SACHS J ABRIDGED JUDGMENT

Dikoko v Mokhatla

105. In concurring with the judgment of Mokgoro J, I offer reasons for proposing a remedial shift in the law of defamation from almost exclusive preoccupation with monetary awards, towards a more flexible and broadly-based approach that involves and encourages apology. Developing the common law in this way would, consistently with our new constitutional ethos, facilitate interpersonal repair and the restoration of social harmony.

106. The facts of this case illustrate well the limitations of responding to injury to a person's good name simply by making a monetary award. When trying to evade responsibility for his grossly excessive use of a municipal cellphone, Mr. Dikoko, the mayor, uttered manifestly silly and self-serving words to the Public Accounts Standing Committee about Mr. Mokhatla, the municipal manager. Mr. Mokhatla was entitled to see the mayor publicly rebuked, entitled to have any possible doubts about his own integrity cleared up, entitled to a retraction of the slur, and entitled to an apology. But he was not, in my opinion, entitled to R110, 000.

107. Hard-boiled members of the committee, who have heard every exculpatory story under the sun, could scarcely have taken his words seriously. And certainly the readers of the local newspaper, in whose columns his exchange with the committee was repeated, could be expected to have taken his bluster with a large dose of salt. Indeed, made in the context of pitiful evasions to the accounts committee, the utterances were so blatantly incredible and unworthy as to demean their author rather than the person blamed. Above all, they were delivered on the fringes of protected institutional speech, calling for institutional remedies and apology, rather than payment of an incongruously large and punitive sum.

108. It might well be that the issue of quantum of damages would generally not on its own qualify as being a constitutional one falling within the jurisdiction of this Court. In this case, however, it arises on the periphery of and in connection with issues of a manifestly constitutional character. Here were public figures being called to account by a public institution for behaviour or misbehaviour in an official setting. Even although qualified privilege was not pleaded as a defence to the claim, the context should have had a significant bearing on the appropriateness of any damages to be awarded. The mayor was testifying before a governmental committee. Witnesses before such investigative committees should feel free to speak their mind. As a matter of general principle they should not be made to fear heavy damages suits if they either overstep the mark in the telling, or do not have iron-clad proof to substantiate their testimony. The chilling effect of punitive awards would not only be felt by officials caught with their metaphorical pants down, but by honest whistleblowers and by newspapers simply carrying testimonial exposures.

109. There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

110. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of a reputation, on the one hand, and determining a sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank.

111. The notion that the value of a person's reputation has to be expressed in rands in fact carries the risk of undermining the very thing the law is seeking to vindicate, namely the intangible, socially-constructed and intensely meaningful good name of the injured person. The specific nature of the injury at issue requires a sensitive judicial response that goes beyond the ordinary alertness that courts should be expected to display to encourage settlement between litigants. As the law is currently applied, defamation proceedings tend to unfold in a way that exacerbates the ruptured relationship between the parties, driving them further apart rather than bringing them closer together. For the one to win, the other must lose, the scorecard being measured in a surplus of rands for the victor.

112. What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings. In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem. The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of *ubuntu - botho.*

113. *Ubuntu - botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past.[1] In present day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution. As this Court said in *Port Elizabeth Municipality v Various Occupiers*:

"The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

114. *Ubuntu - botho* is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of *ubuntu - botho*.

115. Like the principles of restorative justice, the philosophy of *ubuntu - botho* has usually been invoked in relation to criminal law, and especially with reference to child justice. Yet there is no reason why it should be restricted to those areas. It has already influenced our jurisprudence in respect of such widely divergent issues as capital punishment and the manner in which the courts should deal with persons threatened with eviction from rudimentary shelters on land unlawfully occupied. Recently it was applied in creative fashion in the High Court to combine a suspended custodial sentence in a homicide case with an apology from a senior representative of the family of the accused, as requested and acknowledged by the mother of the deceased.

116. I can think of few processes that would be more amenable in appropriate cases to the influence of the affirming values of *ubuntu - botho* than those concerned with seeking simultaneously to restore a person's public honour while assuaging inter-personal trauma and healing social wounds. In this connection attention should be paid to the traditional Roman-Dutch law concept of the *amende honorable* referred to in Mokgoro J's judgment. Although *ubuntu - botho* and the *amende honorable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centre-piece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.

117. Thus, although I believe the actual award made by the High Court in this matter was way over the top, and accordingly associate myself with Mokgoro J's minority finding in this regard, my concern is not restricted to the excessiveness of the amount. It lies primarily with the fact that the law, as presently understood and applied, does far too little to encourage repair and reconciliation between the parties. In this respect the High Court cannot be faulted. The concerns expressed above were not raised in the papers or addressed in argument before it. The Court was simply working with a well-tried remedy in the ordinary way. Unfortunately, the hydraulic pressure on all concerned to go with the traditional legal flow inevitably produces a set of rules that are self-referential and self-perpetuating. The whole forensic mindset, as well as the way evidence is led and arguments are presented, is functionally and exclusively geared towards enlarging or restricting the amount of damages to be awarded, rather than towards securing an apology. In my view, this fixed concentration on quantum requires amendment. Greater scope has to be given for reparatory remedies.

118. It is noteworthy that in the context of hate speech the legislature has indicated its support for the new remedy of Apology. Thus, the Equality Court is empowered to order that an apology be made in addition to or in lieu of other remedies. I believe that the values embodied in our Constitution encourage something similar being developed in relation to defamation proceedings. In the light of the core constitutional values of *ubuntu – botho*, trial courts should feel encouraged pro-actively to explore mechanisms for shifting the emphasis from near-exclusive attention to quantum, towards searching for processes which enhance the possibilities of resolving the dispute between the parties, and achieving a measure of dignified reconciliation. The problem is that if the vision of the law remains as tunnelled as it is today, parties will be discouraged from seeking to repair their relationship through direct and honourable engagement with each other. Apology will continue to be seen primarily as a tactical means of reducing damages rather as a principled modality for clearing the air and restoring a measure of mutual respect.

119. The present case indicates the traps that preoccupation with money awards lays in front of a defendant. For a defendant to make an apology is to concede the defamation in advance and take the risk of paying heavy damages should the apology not be accepted. Thus if Mr. Dikoko had publicly acknowledged that he had wronged Mr. Mokhatla, he risked opening himself up to being seriously mulcted. Hence the ambivalence of his evidence. A retraction and apology genuinely offered and generously received, could have sorted the matter out once and for all, and contributed towards improving the way the parties would have been able to get on in future in the close working environment of local government. Yet the manner in which the process was structured appears to have produced a hurt and humiliated loser on the one side, and a winner (who might find it difficult not to gloat) on the other. Thus, the rupture between the protagonists was not healed, it was entrenched.

120. Giving special emphasis to restoring the relationship between the parties does not, of course, imply that awards of damages should completely fall out of the picture. In our society money, like cattle, can have significant symbolic value. The threat of damages will continue to be needed as a deterrent as long as the world we live in

remains as money-oriented as it is. Many miscreants would be quite happy to make the most fulsome apology (whether sincere or not) on the basis that doing so costs them nothing - “it is just words.” Moreover, it is well-established that damage to one’s reputation may not be fully cured by counter-publication or apology; the harmful statement often lingers on in people’s minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one’s reputation.

121. What is needed, then, is more flexibility and innovation concerning the relation between apology and money awards. A good beginning for achieving greater remedial suppleness might well be to seek out the points of overlap between *ubuntu – botho* and the *amende honorable*, the first providing a new spirit, the second a time-honoured legal format. Whatever renovatory modalities are employed, and however significant to the outcome the facts will have to be in each particular case, the fuller the range of remedial options available the more likely will justice be done between the parties. And the greater the prospect of realising the more humane society envisaged by the Constitution.