

IN THE HIGH COURT OF NAMIBIA

-

CHARL JOHAN MARAIS

Plaintiff

and

E E HAULYONDJABA

DEFENDANT

Heard on: 1993/04/23

Delivered on: 1993/04/29

JUDGMENT

O'LINN, J.: The Plaintiff, Charl Johan Marais, applied for judgment by default against E.E. HAULYONDJABA in regard to an action for damages for defamation and injuria. The relief claimed is set out as follows in the notice of set down:

1. Payment of the sum of R60 000,00.
2. Interest on the said sum at the rate of 20% per annum from the date of judgment to date of payment.
3. Costs of suit.
4. Further and/or alternative relief.

At the hearing of the application the applicant, hereinafter referred to as the plaintiff, was represented by Mr Smuts of the Namibian Society of Advocates. There was no appearance for the respondent, herein-after referred to as the defendant.

The defendant did not at any stage after the combined summons was served on him personally, respond by entering an appearance to defend or in any other manner.

Mr Smuts took the view that he was entitled to judgment by default on the merits but that some evidence on quantum was either necessary or at least desirable and consequently called the plaintiff to testify on the question of quantum.

The fact that the action is undefended, does not relieve the Court from its responsibility to consider whether or not the facts alleged in the particulars of claim and which had to be regarded by the Court as not in dispute, established the alleged cause of action.

It is apposite at this stage to set out the particulars of claim as it appears in the combined summons:

"1. The **PLAINTIFF** is **CHARL JOHAN MARAIS**, an adult male chief inspector in the service of the Namibian Police, Oshakati, Republic of Namibia and residing at 298 Tambotie Street, Oshakati, Northern Namibia.

2. The **DEFENDANT** is **E E HAUL YOND ABA**, an adult male Police Officer with the rank of Commissioner, the Regional Inspector in the Namibian Police and holding the position as Regional Inspector, Northern Region in the Namibian Police, Grootfontein, Republic of Namibia and whose full and further particulars are to the Plaintiff unknown.

3. On 31 December 1992 defendant wrote and published of the plaintiff the following letter:

* INSTRUCTION CHIEF INSPECTOR NUMBER 00276
C.J. MARAIS

A.l. I'm hereby requesting you District Commissioner to inform the above mentioned officer, that I as a Regional Inspector of the region, I declared him as a serious public nuisance in the district, and in the region as a whole.

5. It come to my knowledge on the 23.12.92 that I'm not in command of C/Inspector Marais, instead he want to command me, and I belief he has been given special power to command me. Which I will never tolerate such monsters gangs to rummaging the region, (sic)

6. I now agree fully with district Commissioner's letter of 24.7.92 reference 10/3/1/2/2 that what ever done by him, wrongdoer, indiscipline etc, is part of instruction from his superior (sic) . Now inform him that he must leave the district and go to his commander immediately.'

4. The aforesaid letter was sent and published by the Defendant to the Inspector-General of the Namibian Police, the Police Commissioner in charge of Administration and Personnel, the District Commissioner of the

Namibian Police, Oshakati and to certain other police officers other personnel in the employ of the Police. A copy thereof is annexed hereto and marked 'A'

The aforesaid letter is wrongful and defamatory of the Plaintiff in that it was intended and understood by the readers of the letter to mean that the Plaintiff:

7. Was a serious public nuisance in the Norther Regional District;
8. Constituted a nuisance to the public;
9. Did not demean himself as is required an officer of the Namibian Police in his dealings with the public;
10. Was a gangster;
11. Was involved in underhand and/or unlawful activity in the region;
12. Was engaged in wrongful and criminal behaviour in the northern region of Namibia;
13. Was an undisciplined member of the Namibian Police;
14. Engaged in conduct which required him to be prosecuted or disciplined internally by the Police;
15. Was unfit to be a senior Police

officer

16. The statements concerning the Plaintiff in the aforesaid letter were made with the intention to defame Plaintiff and injure his reputation.

17. As a consequence of the publication of the letter, the Plaintiff has been grossly defamed in his good name and reputation and has suffered injury to his feelings and dignity.

18. As a consequence of the foregoing, the Plaintiff has suffered damages as follows:

19. Injury to his feelings and dignity
R10 000,00

20. Injury to his good name and
reputation R50 000,00

9. In the premises the Defendant is liable to the Plaintiff in damages in the amount of R60 000,00.

WHEREFORE THE PLAINTIFF CLAIMS:

21. Payment in the sum of R60 000,00

22. Interest on the said sum at the rate of 20% per annum from the date of judgment to date of payment.

23. Further and/or alternative relief.

4. Costs of suit.

That the letter written by defendant is defamatory of and

injurious to the plaintiff and that it was published by plaintiff to the Inspector-General of the Namibian Police, the Police Commissioner in charge of Administration and Personnel, the District Commissioner of the Namibian Police at Oshakati and to certain other police officers and personnel, is not in doubt. The innuendo set out in the particulars of claim is also proved in substance.

The only problem on the merits is whether on the basis of the facts alleged by the plaintiff, the letter was not published by the defendant on a privileged occasion, i.e. either communicated in the discharge of a duty or the exercise of a right, or the furtherance of a legitimate interest and communicated to somebody who has a corresponding right or duty or legitimate interest to receive the communication.

If such a qualified privilege is established or apparent from the proved facts, then the publication is lawful, notwithstanding that it is defamatory and/or injurious.

Whatever room there might have been on plaintiffs factual allegations for a defence of privileged occasion, such defence was never raised by defendant. The viva voce evidence of the plaintiff furthermore made it clear that no circumstances existed which would have justified the communication of matter such as contained in the defendant's aforesaid letter. Not only was the contents of the letter defamatory and injurious, but it amounted to a gross abuse of any right or duty or interest that the defendant may have

had to communicate a complaint about the conduct of a junior officer to the plaintiff's superiors in the Namibian Police.

There can be no doubt that the defendant was actuated by an improper motive and with malice which in turn eliminates the defence.

The plaintiff is therefore entitled to damages for defamation and injuria. What remains is the question of quantum.

The plaintiff is a chief inspector in the Namibian Police and was at the time of the incident the crime officer for the Oshakati district and is presently the Commanding Officer of the commercial branch of the Namibian Police.

The plaintiff has served the Namibian Police and its forerunner, the SWA Police, for 18 yrs.

He is an officer since 1985. He has a clean record except for the fact that on one occasion, he was convicted of negligence at an internal police disciplinary hearing in connection with the escape of a prisoner. He holds a B.A. Honours degree in police science from the University of South Africa.

The defendant is a Commissioner in the Police. At the time of the incident he was regional inspector of police in northern Namibia and still holds that position.

after independence but was in due course appointed as a police officer senior to the plaintiff.

The only apparent reason for defendant's action is that plaintiff at one stage before the incident had to investigate a case of theft of certain building material where defendant was a suspect and plaintiff had issued a search warrant for the search of defendant's premises.

The action of plaintiff was based on information in affidavits and authorised by senior officers of police headquarters in Windhoek. However at a later stage, after discussions with the Inspector-general of the Namibian Police, it was decided not to proceed with the search.

There is no doubt that the said investigation by plaintiff was authorized, regular and legal. The plaintiff was only doing his duty as a policeman. The aforesaid action by plaintiff was no excuse and did not mitigate the conduct of the defendant in compiling and publishing the letter aforesaid.

The only mitigation for defendant's conduct, is that parts of the letter are incomprehensible because the author obviously could not express himself properly in the English language.

It is of course also important that the letter was not circulated to the general public or the press. Nevertheless, publication by a senior police officer to the

Inspector-general and officers, was important and a fairly-grave case of defamation and injuria.

Although the defendant must have felt gravely insulted by the letter and his prospects of promotion in the Namibian Police hampered by the attitude of the defendant and others in the force who may share his sentiments, the defendant was not able to demonstrate any serious negative consequences for him up to the present.

I will assume in favour of the defendant, that his financial means is not comparable to that of flourishing newspapers.

It must be held against the defendant that he never apologised to the plaintiff. He also made no effort to explain his conduct to the Court.

I have taken note of the review of recent cases on quantum by my learned brother HANNAH, A.J., as he then was, in the case of Smit v Windhoek Observer & An., 21/6/1991, Nm., unreported. See also: Smith v Die Republikein (Edms) Bpk en 'n ander. 1989(3) SA 872 (SWA).

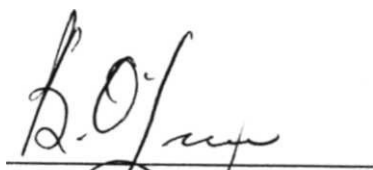
Mr Smuts suggested that the Court need not allocate damages separately to defamation and to injuria. In all the circumstances it appears to me to be in accordance with justice to award damages in the amount of R5 000,00.

Defendant is ordered to pay:

24. The amount of R5 000,00.

25. Interest on the said sum at the rate of 20 percent p. a. with effect from 29/4/1993 to date of payment.

26. Costs of suit



O' LINN, JUDGE.

Adv. for the Applicant: Adv.D.Smuts

instructed by: Kock & Van der Westhuizen