



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 4382/2013

In the matter between:

CLAUDIA MBURA

PLAINTIFF

and

GOTLOB TUPAA KATJIRI

1ST DEFENDANT

KAVETJIUA KAVIKAVI KATJIRI

2ND DEFENDANT

Neutral citation: Mbura v Katjiri (I 4382/2013) [2017] NAHCMD 103 (31 March 2017)

CORAM MASUKU J

Heard: 14, 15, 16, 17 March, 2017,
24 and 31 October 2017.

Delivered: 31 March 2017

FLYNOTE: **LAW OF DELICT** – Defamation – principles applicable thereto – damages awarded – purpose of award of damages and principles applicable thereto – **LAW OF EVIDENCE** – proper approach to fact-finding where the evidence adduced by the parties, is disparate and totally irreconcilable.

SUMMARY: The plaintiff, a businesswoman, sued her step-father and her step-sister for damages in the amount of N\$150 000. She alleged that they defamed her, alleging that she was a witch who uses witchcraft to kill people. It was further alleged by them that she had killed her step-brother at whose funeral the alleged offensive words were allegedly uttered by them in the presence of many mourners.

Held – that the evidence of the plaintiff, together with her witnesses was plausible and generally consistent and believable. Furthermore, the court found and held that the truthfulness of the evidence was borne out by the general probabilities of the case.

Held – that the words attributed to the defendants were *per se* defamatory of the plaintiff and that the said words served to lower her in the estimation right-thinking members of the community, particularly the rural community of Okonjama, where the funeral was held.

Held further – that on the probabilities, the defendants did utter those words, as they were confirmed by independent witnesses, who were unrelated to either of the parties to the dispute.

Held further – that the defendants and their witnesses testified to a bare denial and that their evidence was contrived and inherently unconvincing.

Held – that in determining the damages to be awarded for defamation, the court should consider the character, status, and regard for the plaintiff; the nature and extent of the publication; the nature of the imputation; whether there was a retraction and apology and the form of the defamation i.e. whether oral or in a permanent form.

The court found that the plaintiff had proved on a balance of probability that the defendants uttered the said words, which the court held were defamatory of her. After considering all the relevant factors, attendant to the case, the court awarded the plaintiff damages in the amount of N\$ 70 000 and costs.

ORDER

1. The 1st and 2nd defendants are ordered to pay an amount of N\$ 70 000 as damages for the defamatory utterances they uttered of and concerning the plaintiff.
2. The said defendants are ordered to pay interest on the aforesaid sum at the rate of 20% per annum from the date of judgment to the date of payment.
3. The said defendants are ordered to pay the costs of suit consequent upon the employment of one instructing and one instructed counsel.
4. The amounts referred in para 1 to 3 above, are ordered to be paid by both defendants jointly and severally, the one paying and the other being absolved.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J,;

Introduction

[1] For most human beings, words are at the centre of their existence. In this regard, the word, whether written or spoken, carries with it tremendous power, influence and effect on other people's feelings, actions and sometimes, even reactions. Positively used, the word, whether spoken or written, can bring joy, laughter and serve to build the recipient's self-worth and esteem. On the other hand, when used negatively, it can hurt, cause anguish and serve to affect the esteem of the recipient, causing him or her to endure sleepless nights as the deleterious impact of the words digs in and spews out bile in the recipient's heart.

[2] This case is about words. These words were allegedly uttered by the defendants during the funeral of a common relative to all the protagonists in this case. The plaintiff, in a nutshell, alleges that the defendants accused her of being a witchcraft practitioner, and who uses that 'skill' to kill other people, sending them as it were, irreversibly to the celestial jurisdiction. As a result, the plaintiff claims that the said words were defamatory of her and served to lower her in the estimation of other persons in whose presence they were allegedly uttered by the defendants.

[3] Aggrieved by these alleged words, the plaintiff approached this court seeking a balm from this court of damages in the amount of N\$150 000, as a result of the alleged deleterious consequences these words had on her, reputation, esteem and dignity. Needless to say, the defendants deny liability and in particular, deny having uttered those words at all. To the contrary, they claim that the words they spoke of and concerning the plaintiff actually eulogised her.

The parties

[4] The plaintiff is a Namibian adult business-woman based in Windhoek. The 1st defendant is her step-father. From the evidence, the plaintiff's mother got married to the 1st defendant after her birth. The 2nd defendant, is accordingly the plaintiff's half-sister and the 1st defendant's biological daughter.

[5] The words allegedly spoken by both the defendants of and concerning the plaintiff, appear to have caused serious fissures amongst members of the 1st defendant's family. Testimony to this fact is that witnesses to both sets of protagonists were, for the most part, members of the family, divided between the plaintiff and the defendants. In the circumstances, the idiom, blood is thicker than water, appears to count for very little as the division between the members of this family was almost palpable even during the proceedings.

Common cause facts

[6] Having regard to the entire evidence, it is clear that there are some facts that are common cause or at the least not seriously contested. I enumerate these below:

- (a) the 1st defendant's biological son, Mr. Adolf Katjiri, and half-brother to the plaintiff, passed on in September 2013. He was due to be interred on the weekend of 20 September 2013 in Aminuis Constituency at Okonjama Village, the 1st defendant's home;
- (b) the interment ceremony was preceded by a memorial service;
- (c) the plaintiff assisted financially in the preparation of the interment ceremony and related activities. In this regard, she arranged for the transportation of the deceased's cadaver from Windhoek to Aminius Constituency;
- (d) the plaintiff drove in her vehicle which was accompanying the hearse, together with another vehicle that carried some members of the bereaved family, together with some food for the mourners;
- (e) the defendants were not part of those who went to collect the deceased's cadaver from Windhoek. They remained at home, waiting for the arrival of the vehicles bringing the deceased to his burial place;
- (f) the plaintiff's vehicle arrived first at the homestead, followed by the hearse. This appears to have irked the defendants, who expected the hearse to be in front and the convoy following behind;
- (g) when the vehicles arrived, the mourners, who included the defendants, lined up in front of a tent where the cadaver was to be placed. There were two lines formed, one for women and the other for men, paying their respects to the deceased;
- (h) upon the arrival of the vehicles, the deceased's cadaver was removed from the hearse and placed inside the tent. The plaintiff also went into the tent following the cadaver.

Disputed issues

[7] According to the pre-trial report submitted by the parties and subsequently made an order of court, the only issue for the court's determination was whether or not the defendants defamed the plaintiff in her character. Inevitably, as will be seen from the pleadings, the defendants, deny having uttered the words alleged. In this regard, it would seem that publication of the words is denied.

[8] If the court finds, upon consideration of the evidence led, that the said words or words to the same effect were uttered by the defendants, the court may well be called upon to make a legal conclusion as to whether the words allegedly uttered by the defendants were, in the circumstances, defamatory of the plaintiff. If the finding in that regard is positive, this will naturally lead to the court having to decide on the quantum of damages that will be considered condign.

The words allegedly spoken by the defendants of and concerning the plaintiff

[9] According to the plaintiff, upon arrival at the 1st defendant's home when they came with the deceased's cadaver on 20 September 2013, the defendants uttered words in the OtjiHerero language of and concerning her. These words are quoted below when translated to the language of the court.

[10] The 1st defendant is alleged to have said of and concerning the plaintiff:

'The killer (witch) has made herself known. You are such a bad child. We should make a plan for you.'

He allegedly continued and said, 'You are the one responsible for the death of this child Adolf Katjiri. You are a witch.'

'You took our child our child and killed him and now you bring him with your cars. You are a witch. You bewitch people'.

The utterance of these words was confirmed by the evidence of Ms. Jacqueline Kamberipa, who also testified for the plaintiff.

[11] On the other hand, according to the plaintiff, the following words are attributed to the 2nd defendant of and concerning her (the plaintiff):

‘You are a killer (witch). You can go to court if you want. In any event, with all your witchcraft, who is going to eat the food you brought?’

It must be mentioned that the words attributed to the 2nd defendant were allegedly uttered sometime after the arrival of the cars, which had brought the deceased to his parental home. In this regard, the plaintiff testified that the words were uttered by the 2nd defendant outside the houses where they were sitting next to the fire and in the presence of many people. When she uttered these words, it was the plaintiff’s version that the 2nd defendant was pointing at her. This version is corroborated by the evidence of Ms. Willibartine Kavari.

[12] Mr. Job Mbaha, another witness who testified for the plaintiff testified that the following words were spoken by the 1st defendant next to the fireplace of and concerning the plaintiff:

‘All these people are killers. They practice witchcraft. You killed my son and now you are driving your cars like that in front of my house.’

Another witness, Jim Reeves Zauna testified that he heard the 1st defendant saying, ‘You took our child and killed him. Now you brought him with your cars. You are a witch. You bewitch people.’ It was the latter’s evidence that when an elderly lady tried to intervene and asked the 1st defendant not to make such utterances in the presence of strangers, the 2nd defendant stated in response that, ‘I know them. They stay together. They all practice witchcraft.’

[13] Mr. Zauana also testified that he was very much embarrassed by the 1st defendant's utterances. He then went around the to the fire area about an hour later and requested the men who were sitting around the fire to assist him in off-loading the food from the vehicles that came with the plaintiff. To this request, the people around retorted, 'We are not going to off-load food which has witchcraft.' It was his further evidence that after off-loading the food on his own and putting same in front of the house, he then went away to his village which was not far from Okonjama and never returned to attend the funeral the following day. I will return to other aspects of his evidence later.

Are these words alleged *per se* defamatory of the plaintiff?

[14] As indicated earlier, the defendants deny having uttered those words or even words to the same effect. At this juncture, I find it prudent to deal with the above question without further ceremony. Were the words allegedly uttered by the defendants *per se* defamatory of the plaintiff?

[15] In *Stephanus Unoovene v Lazarus Nangolo*¹ Van Niekerk J adumbrated the applicable principles as follows:

[7] It is trite that the "question whether the defendant's statement is defamatory falls to be determined objectively: the court will construe the statement, draw its own inference about the meaning and effect thereof and then assess whether it tends to lower the plaintiff" in the estimation of right-thinking members of society generally'.

[16] In *Bednarek And Others v Hannam And Another*,² this court expressed itself thus on the above question:

[18] Put differently, the question is whether the court, after reading the statements or considering the behaviour in question would come to the conclusion

¹ *Unoovene v Nangolo* 2008 (2) NR 497 (HC) at para 7

² (I 2615/2013) [2016] NAHCMD 12 (03 February 2016) at para [18] and [19].

that the said statements or conduct were defamatory of the plaintiffs and capable of injuring them in their good names and reputation. In this regard, the court must adopt the test of a reasonable person of sober tastes and sensibilities, neither given to easy excitability nor too docile, for lack of a better epithet, so as to remain calm in circumstances where a reasonable person would react.

[19] To put it in graphic terms, the standard to be employed is that of a reasonable person who is neither as one operating under the energising effect or influence of steroids nor one operating as if under the lulling effect of sedatives.'

[17] Earlier at para [16], in dealing with the words or conduct complained of, the court reasoned as follows in the *Bednarek* matter:

'In this regard, the statement must not only serve to impair the individual's good name but must also be objectively unreasonable or *contra bonos mores*. In this regard, the words complained of must in the opinion of a reasonable person of ordinary intelligence and development have the deleterious effect of subverting or denigrating a person in his or her good name and reputation, regard being had to the esteem in which he or she is held by the community.'

[18] There is no doubt whatsoever, in my mind, that to call a person a witch or a witchcraft practitioner, who uses that 'skill' to kill people is *per se* defamatory and serves to impugn that person's dignity and serves to lower him or her in the estimation of right-thinking members of the society. I say so very cognisant, and I take judicial notice of this, that in many African traditional societies, even in the 21st century, the belief in witchcraft remains as a fossil that continues to rear its ugly head from time to time and normally heralds grave consequences for one 'diagnosed' or 'smelt' out as a witchcraft practitioner.

[19] To be accused of being a witchcraft practitioner, even without a process of divination must, in my opinion, be regarded as defamatory to a reasonable person of sober tastes and sensibilities, particularly because of the likely reaction by others members of the same community to the person accused of same. It is no wonder that the issue of whether the words

allegedly uttered by the defendants were defamatory was not submitted for the court's determination.

[20] If there should be any doubt about this belatedly, I refer to a judgment of this court by Mr. Justice Geier in this very case, dated 30 July 2014, where the learned Judge was, by necessary implication, satisfied that the words were defamatory *per se*. Had he not been so satisfied, he would not have granted the plaintiff the damages he did, notwithstanding that the matter was undefended at that stage. At para [19] of the judgment, the learned Judge accepted that the allegation is defamatory but found that because of the circumstances of the deceased's death from natural causes, and what should be the declining belief in witchcraft in modern Namibia, the accusation must have lost its sting and which fact he found, should reflect in the amount of damages he awarded.

[21] I should also state that the question of publication is not directly challenged by the defendants. In this regard, it is alleged by and on behalf of the plaintiff that the alleged defamatory words were uttered in the presence of many people who had come to participate in the burial of the deceased. I am fortified that the finding of publication in the circumstances will be a given, particularly, if the court does find that the alleged words were uttered by the defendants, which they hotly dispute.

Did the defendants utter the words attributed to them?

[22] This then leads to the only one question that the court has to answer, namely, did the defendants utter these words attributed to them? The proper approach to questions such as the one in issue, where there are disparate and irreconcilable versions before court, was stated with absolute clarity in *SFW Group Ltd v And Another v Martell Et Cie*,³ where Nienaber JA propounded the applicable test in the following terms:

³ 2003 (1) SA 11 (SCA).

'The technique generally employed by our courts in resolving factual disputes of this nature, may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

See also *Ndabeni v Nandu*.⁴

[23] The foregoing exposition and approach will provide a compass that I will follow in trying to cut the Gordian Knot in this matter. I should mention in particular, that the evidence in this case needs careful scrutiny for the reasons mentioned earlier, namely, that most of the witnesses are related to each other. For that reason, biases, both patent, but may be more latent, are likely to be a constant companion and must, for that reason, be acutely identified and where possible, guarded against. In this regard, the court must be astute to ensure that the aversion or affinity of one witness to the one side does not gain sway and ultimately lead the court away from the truth, regard had to the probabilities of the case.

The brief chronicle of the evidence led

The plaintiff's evidence

[24] In support of her case, the plaintiff, in addition to her own evidence, called three witnesses. These witnesses were Mr. Job Mbaha, Mr. Jim Reeves Zauana and Mr. Jamakuna Tjinae. I briefly chronicle the material aspects of the evidence adduced below.

⁴ (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

[25] Mr. Mbaha testified about the incident, which occurred on 21 September 2013 at Okonjama Village. He testified that on that day he drove the vehicle that transported the remains (body) of the deceased to the traditional homestead of the 1st defendant in Okonjama village where the memorial service for the deceased was scheduled to take place. The Plaintiff also drove following his car but when they were about to reach the village, he allowed plaintiffs car to drive in front because he did not know where the exact location of the 1st defendant's homestead was.

[26] They proceeded in a convoy of three cars to wit, the plaintiff's vehicle, another vehicle driven by one Mr. Jim Reeves Zauana and his vehicle carrying the body of the deceased. Upon reaching Okonjama, Mr. Zauana was driving a little slower than them and as a result he arrived about ten (10) minutes or so later. Mr Mbaha was later informed that this was the homestead of the first defendant.

[27] When they arrived, so the evidence goes, he saw a commotion. He regarded this as normal because it happens that when relatives welcome the remains of their loved one people react in unusual ways. He went off his car and went to the fireplace where men normally gather at such events. While at the fireplace he heard the first defendant saying: "*Ovandu avehe mba ovazepe*" translated to mean '*All these people are killers they practice witchcraft.*' and again first defendant altered the words "Mwazepa omwatje wandje nambano mamuhingi ovihauto momuvanda nao, translated to mean "*You killed my child and now you are driving your cars like that in front of my house.*" His evidence is that he is not from that family and did not know the people there from that family. He simply wanted to assist the plaintiff who had lost her brother.

[28] The second witness called on behalf of plaintiff was Mr. Zauana. It was his evidence that he personally knows the plaintiff and decided to assist her when she had lost her half-brother. He stated that he arrived at the 1st defendant's homestead on the date of the memorial service. His vehicle transported the food and luggage in the convoy, which escorted the remains

of the deceased. He arrived at least 10 minutes later because at some point he drove slower than the other two vehicles.

[29] Upon entering the precincts of the homestead, he heard the 1st defendant shouting at them for entering his yard the way they did. He shouted words namely, "*Mwatoora omwatje wetu mwakazepa nambano mwatoora novihauto*" translated to mean, "You took our child and killed him now you brought him with your cars." And again "*Owene ovarove munomiti*," translated, 'You are a witch. You bewitch people.' According to Mr. Zauana, an elderly person tried to intervene and asked the 1st defendant not to insult the arriving party, especially those who were strangers. The 1st defendant then responded by saying "*Mbivei vekara pamwe venomiti*" translated, 'I know them they stay together, they all practice witchcraft.'

[30] After all these utterances, Mr. Zauana testified that he felt embarrassed and went to the fire where men gather at such events and returned after an hour and he thereafter requested those present to help him remove the food from the vehicle. They responded by saying: "*Katunokuherura ovikuria viomiti*" translated, 'We are not going to off-load food which has witchcraft.' He then off-loaded everything from the vehicle and put same in front of the house. He testified that he then left for his village which is nearby. He did not even return for the funeral the following day on account of the treatment meted to them at the 1st defendant's home.

[31] The third witness was Mr. Jamanuka Tjinae. He stated that on Saturday 21 September 2013 and at the funeral gathering of the plaintiff's half-brother, a number of vehicles arrived. He did not recall the exact number of vehicles that came. He did, however, recall that the plaintiff's vehicle was among these vehicles. When the vehicles arrived, the plaintiff's younger sister, the 2nd defendant), known to him as Kavikavi, shouted; '*Omuzepe ejengo weja!*' which is translated, 'There she is, the killer has arrived.'

[32] It was his evidence that the 2nd defendant shouted these words out loudly for everybody within earshot to hear them. He personally made an attempt to stop the 2nd defendant from making such statements, but with no success as she continued to make such statements unabated. As is customary for women during mourning, the plaintiff got out of the vehicle and went inside the house. As a result of the statements that had been made about her, the plaintiff left the entire homestead and went to a neighbouring homestead due to the gravity of the situation. He was then later that evening to go fetch the plaintiff. Plaintiff returned with him to the gathering place.

[33] On Sunday 22 September and after the plaintiff had left the homestead, a meeting was held at Okonjama by the members of the 1st defendant's family. The purpose of this meeting was to deal with the statements regarding the plaintiff that had been made by the 2nd defendant. At this meeting, the 2nd defendant continued to make statements about the Plaintiff and said: - "Oove nguwaroo omuatje ngwi norniti vioje," translated, 'It is you who has killed this child (the deceased) with your witchcraft.' The meeting yielded no positive result because the 2nd defendant continued to make injurious remarks about the plaintiff.

The defendants' evidence

[34] The defendants paraded five witnesses in support of their case, themselves included. The 1st defendant testified that he is a pensioner and a resident of Okonjama Village; during the morning hours of Saturday, 21 September 2013, he sat with other men at his homestead to mourn the death of son, Adolf Katjiri who had died earlier during the week of 16 September 2013. As is the tradition, women were seated inside as well as outside and also around the house, separate from the men. At around 11H00, the remains of the deceased arrived from Windhoek accompanied by the plaintiff and a few other relatives.

[35] Upon arrival of the deceased's cadaver, the people in attendance at the homestead stood at attention when the remains were carried inside the

house. Some women kept vigil over the remains inside the house, while others kept themselves busy with chores like looking outside the house. It was his evidence that he was very sad and did not say anything, and accompanied other men. He denied exchanging any words with the plaintiff. He also denied that he made any defamatory remarks about the plaintiff. He further stated that he did not have any contact with the plaintiff nor did he sit in any grouping of people of which the plaintiff was part.

[36] Another witness, Ms. Kavetjiua Katjiri, the 2nd defendant. She is the daughter of the first defendant as earlier stated. It was her evidence that on Saturday 21 September 2013, she was seated with her father and other men at a distance of approximately fifty (50) metres from her father's house at Okonjama Village. They were seated under the shade of trees mourning the death of her late brother. At around 11h00, two (2) vehicles arrived at the homestead, being a Toyota RAV 4 which drove in front and the other being an Isuzu light pick-up vehicle carrying the remains of the deceased.

[37] As the second vehicle approached the homestead, she further testified, some men including herself and the 1st defendant approached the house in order to welcome or receive the deceased's remains. She testified that she went to stand near the entrance of the house and saw the plaintiff alighting from her vehicle and walking straight into the house. She was crying. According to her, the 1st defendant did not say anything apart from mumbling through his tears while he stood near the house together with other men. They spent most of the time sitting with the men including his father until the early evening when the memorial service commenced.

[38] The 2nd defendant further testified that during the memorial service people delivered messages of condolence to the family and to 1st defendant in particular as the head of the bereaved family. She could not recall whether the plaintiff was inside or outside the tent-house during the memorial service. After the memorial service, some people dispersed while others sat around the fire. The 1st defendant went to sleep.

[39] It was her further evidence that on Sunday 22 September 2013, the funeral service took place. Towards the end of the funeral service at the homestead, her father, as the head of the bereaved family, closed off the funeral service by amongst others, making announcements as to how the procession to the cemetery would be conducted and he also used the occasion to say words of praise and appreciation about the plaintiff, saying 'Claudia has done a wonderful job by erecting a tombstone at her late brother's grave site'. According to the 2nd defendant, that was the only time during the memorial and funeral services when she heard her father mentioning the plaintiff's name or saying anything in reference to the plaintiff.

[40] Ms. Crethe Katjiri, another daughter to the 1st defendant, also adduced evidence. She stated that early morning on Saturday 21 September 2013, they travelled with the plaintiff and other people with the remains of the late Adolf Katjiri from Windhoek to Okonjama village. They travelled in three motor vehicles, which were an Isuzu bakkie, a Toyota RAV 4 SUV and a Toyota bakkie. The vehicle, which carried the deceased's remains, was always at the front, followed by the bakkie in which she travelled and the Toyota RAV 4 in which the plaintiff travelled. At or around 8h00, she further testified, the plaintiff telephoned the family at Okonjama village to inform them that the convoy was at Witvlei so that the family at home would know more or less what time to expect their arrival at Okonjama.

[41] At Omitiomire village, which was just before Okonjama on their way, the Toyota RAV 4 overtook the Isuzu van, which had been driving in front all along. The witness then asked an uncle why a vehicle not carrying the remains would be driving in front but the uncle did not give a clear answer. The Toyota Rav 4 drove in front and was driven in an "O" form in front of the house on arrival at the 1st defendant's homestead. It was then parked near a house by the fireplace. The Isuzu bakkie which carried the remains, stopped right in front of the tent house and about 10 meters from the entry thereof.

[42] The mourners who had gathered, rushed to welcome the deceased's remains when they saw the motor vehicles entered the yard. They had quickly formed two rows, extending from and on either side of the doorway of the

tent-house to almost where the Isuzu bakkie came to a stop. She testified that she then walked into the tent-house and found the plaintiff as well as one Ms. Jacqueline Kamberipa with other women inside.

[43] Crucially, she testified that she did not recall seeing her father or the 2nd defendant inside the tent house. She also did not hear them saying anything to the plaintiff. On the date of the funeral, it was her evidence that she recalled the 1st defendant praising the plaintiff for her sterling work in erecting a tombstone at the gravesite of her half-brother the late Gershon Katjiri. That was the extent of the important aspects of the evidence adduced.

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Analysis of the evidence

[44] I now analyse the evidence and will in the process and to the best of my ability, apply the principles carefully set out in the *SFW Group Ltd* case (*supra*). In the first place, I must mention that the plaintiff, except a few minor issues that were pointed out to her as being inaccurate, regarding the dates of the funeral and other insignificant issues, she adduced her evidence matter-of-factly and was largely unruffled in cross-examination like a Bishop presiding over a tea party. She was emphatic that the 1st defendant approached her aggressively and accused her of the words quoted above. She emphatically rejected the version put to her that the 1st defendant actually eulogised her.

[45] What is important, in my view, is that it was put to her in cross-examination that after the interment of the deceased, a meeting was called in order to deal with the alleged defamatory statements that the defendants had uttered of and concerning her. Her evidence was that she did not know of this meeting as she had by that time taken her leave. This is important and I will show its significance when I consider the evidence of Mr. Jamanuka Tjinae, who presided over the burial ceremony. It is important, as I have said, that this is an issue that was raised for the first time in cross-examination on behalf the defendants themselves.

[46] The evidence that I also consider important in this matter is that of Mr. Job Mbaha. He had been asked by the plaintiff to drive one of the vehicles that formed the convoy carrying the deceased's cadaver. He was, for that reason, an impartial person, who was not related to the parties by blood or marriage. He testified that when they arrived and he parked the vehicle he was driving, there was commotion, which to him as a Herero, was very uncommon in funerals, where the proceedings usually are solemn and are conducted with peace, quiet and dignity.

[47] So engraved in his mind were the 1st defendant's words that he testified that regarded the 1st defendant as an a venerable elder and his image became indelible as he did not expect a person of the 1st defendant's age and stature to behave in that unbecoming manner. He confirmed that the 1st defendant uttered the words attributed to him and it was his evidence that he felt that the unsavoury words were directed at him as well for the reason that he drove the vehicle that brought the deceased's remains. As a result of this, Mr. Mbaha testified, he decided to leave the funeral as he had been hurt by the accusations levelled at the plaintiff, and him included, as stated.

[48] It further emerged in evidence that not only that, Mr. Mbaha left the ceremony altogether and did not even wait for the customary gratitude that is normally paid by the family to the person who was driving the vehicle carrying the deceased. In this regard, it was stated that there is a ceremony conducted of even cleansing the hearse that is performed by the bereaved family. This could not be done on the vehicle, clearly pointing inexorably in the direction that something very serious happened that persuaded Mr. Mbaha to leave. His evidence is clearly that it was the defamatory statements uttered at the funeral and I accordingly find that the defendants did utter the words attributed to them and I hold so for a fact.

[49] I am of the considered view that the evidence of Mr. Zauana, who was also not related to the family but had made common cause as it were with the plaintiff during the loss of her brother, also falls in the same category as that of Mr. Mbaha. I find that this witness had no reason for concocting the story

about the defendants whom he did not know and had not previously met. I also find that his evidence must, for that reason be accepted as truthful and accurately reflective of the events of the day in question. I also hold this for a fact.

[50] I also place into focus, the evidence of Mr. Jamanuka Tjinae. He struck me, during his evidence as a witness of truth and was unwavering in his evidence. He stuck to his version like a postage stamp to an envelope. He is related to the 1st defendant. According to the latter, in his evidence, Mr. Tjinae is his cousin and was given the honour to preside over the entire burial ceremony. The court was informed and has to accept that in the Herero culture, this is a position of honour. Mr. Tjinae, crucially confirmed what was put by defence counsel to the plaintiff that a meeting was called after the funeral to address the allegations allegedly made by the 1st defendant to the plaintiff. He testified that he heard these words also. Gallant efforts to discredit his evidence in this regard failed dismally.

[51] In answer to questions posed by the court, Mr. Tjinae testified that during the meeting, they were intent on getting to the bottom of the allegations. He stated that as black people, some of them believe in witch doctors and for that reason, they wanted to find out from the 1st defendant whether he had consulted soothsayers before levelling the serious allegations of witchcraft and killing at the plaintiff. He established that the 1st defendant had not done so. This led the meeting, he testified, to conclude that the defendants were in the wrong in making those damning allegations devoid of any 'professional' opinion in that regard. It was his evidence that he advised the 1st defendant to ask for forgiveness and further stated that no homes are perfect as there are family squabbles in most.

[52] Mr. Tjinae also testified that he found it ill-fitting for the plaintiff to attend that meeting as it would have hurt her more to hear further injurious statements regarding that issue. His younger brother, during the meeting, he further testified, also called on the defendants to apologise as the plaintiff

could not have killed the deceased and then contributed N\$20 000 towards his funeral.

[53] I am of the view that this evidence is worthy of belief and the said witness was left unhinged even after cross-examination. I mention also that his version ties in with the cross-examination of the plaintiff by Mr. Kandara about the meeting to deal with the allegations of defamation. I am of the view that this shows that there could not have been smoke without any fire. The reason that the plaintiff, knew nothing about the meeting, in my view lends credence to the fact that the said injurious statements were made. This was the evidence of Mr. Tjinae as aforesaid.

[54] Furthermore, one should consider that Mr. Tjinae is a blood relative of the 1st defendant. It would take quite a lot of courage for him to come to court, throw dust into the court's eyes and concoct evidence against his cousin in favour of a person to whom strictly speaking, he is unrelated by birth save the chance of the 1st defendant marrying the plaintiff's mother. I am fortified, in the circumstances, to rely on his evidence. I do so because it also ties in neatly with the general probabilities and objective facts testified to by other witnesses, not least, the question posed to the plaintiff by the defendants' counsel as recounted earlier.

[55] It is also not insignificant to note, as I am called upon to do, that the witnesses who testified on behalf of the defendant were for the most part his biological children, including the 2nd defendant of course. Their evidence, as will be mentioned later, was fashioned carefully to exculpating the defendants and the tailoring of their evidence was clear for the discerning to see.

[56] Coming to the balance of probabilities, which in my view favour the plaintiff's version, two things became clear from the evidence. I took the trouble to ask the 1st defendant how he felt about the deceased's death and he expressed gratitude to the court for having been afforded that opportunity to ventilate his feelings. It was his evidence that the death of the late Adolf

Katjiri was very painful to him as the latter was the third son he had lost up to that time. 'I was touched by this loss' he retorted.

[57] In my view, it is clear that it was out of the deep pain of the loss that he could have made those utterances. In this regard, and this is the second issue, it came out in evidence that there was some bad blood between the plaintiff and the 1st defendant. According to the former, this related to the winding up of the estate of the late Gershon Katjiri, with whom the former was in an arranged sham marriage of convenience. It was her evidence that she was not allowed by the 1st defendant to participate in the distribution of his estate.

[58] Furthermore, it came out in cross-examination that the 1st defendant was not amused at the manner in which the vehicles were being driven and particularly that the hearse was not in front as the custom seems to be. This the plaintiff explained but it does not appear that the defendants asked nor was it explained to them why the plaintiff's vehicle arrived at the homestead first. In my view, this goes to show that there was a motive at that very point why the defendants could hurl the insults that they did. The probabilities in this regard, accord with the plaintiff's case in my considered view.

[59] I also note that even from the defendants' evidence, particularly that of the 2nd defendant, as recorded above, the plaintiff was also crying when she went into the house after the deceased's body had been removed from the vehicle. In the circumstances, her behaviour of grief and sadness was totally at odds with a person who had achieved the mission of killing the deceased as alleged. Why would she cry? It was not suggested nor even put to her that she was happy with the death of the deceased and that if she did shed any tears, they were nothing but crocodile tears. This, in my view lends credence to the plaintiff's case and correspondingly weakens, if not totally destroys the substratum of the defendants' accusations.

[60] It also bears mentioning that the story of the 1st defendant heaping praises on the plaintiff for erecting the tombstone of the late Gershon Katjiri rings hollow and points to the eulogy alleged by some of the 1st defendant's

witnesses as having been fabricated by the defendants. I say so for the reason that it is clear that the 1st defendant was unhappy with the plaintiff as exemplified by him being agitated by the sequence in which the vehicles arrived and with how the plaintiff's vehicle in particular, was being driven. How he could, in those circumstances, thank the plaintiff for erecting a tombstone two years earlier, and 'forget' to thank her for her latest acts of magnanimity, in catering for Adolf's funeral, is simply mind-blowing and unbelievable, inexorably pointing to the defendants' evidence in this regard being contrived and false. I find and hold this for a fact.

[61] There may have been some contradictions in the plaintiff's case but I am of the considered view that these were minor and in any event, not centrally connected to the key issues in dispute in this case. In this regard, I should mention the contradiction between the version put to the defendants and their witnesses that there was no unveiling of the tombstone of the late Gershon Katjiri yet the plaintiff in her evidence admitted this. I do not find this issue as having been central to the main issue and it accordingly carries trifling weight in my view.

[62] I come to the view that the evidence of the defendants together with their witnesses was nothing but a bare denial and the evidence appears to have been contrived. Some of the witnesses appeared to remember everything else said, particularly the good said about the plaintiff by the 1st defendant except the ugly he said, as I have held to be the case. Some did not outright deny this but stated that they did not remember the defendants making the said utterances. This nails the true colours of the defendants' and their witnesses to the mast.

[63] I should, in this connection also mention some strange and unbecoming behaviour on the part of the 1st defendant that I noticed which did not sit well with court. It is this - during the first three days of the trial, the 1st defendant was formally dressed and very smartly if I may add. He was the embodiment of calmness, class and poise personified.

[64] On the day he was to adduce his evidence, however, he inexplicably came dressed as a preacher with a collar and all the pastoral paraphernalia. That was not all. He proceeded, when I admonished him in terms of the provisions of Rule 93 (4), to inform the court, totally unsolicited, that he was a Man of God and would not lie. I was accordingly very wary of what the 1st defendant was trying to do and the impression he was trying to create in the mind of the court, namely that he was a man of the cloth and could not be expected or be accused of making the utterances attributed to him.

[65] I only took, into account, as I am by law expected to, what the evidence objectively considered suggested, expressly barring the inducing effect of any colourants and additives to the evidence that the 1st defendant's behaviour utterances attempted to throw into the court's mind. His attempt was shot down as the court saw and smelt its intended effect from afar off.

[66] In view of the foregoing, I am of the view that the plaintiff has, on a balance of probabilities, shown that the defendants did, on the occasion alleged, utter words to the effect that she was a witch and that she kills people using the instrumentality of witchcraft, including the late Adof Katjiri. I accordingly find for the plaintiff in this regard. Both defendants are accordingly held to be jointly and severally liable to the plaintiff for the defamatory statements they uttered.

Quantum

[67] It now remains for me to determine the amount in damages due to the plaintiff as a result of the finding that the defendants uttered the defamatory words attributed to them. In this connection, I must preface this section of the judgment by stating that like with the imposition of a sentence in criminal proceedings, the determination of the award to be granted in favour of a successful plaintiff in a defamation suit is not an exact science, which would result in the amount granted being precise to the dollar and cent. This speaks to the fact that the determination of an appropriate award is by no means a walk in the park. It is a difficult, treacherous and engrossing exercise.

[68] In determining the amount, I will call in aid the guidelines that the authorities suggest should assist the court in coming to an appropriate award. The learned author, Jonathan Burchell,⁵ states the following useful principles that should guide the court as it navigates towards determining the appropriate amount in any case before it:

‘An award of damages for defamation serves two broad purposes; vindication of the plaintiff’s reputation and providing him or her with a *solatium* (or solace) for wounded feelings. The objective of the award of damages to the plaintiff is to compensate for the loss of reputation’.

[69] In dealing with the general factors that the court may take into account in making its determination of an appropriate award, the learned author says:

‘A number of general factors may affect the assessment of damages for defamation; the character, status and regard of the plaintiff; the nature and extent of the publication; the nature of the imputation; the probable consequences of the defamation; partial justification (e.g. publication of truth which is not for the public benefit); . . .; whether there has been a retraction or apology; and whether the defamation was oral or in permanent form. In addition to these and other relevant factors, the court is entitled to take into account of comparable awards in other defamation cases and the declining value of money.’

[70] In the instant case, it is in evidence that the plaintiff is a businesswoman of note and who is well regarded in business and political circles in Namibia. It would appear that she is generally held in high regard and there was nothing said or suggested by the defendant that would detract from this position. A pointer in this direction, is the fact that there were total strangers who came to her assistance and who sympathised with her loss, namely, Messrs. Mbaha and Zauana.

[71] Regarding the nature and extent of the publication, the court cannot lose sight of the fact that in a traditional African setting, away from the affluent

⁵ Principles of Delict Juta & Co. Ltd, 1993 at p.188-189.

suburbs of Ludwigsdorp, Olympia and Auasblick in Windhoek, where enlightened professionals like lawyers, doctors, accountants and engineers live, in rural areas however, such as Okonjama village, where the offensive utterances took place, to label a person a witch, and particularly one who uses witchcraft to kill people, is a very serious matter. This is so because in those areas, the belief in witchcraft is by and large deeply embedded such these accusations are believed and will often result in other people ostracising the person so accused and looking at him or her with askance.

[72] Whatever the court's belief and attitude towards the issue of witchcraft may be, I am of the considered view that the important consideration should rather be how the recipient feels and more importantly, how the people around the person accused, particularly those who heard the utterances, received and perceived the allegations of witchcraft.

[73] I may mention that the issue of the belief in witchcraft is not one totally unknown and therefore not unrecognised by the courts over the years. In criminal cases, for instance, the belief in witchcraft was taken into account,⁶ as an extenuating circumstance in a murder case. In other cases, it was regarded as an aggravating circumstance, especially where the victim was killed in order to obtain some body parts for medicine (*muti*).⁷ A full discussion of this subject is done by the learned author D. P. Van der Merwe.⁸

[74] In this case, I am certain that the effect of the allegations on the plaintiff's reputation were indeed grave, as exemplified by the attempts by Mr. Tjinae to throw the olive branch to no avail. It is clear that the offensive utterances were made in the presence of many people at a funeral and was, according to Mr. Tjinae, repeated during the meeting where an effort was being made to discuss the issue with a view to obtaining a favourable resolution to the imbroglio.

⁶ *R v Biyana* 1983 EDL 310.

⁷ *S v Mavhungu* 1981 (1) SA 56 (A); *Maphutu Mogaramedi v The State* Case No. A 165/2013 (Gauteng Province, Pretoria).

⁸ Sentencing, Juta & Co, 1996 at p. 6-21 onwards.

[75] The manner in which the utterances were perceived by Mr. Mbaha and Mr. Zauana, is indicative of how badly bruised the plaintiff would have felt. Both Messrs. Mbaha and Zauana decided to leave the ceremony and take no further part. In this regard, sight should also not be lost of the notorious fact that the plaintiff played a significant role in funding the deceased's funeral and this was stated in evidence. She organised the vehicles to ferry the deceased's remains and organised another vehicle to carry the relatives and also contributed, according to the evidence, an amount in the region of N\$20 000. This was not controverted.

[76] Instead of the defendants, the 1st defendant, in particular, thanking the defendant for her generosity, he decided to offer her the ultimate insult of not only being a witch, but that she killed the deceased using witchcraft. There were even insinuations that the food she had brought for the mourners to eat should not be used because it was 'full of witchcraft', as it were. This is the ultimate insult in my view that should have a bearing on the quantum.

[77] The context in which the statements were made, is in my view not unimportant. I say so because the 1st defendant's son had died and his remains were brought to his home. On arrival at the homestead with the plaintiff, the defendant points to the plaintiff as a witch and the one responsible for his son's death. This must have been hurtful in the sense that the people who were present and heard the words would have seen the works of the plaintiff of witchcraft as alleged laid bare for them to see, in all likelihood convincing even the unbelieving to think twice and say to themselves, "Well, the deceased is dead and is before us. Why would the defendants accuse the plaintiff of having done this if this was indeed not so?" This context, in my view, aggravates the plaintiff's injury and would have done enormous harm to her esteem and reputation in the minds of the rural folk who were in attendance in particular.

[78] Another factor that I consider not insignificant is that there was no apology offered to the plaintiff by the defendants. This issue must be considered against the backdrop of the attempts by Mr. Tjinae to ascertain the

circumstances surrounding the allegations. Once he ascertained that the defendants had no 'professionally diagnosed' basis for making the serious allegations, he suggested that they should apologise, which they blatantly refused to do, but continued making further allegations reinforcing the earlier allegations. I view their behaviour in this regard in a very serious light. In this connection, it must be mentioned that the defendants had no defence, e.g. a partial justification. Theirs was just a bald denial of the allegations, which has been proved to be false on a balance of probabilities.

[79] Counting in favour of the defendants is that the statements made were not in a permanent form, like in a newspaper or other written document. The effects of these words have, for that reason, a shorter lifespan than written words and accordingly, the recurrence of the anguish, is likely to be minimised and not renewed every time they read the article or document, as the case may be.

[80] I now turn to consider comparable awards issued by the courts in cases of defamation. I will refer to these below. What I must state upfront, is that among the cases I have managed place my hands on, there is no case of defamation regarding the issue of witchcraft and there is, in that context, no useful guidance on this issue. I proceed presently, to do a short survey of the relevant cases of damages granted by our courts for defamation in the last decade:

(a) *Amunyela v Shaanika*⁹

In this matter, the plaintiff, a litigant, was defamed by the defendant, a magistrate in open court. The defendant made various demeaning allegations about the plaintiff, *inter alia*, that he was poor, stupid and had having sexual relations with a named individual. The plaintiff was therefore suspected of having contracted a certain disease by the magistrate. The court, after

⁹ 2007 (1) NR 146 (HC).

assessing the evidence, came to the view that the words were uttered in the presence of only a few persons and that the defendant had abused her position as a judicial officer. An award of N\$35 000 was held by the court to be condign.

(b) *Unoovene v Nangolo*¹⁰

In this case, the defendant uttered statements at two separate political gatherings to the effect that the plaintiff's business was funded by stolen money and that if he were to be asked where the money came from, he would be unable to proffer an answer. The court, after taking the circumstances into account and previous awards, came to the conclusion that an award in the amount of N\$60 000 was appropriate.

(c) *Nghiwete v Nekundi*¹¹

In this case, the plaintiff, a Permanent Secretary in the Ministry of Foreign Affairs attended a dinner on his Minister's behalf at the invitation of the German Ambassador. The defendant, a prominent member of the SWAPO Youth League, attacked the plaintiff, at a press conference, alleging that the plaintiff had brought the country into disrepute by associating himself with certain German diplomats and with members of Namibia's opposition parties, which was untrue. The latter did not take the time to verify the correctness and accuracy of the information he disseminated. The court, after considering the facts of the matter, awarded the plaintiff an amount of N\$ 250 000 and further mulcted the defendant with punitive costs.

(d) *Universal Church of the Kingdom of God (Incorporated Association Not for Gain) v Namzim Newspaper (Pty) Ltd t/a The Southern Times*¹²

In this case, the defendant, a newspaper, published an article entitled, 'State Bans Satanic Sect'. In another article, in the same newspaper, the readers

¹⁰ 2008 (2) NR 497 (HC).

¹¹ 2009 (2) NR 759 (HC).

¹² 2009 (1) NR 65 (HC).

were informed that the Zambian chapter of the same church had been banned. The court was of the view that a reasonable reader would conclude that the latter article in question had a bearing on the plaintiff specifically. The court thus awarded the plaintiff an amount of N\$60 000 in damages.

(e) *Trustco Group International Ltd and Others v Shikongo*¹³

In this matter, the appellant Company, the proprietors of a newspaper, were sued for an article published by their newspaper, to the effect that the Mayor of Windhoek had been involved in an underhand land deal, which was described in the article as a 'Broederbond cartel'. The Supreme Court on appeal, awarded the plaintiff an amount of N\$100 000, overturning an award of N\$175 000 granted by this court. The Supreme Court was of the considered view that the award by this court was extremely high in view of all the circumstances attendant to the matter.

(f) *Nghimtina v Trustco Group International Ltd*¹⁴

In this matter, the plaintiff sued the defendant for an article published by its newspaper, captioned, 'Nghimtina Hijacks Rural Power Plan to Pamper In - Laws'. This court, after considering comparable awards and the circumstances of the case, awarded damages in the amount of N\$60 000.

[81] Having regard to all the foregoing factors, particularly the import and sting of the allegations of witchcraft, coupled with killing, which are two different allegations, each with a sting of its own, I am of the view that the message must be sent home that wild, hurtful, demeaning and unsubstantiated allegations of this kind cannot be allowed or tolerated at this time and age. As a deterrent, an award with a sting is in my view called for.

[82] In determining the award, I will not, however, close my eyes to the fact that the protagonists are related. There may well be family disputes that

¹³ (SA 8/2009) [2010] NASC 6 (7 July 2010).

¹⁴ (I 2976/2010) [2014] NAHCMD 11 (23 January 2014).

motivated this attack as alluded to in the judgment. It would probably assist, in the circumstances, and one can do no more than hope, to issue an award that might serve to heal and bridge the relations rather polarise the protagonists even further. In this regard, an award that has a conciliatory note, without justifying the putrid words uttered, is in my view, called for.

[83] As I do so, I will not act in oblivion of the remarks that fell from the lips of Sachs J in *Dikoko v Mokhatla*¹⁵, which to some extent, express the difficulty that faces the court in such cases as stated at the opening of this phase of the judgment. The learned Judge said the following:

'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.

There is something conceptually incongruous in attempting to establish a proportionate relationship between the vindication of 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.'

[84] Taking all the foregoing into account, and in particular, the general trend in awards by our courts in cases of defamation, as considered above, I am of the considered view that an award that will take into account all the foregoing important imperatives is the following:

¹⁵ 2006 (6) SA 235 (CC) 110 at para 109 and 110.

1. The 1st and 2nd defendants are ordered to pay an amount of N\$ 70 000 as damages for the defamatory utterances they uttered of and concerning the plaintiff.
2. The said defendants are ordered to pay interest on the aforesaid sum at the rate of 20% per annum from the date of judgment to the date of payment.
3. The said defendants are ordered to pay the costs of suit consequent upon the employment of one instructing and one instructed counsel.
4. The amounts referred to in para 1 to 3 above, are ordered to be paid by both defendants, jointly and severally, the one paying and the other being absolved.
5. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge