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2000-11-09

Exception granted and parts of plea struck out

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Case No.: I. 1645/2000

FN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES MARTHINUS SMITH

PLAINTIFF/EXCIPIENT

and

KAZENAMBO KAZENAMBO

DEFENDANT

CORAM: LEVY, AJ Heard on:

2000-10-30 Delivered on:

2000-11-09 **JUDGMENT**

LEVY, **AJ**: This is an exception taken by the Excipient (hereafter plaintiff) to a Plea filed by respondent (hereafter defendant).

Mr D Smuts acts for plaintiff and Mr T Mbaeva acts for defendant.

Mr Smuts fded Heads of Argument but Mr Mbaeva failed to do so. Neither party requested a postponement by reason of the foregoing and asked that the matter be argued forthwith. The

Court thereupon ruled that the matter proceed.

Plaintiff had issued a combined summons and particulars of claim against defendant for damages for defamation alleging that defendant had published *animus iniuriandi* a letter defaming plaintiff, to the editor of the New Era Newspaper. A copy of the letter was annexed to the particulars of claim.

According to the pleadings plaintiff is himself the editor of the newspaper Windhoek Observer and the letter complained of quotes an editorial which appeared in the aforesaid newspaper and defendants purported comments thereon.

For the purposes of this judgment defamation can conveniently be defined as the unlawful and intentional publication by a person of any matter which injures the fair name and reputation of another. In respect of the latter requirement the test is traditionally expressed in terms of whether the words tend to lower the plaintiff in the estimation of right thinking people generally.

Demmers v Wyllie and Others 1978(4) SA 619 (D) and 1980(1) SA 835 (A)

The word "publication" as used in the said definition, means the communication or making known of the defamatory matter to at least one person other than the person defamed. *African Life Assurance*

Society Ltd & Others v Robinson & Co. Ltd & Another

1938 NPD 277 at 295

No person can bring an action for defamation unless the words complained of refer to him personally.

Ahmadiyya Anjuman Ishaati - Islam Lahore (South Africa) v Muslim Judicial Council (Cape) and Others

1983(4) SA 855 (C) at 865 *Goodall v Hoogendoorn Ltd* 1926 AD 11 at 15

The plaintiffs name need not be mentioned if he can be identified from the defamatory matter by reasonable readers. *South African Associated Newspapers Ltd and Another v Estate Pelsler* 1975(4)

SA797 (A) at 812

Where unworthy conduct is imputed to a newspaper, it was ruled that evidence was permissible by members of the public that they understood that the language applied to the editor of the newspaper.

Nasionale Pers Bpkt v Long 1930 AD 87 *Verwoerd v Paver and Others*

1943 WLD 153

Consequently if reasonable readers would regard an article which criticises an editorial of the newspaper as referring to the editor, evidence would be unnecessary.

Rule of Court 18(3) provides:

"Every pleading shall be divided into paragraphs (including subparagraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment."

Rule of Court 18(4) provides:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

Rule of Court 22(2) provides:

"The defendant shall in his or her plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he or she relies."

It is essential that these requirements for a plea be read together. It then becomes clear that a defendant who has several different defences to a claim is obliged to plead each one of his defences in a separate paragraph.

The defendant is required to set out the defence clearly and concisely. There can be no defence by implication. In *Wildner v Compressed Yeast Ltd* 1929 TPD 166, Tindall J (as he then was) said at p 170:

"And if the terms of the plea do indicate by implication that defendant intends to rely upon a certain defence, then I think it is the duty of the defendant to state clearly and concisely the material facts on which the defence is based."

Although the Rules do not make provision for alternative pleas, both the practice and decided cases indicate that this is permissible and that even inconsistent defences can be pleaded provided that they are in separate paragraphs or sub-paragraphs and are clearly and concisely pleaded. If the plea fails to comply with the foregoing, it is vague and embarrassing and can be excepted to and struck out.

In paragraph 1 of his particulars of claim plaintiff alleged that defendant had "published" a letter to the editor of the New Era Newspaper of and concerning plaintiff annexing a copy of the letter. Defendant in his paragraph 2 in reply to this paragraph, pleaded as follows;

"The defendant denies having published a letter about or concerning the plaintiff " (This constitutes a defence but defendant continued with

that sentence) "and pleads that he only reacted to an editorial comment published by the Windhoek Observer Newspaper." (This sentence is a different defence. It is in fact capable of several meanings including that the letter is 'of and concerning plaintiff but that it was a 'reaction' to an editorial written by plaintiff.)

The defendant then pleads in the alternative but in the same paragraph 2 that "the defamatory letter" (i.e. he admits it is defamatory) represents "fair comment".

"Fair Comment" is a recognised defence but it requires the allegation (and proof) of several preconditions which are not alleged by defendant.

Defendant's reference in his plea to a "reaction" will be considered hereunder. It may in certain circumstances be another and different defence. There are therefore certainly more than one defence in one and the same paragraph that is, in paragraph 2 of the Plea. Furthermore these defences are vaguely pleaded the necessary facts not being set out.

Because paragraph 2 does not comply with Rules of Court and is vague and embarrassing containing several defences it should be struck out.

In his Paragraph 3, defendant raises three further defences. Firstly he denies that "he intended" the letter to be defamatory. This is an admission that the letter is defamatory but it was his "intention" that it should not be so. Where a defendant does not intend to be defamatory e.g. where he cracks a "joke", he is not liable in damages for defamation. However, the defendant must allege and prove why the defamatory matter was not intended to lower plaintiff in the eyes of the public. This defence defendant has conjoined with an allegation that he did not "intend to denote the meanings assigned thereto by plaintiff. Because a defendant "intends" that the words used by him which are *per se* defamatory do not

have the *per se* defamatory meaning "denoted by plaintiff, does not constitute a defence. Where the words are ambiguous and one of the meanings is defamatory the other not the plaintiff cannot escape responsibility by pleading that he did not "intend" to defame the defendant. In any event defendant has not pleaded the meaning which he allocates to those words which he pleads do not have the defamatory meaning of which plaintiff complains. Paragraph 3 therefore contains more than one defence and does not have sufficient factual allegations to substantiate his several defences.

Paragraph 3 is therefore vague and embarrassing and falls to be struck out.

I turn now to paragraph 4 which purports to invoke the provisions of the Constitution.

Article 21(l)(a) [and not 21(l)(b) as pleaded by defendant] enshrines the right of persons to freedom of expression but this fundamental right is specifically made subject to the provisions of Article 21(2)

which provides as far as relevant:

"The fundamental freedoms referred to shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred, which are necessary in a democratic society and are required in the interest of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to content of court, defamation or incitement to an offence." (My emphasis)

Free Speech therefore is specifically subject to the laws of defamation.

For this reason paragraph 4 constitutes no defence and must be struck out.

In paragraph 4 defendant again refers to his reason for writing the letter namely his reaction to the "editorial comment" which "concerned defenceless fallen heroes". In other words this editorial comment "provoked" him, and I shall accordingly deal in detail with the question of provocation as a defence to an action for damages based on defamation.

There is doubt in legal circles as to whether provocation can ever be a defence to defamation. One thing is certain if it is a defence, it can only arise where there is a "verbal assault" on a defendant personally, invoking an immediate response from him in proportion to the verbal assault on him. On this point in respect Zietsman AJP in *Winterbach v Masters* 1989(1) SA 922 at 925 said,

"It is my opinion that, in a case where self-defence is not involved, to hold that provocation which does not affect the defendant's mental capacity may render lawful an otherwise unlawful assault is tantamount to accepting the principle of an eye for an eye and a tooth for a tooth, and is contrary to our legal principles. I do, however, consider that provocation on the part of the plaintiff will mitigate his damages, and that in a proper case it may be held that his provocation was such as to reduce to nothing the damages recoverable by him, or that it was such as to justify an award to him of nominal damages only coupled perhaps with an order that he be deprived of his costs, or even that he pay the defendant's costs."

In paragraph 5 of the Plea, defendant admits having published the aforesaid letter but only to the editor of the New Era Newspaper. This would still constitute "publication" and is inconsistent with defendant's paragraph 2 where he denies publication, and furthermore does not constitute a defence, except perhaps to reduce the quantum of damages. It is however not pleaded with the latter purpose in mind. It is pleaded simply as a defence. Inasmuch as it is not a defence and inasmuch as it conflicts with paragraph 2 of the plea it must be struck out.

Plaintiff gave notice to defendant in terms of Rule 23(1) that the Plea was in certain respects vague and embarrassing and that he should remedy the plea. Defendant failed to remedy the plea.

For the reasons set out above, paragraphs 2, 3, 4 and 5 of the Plea are struck out with costs and defendant is given 20 days from date hereof to file an amended Plea.

For the plaintiff/excipient;

Adv D F Smuts

Instructed by:

Messrs P F Koep & Co

for the defendant:

Mr T Mbaeva

Instructed by:

Dammert & Hinda Law Office