



'Reportable'

SUMMARY

CASE NO.: I 1218/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RAUHA AMWELE v ALINA NDEYAPO AMUNYELA-NAMUKWAMBI

PARKER J

2012 March 7

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- Defamation** - What constitutes – Court observing that there are two classes of publishees when it comes to defamatory matter, namely (1) reasonable persons of ordinary intelligence and (2) right-thinking members of society generally – Court finding that in instant case, in virtue of being trained and senior police officials the publishees are reasonable persons of ordinary intelligence – Court holding that the defamatory signification they would attach to the ordinary meaning of the words stated in Exh A (the published matter) is that the plaintiff, a married woman, is a person of low moral scruples, which is a clear imputation of adultery to the plaintiff.
- Defamation** - Defences – Privilege – Qualified privilege – Defendant making defamatory statement in Exh A – Such giving rise to presumption of unlawfulness and *animus injunandi* – Presumption may be rebutted by proof that statement was made on occasion of qualified privilege and provided the requirements of relevance are satisfied – Court finding that in instant case the plea of qualified privilege could not be sustained by the law and the evidence.

Defamation - Defences – Privilege – Qualified privilege – Forfeiture – Malice – Qualified privilege forfeited where statement is published maliciously and where requirements of relevance are not satisfied.

Defamation - Damages – Assessment of – Usefulness of looking at awards of damages recently made for defamation.

Defamation - Quantum – Plaintiff, a married woman and Deputy Commissioner, Namibia Police – Court awarding N\$30, 000-00 in damages.

Held, that the defamatory signification the publishees who are senior police officials would attach to the ordinary meaning of the words stated in the first sentence of Exh A is that the plaintiff, a married woman, is a person of low moral scruples, which is a clear imputation of adultery to the plaintiff.

Held, further that there is no credible evidence linking the defendant to the republication of the defamatory matter in the *Informante* newspaper.

Held, further that while the absence of reasonable grounds for belief of the truth of the matter stated does not amount to or necessarily prove malice, it provides cogent evidence that there was in fact no such belief, which, in turn, will generally lead to the inference of malice and so defeat the defence of qualified privilege.

Held, further, that a defamatory matter that is malicious would always be irrelevant and so defeats the defence of qualified privilege.

CASE NO.: I 1218/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RAUHA AMWELE**Plaintiff**

and

ALINA NDEYAPO AMUNYELA-NAMUKWAMBI**Defendant****CORAM: PARKER J**

Heard on: 2012 February 20 – 21

Delivered on: 2012 March 7

JUDGMENT

PARKER J: [1] The plaintiff is a high ranking commissioned officer holding the rank of Deputy Commissioner in the Namibia Police (NAMPOL), and she is at all material times a married woman. The defendant, too, is also at all material times a married woman; and she is a Sergeant in NAMPOL and the Secretary to the Regional Commander of NAMPOL (Oshikoto Region).

[2] The plaintiff instituted the present defamatory action against the defendant. The alleged defamatory statement was made in a letter under the hand of the defendant and addressed to The Regional Commander and his Committee, NAMPOL, Oshakati (Oshana Region) ('the Committee'), dated 20 July 2010 (Exh 'A', at pp 8–9 of the bundle). The Regional Commander holds the rank of Commissioner, and 'the Committee' consisted of the following:

- (1) The Regional Commander, Commissioner Kashihakumwa,
- (2) Deputy Commissioner Amwele (the plaintiff)
- (3) Deputy Commissioner Amadhila
- (4) Chief Inspector Clay
- (5) Chief Inspector Steenkamp

[3] The said offending statement is contained in para 6.1 of Exh A. For reasons that will become apparent in due course I shall prefix para 6.1 with its chapeau as follows *verbatim et literam*:

'6. If any transfer as contemplated by the RC (The Regional Commander and his Committee) is based on rumours I request the following issues to be investigated the same procedures that were done to me may also be done to others:

6.1 During the promotion of Commissioner Kashihakumwa and D/Comm Amwele (the plaintiff) it was reported in the Informante newspaper that there is some affairs between them but we never heard something that they are to be transferred. Everybody especially women members in the Police are having their problems with their husbands but it was never brought to RC's office. Why mine?'

Excerpts of Exh A were published in the *Informante* newspaper in its 13-19 January 2011 issue.

[4] In the amended parties' joint proposed pre-trial order, dated 8 January 2012, the parties' legal representatives set out the following as the issues of law this Court should determine. I commend the legal representatives for the crisp and clear manner in which they have identified the issues. Furthermore, I have

pored over the authorities referred to me by counsel: some I have found to be of no assistance on the issues under consideration in the instant case. For example, the *ratio* of *Trustco Group International v Shikongo* 2010 (2) NR 377, which approved the Court's decision in *Shifeta v Munamava and Others* Case No. I 2106/2006 (Unreported); and *Universal Church of the Kingdom of God v Zamzim Newspaper (Pty) Ltd t/a The Southern Times* 2009 (1) NR 65 (HC), is that the rule in *Palkendorf and Others v De Flamingh* 1982 (3) SA 146 (a), which imposed strict liability on the media, was repugnant to the Namibian Constitution and did not form part of the common law of Namibia.

[5] It seems to me clear that this matter falls within a short and simple compass. I now proceed to determine the issues; and in doing so I make the following important factual findings; some of which I have already set out previously and most of them are really not in dispute. The defendant wrote Exh A and addressed it to the Regional Commander and the four other members of the Committee. The letter shows that a carbon copy (cc) thereof was to be sent to each of the following, namely, The Ombudsman, the Inspector General (NAMPOL) and Commissioner Shilunga (Internal Directorate, NAMPOL). It is not in dispute that the copies were faxed to all these persons, except the Ombudsman. The Regional Commander's was left at his office.

[6] Accordingly, the evidence that I accept as credible is that Exh A was communicated by the defendant to Commissioner Kashihakumwa (the Regional Commander) and his Committee. The Commissioner read Exh A to members of the Committee at a meeting attended by the members except Commissioner Amadhila (who was absent) and at which an unnamed member of State Security was also present. Apart from these persons, the defendant communicated Exh A

to also the Inspector General of NAMPOL and Commissioner Shilunga (of NAMPOL'S Internal Directorate), as aforesaid. These are the publishes of Exh A, containing the alleged defamatory matter. I, therefore, accept Mr. Maasdorp's argument that there is no evidence placed before the Court that establishes that it was the defendant who communicated Exh A to the *Informante*.

[7] It is the plaintiff's case that the statements in the aforementioned para 6.1 of Exh A about the plaintiff are in their ordinary meaning defamatory of the plaintiff in that (1) they were intended by the defendant to mean and were understood by the persons who acquired knowledge of the statements (the 'publishes') to mean that the plaintiff, while a married woman, had 'throughout the course of' (i.e. 'during'; *Concise Oxford English Dictionary*, 11th edn (revd)) the promotion of Commissioner Kashihakumwa (the plaintiff's immediate superior) and the plaintiff, there was a liaison between them, (2) they are meant to convey a meaning to the publishes that the plaintiff (a) abused her position in the Namibia Police (NAMPOL), (b) is corrupt, and (c) is a person of low moral scruples. The plaintiff also relies on alternative items to support her case. For obvious reasons, I shall only consider them after looking at these main grounds, if that becomes necessary. What is the defendant's response thereto? In her plea, the defendant 'denies that the contents of Exh A are in their ordinary meaning defamatory of or concerning the plaintiff'. She argues in the alternative, which I shall consider after considering her main argument, if that becomes necessary.

[8] 'A defamatory matter,' stated Silungwe AJ, 'is one which injures the person to whom it refers by lowering him (or her) in the estimation of reasonable persons of ordinary intelligence or right-thinking members of society generally.' (*Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd* 2009 (1) NR 65 at

69G) I respectfully accept Silungwe AJ's dictum as a correct statement of law, and so I adopt it. Silungwe AJ's proposition gives rise to 'two crucial legal issues on liability ... firstly, can the alleged defamatory matter complained of reasonably be read as referring to the plaintiff? Secondly, is the matter complained of reasonably capable of conveying to the reasonable reader a meaning defamatory of the plaintiff?' (*Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd* supra, at 69I, per Silungwe AJ)

[9] From the papers filed of record and the evidence it is as clear as day that the statements in Exh A, particularly para 6.1, refers to the plaintiff, *inter alios*. Indeed, not only is her name mentioned but also her NAMPOL rank. I pass to consider the second legal issue on the above-quoted passage by Silungwe AJ. What is the argument on other side contrariwise to the plaintiff's. The defendant's counsel's argument is that since the publishees are 'the ordinary Chief Inspector, Deputy Commissioner or Commissioner, by the inherent nature of police business (whatever that means), would not simply read the allegations and form a view without carefully considering the precise words used in the context in which they were made, more so when each person in the audience was astutely aware of the surrounding circumstances.' And furthermore, counsel argued, 'The first sentence of para 6.1 cannot be divorced from the rest of the letter, which essentially dealt with rumours, the unwarranted invasion into (sic) peoples (sic) lives and interference with the defendant's dignity by the Regional Commander and his committee, and was clearly a call for consistency in acting on rumours.'

[10] I accept Mr. Maasdorp's submission – in principle, of course – that the contents of Exh A should be read intertextually. But to what avail? Mr Maasdorp does not say. There is nothing in the first sentence of para 6.1 that remotely

suggests that the defendant says therein that she is merely peddling a rumour about a liaison between the plaintiff and Commissioner Kashihakumwa; and, a *fortiori*, the meaning of what the defendant meant in the first sentence is clearly and sufficiently carried by the width of the words used. As Mr. Namandje submitted, the plaintiff categorically states that what she writes in the first sentence of para 6.1 is 'reported in the *Informante* newspaper'. If the plaintiff had stated in Exh A that she was merely bringing to the attention of the Regional Commander and his Committee what the *Informante* had reported and had enclosed a cutting of the said article, different considerations would have reasonably arisen. That is not the case in this matter. From the date of issuance of summons (i.e. 26 April 2011) up to the date of conclusion of trial (i.e. 21 February 2012), a period of some 10 months, no such issue of *Informante* has been placed before the Court or, indeed, the plaintiff, albeit the defendant had in July 2010 promised the plaintiff that she would place the issue of the *Informante* before the plaintiff within two weeks. I shall return to this factual finding in due course.

[11] That is not the end of the matter. What about Mr Maasdorp's argument about the publishees of Exh A? Mr Maasdorp misses the point. The tenor of the first sentence of para 6.1 of Exh A belies any suggestion that the defendant was making allegations. The width of the words used does not account for any such suggestion: she states categorically – in no uncertain terms – that: 'During the promotion of Commissioner Kashihakumwa and D/Comm Amwele *it was reported* in the *Informante* newspaper that there is some ...' (Italicized for emphasis) The defendant does not write that she was alleging something or peddling a rumour (as I have said previously) or an allegation contained in the *Informante*. Thus, in my opinion, the 'ordinary Chief Inspector, Deputy Commissioner or Commissioner'

would not read and understand the first sentence of para 6.1 as containing allegations. Now, the question that immediately arises is this: would the publishees attach a defamatory signification to the words written in para 6.1 of Exh A, particularly the first sentence thereof? They will. To illustrate the point; any 'right-thinking person of *ordinary* intelligence or right-thinking members of society generally' would know what imputation is conveyed by calling a person a thief. The test as to what constitutes a 'defamatory matter is one which injures the person to whom it refers by lowering him (or her) in the estimation of reasonable persons of ordinary intelligence (Category (1)) or right-thinking members of society generally' (Category (2)) (See *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd* supra at 60G).

[12] The law as proposed by Silungwe AJ which, as I say, I accept as good law, distinguishes two distinct classes of publishees as indicated in my Category (1) and Category (2), above. In this regard, as I see it, the import of Mr Maasdorp's argument – if I understand counsel correctly – is that the publishees of the alleged defamatory matter in para 6.1 of Exh A are 'Chief Inspectors', 'Deputy Commissioners' and 'Commissioners' (I will add the Inspector General of NAMPOL), and such senior Police officials are not just right-thinking members of society generally (my Category (2)). I agree. But I find that in virtue of being trained and senior police officials, these publishees are reasonable persons of ordinary intelligence. No evidence – scientific or otherwise – was placed before the Court tending to show that these senior NAMPOL officials are persons of super intelligence or paranormal intelligence. This finding impels me to the inevitable and reasonable conclusion that any reasonable person of ordinary intelligence, as the publishees have been found to be, would attach a defamatory signification to the words in para 6.1 of Exh A. That is to say, they would know

what defamatory imputation is conveyed by the defendant when she wrote about the plaintiff that during her promotion and that of Commissioner Kashihakumwa 'the *Informante* reported that there is some affairs between them'.

[13] The defamatory signification they would attach to the ordinary meaning of the words in the first sentence of para 6.1 is that, as pleaded, the plaintiff, a married woman, has at all material times a liaison with Commissioner Kashihakumwa (her senior), and that the plaintiff is a person of low moral scruples, which is a clear imputation of adultery to the plaintiff. However, I do not find that the defamatory signification they would attach to the ordinary meaning of the words in the first sentence of para 6.1 of Exh A is that the plaintiff abused her position in the Namibia Police or that the plaintiff is corrupt, as also pleaded by the plaintiff.

[14] It follows as a matter of course that in my judgment I hold that the words in the first sentence of para 6.1 of Exh A is defamatory matter, and it defamed the plaintiff. Having so held, I now turn to the defendant's alternative plea which is framed as follows:

'... the defendant pleads: (1) that her letter containing the statement of and concerning plaintiff, was in essence the truth and was published in the exercise of her right to defend herself and was addressed to individuals who had a duty, alternatively a right, to receive the statement; and (2) that the contents of her letter including the statement of and concerning plaintiff were germane or pertinent to the material issues.'

In my opinion, the defendant's alternative plea relies on (1) qualified privilege and (2) relevance (see *Basner v Trigger* 1946 AD 83 which is confirmed by *Tuch v Myerson* 2010 (2) SA 462 (SCA)), which I must now consider.

[15] The publication of the defamatory matter in Exh A to the publishees gave rise to a presumption of unlawfulness and *animus injuriandi* on the part of the defendant. And the presumption of unlawfulness could be rebutted by, for example, proving that the publication took place on an occasion of qualified privilege; provided the requirements of relevance were satisfied (*Tuch v Myerson supra*.) It has also been held that the protection afforded by the qualified privilege afforded to a litigant is forfeited if the defamatory matter is published maliciously. (*Tuch v Myerson supra*, confirming *Van der Berg v Cooper & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA)). Additionally, *Basner v Trigger supra* at 95 (per Schreiner) is authority for the proposition that ‘Privileged occasions are recognized in order to enable persons to achieve certain purposes and when they use the occasion for other purposes they are actuated by improper or indirect motives, that is, by “malice”.’ Thus, privilege is defeated by proof of malice. Another essential element is relevance. And on that behalf, it is my firm view that a defamatory matter that is malicious would always be irrelevant.

[16] The defendant’s alternative plea cannot be sustained by the law and the evidence. To start with; not one iota of evidence was placed before this Court which established that there was a liaison between Commissioner Kashihakumwa and the plaintiff as stated by the defendant in Exh A. Furthermore, no wraith of evidence was placed before the Court to establish that the defendant brought to the attention of the publishees a report she had seen and read in the *Informante*, as the defendant boldly proclaimed in Exh A. Accordingly, I find that on 20 July 2010 when the defendant sat down, as it were, and wrote Exh A in her handwriting and got it typed by a commercial typing service provider and communicated the finished product to the publishees the same day she had no reasonable ground for belief in the truth of the matter she had stated in Exh A that is defamatory of

the plaintiff. I am aware – upon the authority of *Basner v Trigger* supra at 106 (per Schreiner JA) – that ‘the absence of reasonable grounds for belief in the truth of the matter stated does no (sic) amount to or necessarily prove malice, *but it provides cogent evidence* that there was in fact no such belief, which in turn, will generally lead to the inference of malice and so defeat the privilege.’ (Italicized for emphasis) Accordingly, from what I have said previously, I find that there is cogent evidence that the defendant had no reasonable grounds for belief in the truth of the defamatory matter she stated in Exh A; and this in turn leads to the inference of malice and so defeats the privilege that the defendant relies on in the first part of her alternative plea set out previously. And I have held previously that a defamatory matter that is malicious would always be irrelevant. Accordingly, I find that the second part of the defendant’s plea based on relevance, too, is defeated. Accordingly I hold that the alternative plea fails. All these conclusions dispose of the issue of liability; that is, to say, the defendant is liable for defaming the plaintiff. I, therefore, find for the plaintiff.

[17] What remains to be determined is the issue of damages. The plaintiff claims damages in the amount of N\$100,000.00, plus interest at the rate of 20% per annum from date of judgment to date of final payment. The defendant denies that the plaintiff has suffered damages to that amount. I understand Mr Namandje to concede that it would seem that an amount of N\$100,000.00 may be on the higher side in virtue of the Supreme Court’s recent review of awards of damages recently made for defamation in *Trustco Group International v Shikongo* at 403H-404G. There, the Supreme Court observed that in the assessment of damages it was useful to consider awards of damages recently made for defamation. I have done that. I find that there are these aggravating factors in the present case: (1) There is the defendant’s misplaced and empty belief up to the trial that there is,

indeed, an issue of *Informante* which she says she relied on in her letter (Exh A), which, in turn has numbed her conscience to the extent that she has failed and has refused to do the right thing by apologizing to the plaintiff through, for instance, well-meaning reputable and respectable intermediaries within their community. (2) There is the unproven imputation of adultery to a married woman who is a Deputy Commissioner of NAMPOL who the society and the community expect to have character and self-respect and scruples. (3) I have found previously that there is no credible evidence linking the defendant to the republication of the defamatory matter in the *Informante*, a free newspaper at all material times which is available to any person in Namibia who has eyes with which to see and who has a hand with which to pick a copy from the various *Informante* stands. Nevertheless, it was the defendant's Exh A which was the 'big bang' that created the article in the *Informante*. She must therefore take some blame for being the source of the news item. To say otherwise is to take an unintelligent view of human experience. Be that as it may, having taken counsel from *Trustco Group International v Shikongo* supra and, indeed, having taken into account Mr Namandje's gracious concession and all the circumstances of the case, I consider that an award of N\$30,000.00 is appropriate and reasonable.

[18] Whereupon the following order is made:

1. Judgment is granted against the defendant in the amount of N\$30,000.00.
2. The defendant must pay interest on the N\$30,000.00 at the rate of 20% per annum, calculated from the date of judgment to the date of payment.

3. The defendant must pay costs of the plaintiff on the scale as between party and party.

PARKER J

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