n Ander 1981 (1) SA 1157 (A) and Johnson v Beckett and Another 1992

(1) SA 762 (A).

[10] Marais v Richard en 'n Ander 1981 (1) SA 1157 (A) and Johnson v Beckett and Another 1992

(1) SA 762 (A).

[11] May v Udwin 1981 (1) SA 1 (A).

[12] Bogoshi.

[13] Bogoshi at 1212G-H.

[14] Holomisa at 422F.

[15] SA Associated Newspapers Ltd en 'n Ander v Samuels 1980

(1) SA 24 (A) at 30F – G; Le Roux and Others v Dey 2011 (3) SA 274 (CC) at 305G.

[15] SA Associated Newspapers Ltd en 'n Ander v Samuels 1980

(1) SA 24 (A) at 30F – G; Le Roux

and Others v Dey 2011 (3) SA 274 (CC) at 305G.

[16] Demmers v Wyllie & Others 1980 (1) SA 835 (A) at 842A; see also Jonathan Burchell, *The Law of Defamation in South Africa*, page 83.

[16] Demmers v Wyllie & Others 1980 (1) SA 835 (A) at 842A; see also Jonathan Burchell, *The Law of Defamation in South Africa*, page 83.

[17] Dey at 305 to 306A.

[18] Dey 306A.

[19] Ibid.

[20] Sindani v Van der Merwe and Others 2002 (2) SA 32 (SCA) at 36G.

[21] Ibid.

[22] Cele v Avusa Media Limited 2013 (2) All SA 412 (GS) at para 11.

[23] Independent Newspapers Holdings Ltd and Others v Suliman [2004] 3 All SA 137 (SCA) at p148 para 19.

[23] Independent Newspapers Holdings Ltd and Others v Suliman [2004] 3 All SA 137 (SCA) at p148 para 19.

[24] Ibid.

[25] Ngcobo v Shembe and Others 1983

(4) SA 66 (D) at 71C – D.

[26] Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994

(2) SA 1 (A) at 20F to G; see also Morgan v Odhams Press Ltd and Another [1971] 2 All ER 1156 (HL) at 1184 referred to with approval in Sindani at 36E to F, See also Simon Brown LJ in Mark v Associated Newspapers Ltd [2002] EWCA Civ 772; 2002 E M L R 38 para 11 quoted with approval by Nugent JA in Tsedu v Lekota 2009 (4) SA 372 (SCA) at 377D-F, Johnson v Rand Daily Mails 1928 AD 190.

[26] Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994

(2) SA 1 (A) at 20F

to G; see also *Morgan v Odhams Press Ltd and Another* [1971] 2 All ER 1156 (HL) at 1184

referred to with approval in *Sindani* at 36E to F, See also Simon Brown LJ in *Mark v Associated Newspapers Ltd* [2002] EWCA Civ 772; 2002 E M L R 38 para 11 quoted with approval by Nugent JA in *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 377D-F, *Johnson v Rand Daily Mails* 1928 AD 190.

[27] *Basner v Trigger* 1945 AD 22; *Channing v South African Financial Gazette Ltd* 1996 (3) SA 470 (W).

[27] *Basner v Trigger* 1945 AD 22; *Channing v South African Financial Gazette Ltd* 1996 (3) SA 470 (W).

[29] *Bogoshi* at 1212G-H.

[30] *Holomisa* at 422C-D.

[31] 2004

(6) SA 329 (SCA).

[32] At 355G to I.

[33] *Gold Reef City Theme Park (Pty) Limited v Electronic Media Network Ltd and Another* 2011 (3) All SA 323 (GSJ) at para 83; *Trusco Group International Ltd & Others v Shikongo* (SA 8/2009) [2010] NASC 6; *Tshabalala-Msimang & Another v Makhanya & Others* 2008(6) SA 102 (W).

[34] 2004

(6) SA 329 (SCA).

[35] *In re: Rex v Jacobson and Levy* 1931 AD 466 at 468.

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