

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2016/02863

In the matter between:

PIO MARAPI TEEK

1ST PLAINTIFF

PIA MBEMURUKIRA TEEK

2ND PLAINTIFF

and

JOHN WALTERS

1ST DEFENDANT

EILEEN RAKOW

2ND DEFENDANT

Neutral Citation: *Teek v Walters* (HC-MD-CIV-ACT-DEL-2016/02863) [2018]
NAHCMD 376 (23 November 2018)

CORAM: PRINSLOO J

Heard: 3 - 4 April 2018 and 9 September 2018

Delivered: 23 November 2018

Flynote: Defamation - What constitutes – Plaintiffs averring that statement made in plea to the plaintiffs claim by the defendants are defamatory – Defendants raising defence of privilege – Plea filed during course of judicial proceedings – Court to determine whether plea filed is defamatory in nature or not.

Summary: The plaintiffs instituted action against the defendants claiming payment in the amount of N\$ 6 000 000 (six million Namibian Dollars) for an alleged defamatory statement made in a plea on behalf of the first defendant under a different case in I3265/2013.

The plaintiffs allege that the statement was made with malice and with the intention to defame the plaintiffs' good character and reputation. The plaintiffs further allege that the above statement carries an additional connotation that the plaintiffs are "corrupt and dishonest; crooks, criminals, not law abiding citizens and without moral fibre". It is further the plaintiffs stance that the words "true beneficiary" imputes the innuendo and that it should be understood to mean that the plaintiffs fraudulently conspired and colluded to conceal or hide the real identity of the true beneficiary or owner of the shareholding in Old Man Fishing CC from the Ministry of Fisheries and Marine Resources, the public or other persons.

The defendants admitted in their plea that the statement in issue indeed appears in the first defendant's plea in case I3265/2013, however the first defendant denies that the statement is defamatory or it was made wrongfully or maliciously. The first defendant pleads that the statement was made in response to the allegations made in the particulars of claim filed in case I3265/2013 that the second plaintiff is the legitimate shareholder member in Old Man Fishing CC and that she had suffered damages as a result of the alleged conduct of the first defendant.

Held – It is trite law that defamation is defined as the wrongful and intentional publication of defamatory words or conduct that refers to a plaintiff.

Held – Once a plaintiff establishes that a defendant has published a defamatory statement concerning himself/herself, it is presumed that this publication is both wrongful and intentional. A defendant wishing to avoid liability for defamation must raise a defence which rebuts either the requirement of wrongfulness or intention.

Held further – that there is no link between the plea filed by the defendants in case I 3265/2013 and the newspaper article published 9 years prior. No reasonable person reading the statement would understand the plaintiffs to be “corrupt and dishonest; crooks, criminals, not law abiding citizens and without moral fibre” or that they fraudulently conspired and colluded to conceal or hide the real identity of the true beneficiary or owner of the shareholding in Old Man Fishing CC.

Held further that – During the trial in this matter, there was no evidence presented to proof that any readers of the statement complained of understood the words in that sense.

Held further that –the statement alleged to be defamatory was not one communicated to various people but directly to the parties involved in court proceedings via a plea to the particulars of claim as prescribed by the rules of this court. In the result, this court can find no evidence that the statement was made with malice and with the intention to defame the plaintiffs’ good character and reputation.

Held further – Even if this court agrees with the plaintiffs that the statement is defamatory, then the statement published by the defendants in the course of judicial proceedings is a privileged occasion.

Held further that – In light of the nature wherein the statement was made, it cannot be that the said statement was defamatory but an answer to the claim only. Further, the plaintiffs adduced no evidence indicating that the statement caused a violation of the plaintiff’s rights or interests neither infringement of any kind.

ORDER

1. Plaintiffs' action is dismissed in respect of first and second defendant with costs.
 2. Cost to include the costs of one instructed and one instructing counsel.
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JUDGMENT

PRINSLOO J:

Introduction

[1] This is an action for damages for defamation of character. The first plaintiff is a retired judge of the Court of Appeal of Namibia and the second plaintiff is his daughter. The plaintiffs instituted action against the defendants claiming payment in the amount of N\$ 6 000 000 (six million Namibian Dollars) for an alleged defamatory statement made in a plea on behalf of the first defendant under a different case number I3265/2013.

[2] The defendants are sued in their official capacity, with the first defendant sued in his capacity as the Ombudsman and the second defendant in her capacity as the first defendant's legal representative.

[3] The plaintiffs acted in person in this matter and the defendants are represented by Ms. Bassingthwaighe.

[4] The main bone of contention raised by the plaintiffs is the following statement made by the first defendant and prepared by the second defendant as a

defence raised in respect of the plaintiffs claim in case I3265/2013, which reads as follows:

'The second defendant denies that the plaintiff was the true beneficiary of the members' interest in Old Man Fishing and puts the plaintiff to the proof thereof. In amplification of the aforesaid denial, the second defendant pleads that according to information obtained from the late Benjamin Kheibeb during the investigation of a complaint from the ninth defendant, the true beneficiary of the members' interest held by the plaintiff was Pio Teek as the plaintiff was merely holding the members' interest on his behalf at the time'

[5] With the above, the plaintiffs in the present matter allege that the statement was made with malice and with the intention to defame the plaintiffs' good character and reputation. The plaintiffs further allege that the above statement carries an additional connotation that the plaintiffs are "corrupt and dishonest; crooks, criminals, not law abiding citizens and without moral fibre". It is further the plaintiffs stance that the words "true beneficiary" imputes the innuendo and that it should be understood to mean that the plaintiffs fraudulently conspired and colluded to conceal or hide the real identity of the true beneficiary or owner of the shareholding in Old Man Fishing CC from the Ministry of Fisheries and Marine Resources, the public or other persons.

[6] For shock, pain and suffering, the plaintiffs claim the amount of N\$ 1 000 000 (one million Namibian Dollars) and N\$ 500 000 (five hundred thousand Namibian Dollars) respectively, N\$ 1, 5 000 000 (one million and five hundred thousand Namibian Dollars) and N\$ 500 000 (five hundred thousand Namibian Dollars) respectively for injury to reputation and N\$ 1, 5 000 000 (one million and five hundred thousand Namibian Dollars) and N\$ 1 000 000 (one million Namibian Dollars) respectively for *contumelia*.

[7] The defendants admitted in their plea that the statement in issue indeed appears in the first defendant's plea in case I3265/2013, however the first defendant denies that the statement is defamatory or that it was made wrongfully or maliciously. The first defendant pleads that the statement was made in

response to the allegations made in the particulars of claim filed in case I3265/2013 that the second plaintiff is the legitimate shareholder member in Old Man Fishing CC and that she had suffered damages as a result of the alleged conduct of the first defendant.

[8] In the result, this court is thus called upon to determine whether the statement made by the first defendant with the assistance of the second defendant as the legal representative in case I3265/2013 is indeed defamatory and whether the defendants suffered the alleged damages as claimed.

[9] It must be noted that this court is not privy to the findings and proceedings in case I3265/2013 and in the result cannot rely on any findings or evidences led in that case apart from the allegations made by the parties in these proceedings.

[10] In the summary of the evidence, it would be necessary to give an account of the events that led up to the matter *in casu*, because unless this is done, the legal question that have arisen between the parties will not be intelligible.

Evidence of the First Plaintiff

[11] During the evidence of the first plaintiff, he explained the history leading up to the litigation in the matter *in casu* going back to 2003 when a matter served before this court under case number A 169/2003. This was the matter between *Axali Jacobus Doeseb and others v Benjamin Kheibeb and others* wherein the applicants brought an application to divest the first respondent, Mr. Kheibeb of his membership interest in the second respondent, Old Man Fishing CC, by compelling the him to sell such interest to the applicants. In his opposing affidavit the late Benjamin Kheibeb made certain allegations relating to the shareholding and non-payment of price of member's interest in Old Man Fishing CC. The allegations made by the late Benjamin Kheibeb was denied by the first plaintiff in the strongest terms.

[12] Following on this High Court case,¹ the Namibian Newspaper of 16 January 2004 published an article under the heading '**Judge 'hid' share ownership**'. The said Newspaper article referred to the documents filed in the High court and started the article by stating:

'Supreme Court Justice Pio Marapi Teek used his 16-year old daughter to conceal his part-ownership of a fishing company, according to documents submitted in a secret High Court case this week. Teek has denied the claim in an answering affidavit....'

[13] A further article was published in the Windhoek Observer Newspaper dated 17 January 2004 under the caption '**Daughter of Judge holds 8% in affirmative action corporation**'. The article discussed court papers and the first plaintiff's response thereto.

[14] The first plaintiff described these newspapers articles as an evil figment of the media's malicious imagination and referred to it as 'Fake News'.

[15] The matter thereafter fast-forwarded to 2013 and more specifically to the pleadings in case I 3265/2013 in respect of which the first plaintiff testified that the defendants relied on these newspaper articles in their pleadings as they repeated the allegations set out in the two newspapers in their pleadings. He also states that defendants relied on the information by the late Benjamin Kheibeb which was untrue without conducting a proper investigation to confirm the allegations. The first plaintiff testified that the defendants ought to have extracted the true facts from the documents provided to their offices by Old Man Fishing CC chairperson, Mr. Axali Doeseb, when the complaint was lodged by him on behalf of the members of the CC against the Ministry of Fisheries and Marine Resources.

[16] It is the case of the first plaintiff that if the statement of the defendants is considered in the context that it is made, then it is:

¹ A169/2003.

- a) Immaterial, irrelevant and not germane to the ventilation of the issues of the said case, and
- b) Made intentionally, wrongfully and maliciously made to defame and injure the plaintiffs in their good reputation;
- c) and apart from the defamatory meaning of the statement it suggests that the plaintiffs are corrupt and dishonest, crooks/criminals, not law abiding citizens and without moral fiber.

[17] During cross examination about the defamatory nature of the statement, the first plaintiff stated that the statement being false renders it defamatory. He further pointed out that the statement must be read in conjunction with the two aforementioned newspaper articles, which would indicate the maliciousness of the defamation. The first plaintiff places a lot of emphasis on the newspaper articles but conceded that if one has no regard to the newspaper articles, the statement is not in itself defamatory, however he added that it must be the truth.

Evidence by the Second Plaintiff

[18] The second plaintiff testified that she is the biological daughter of the first plaintiff. She stated that the first plaintiff represented her as a guardian in Old Man Fishing CC since 2001 until she was a major. The second plaintiff testified that she is the true owner and beneficiary of the members' interest in Old Man Fishing CC and she is the one who received the benefit of such interest. She testified that the statements complained of are defamatory because these statements are false and that a reasonable person reading such statement would believe that the plaintiffs are fraudsters. She testified that she was never part of any meeting between the defendants and the first plaintiff and never followed up on the complaint lodged with the defendants.

The Evidence by the first defendant: The Ombudsman

[19] The first defendant testifies that the first plaintiff came to see him 26 June 2010 regarding a complaint lodged by one of the members of Old Man Fishing CC, one Axali Doeseb, against the Ministry of Fisheries and Marine Resources and explained to him that the second plaintiff is his biological daughter and was one of the aggrieved persons and requested him to keep the file open. The first defendant further testified he was informed that if he keeps the file open, the first plaintiff will not sue him. The first defendant later went to enquire about the complaint and was informed by the second defendant that the investigation into the complaint was completed and therefore there was no need to keep the file open.

[20] The first defendant testified that shortly after this meeting the first plaintiff instituted action against him, i.e. case I3265/2013. According to the first defendant the plea prepared was on his instructions in the aforementioned proceedings. From the information available at his office, it appeared that the members' interest in Old Man Fishing CC was offered to the first plaintiff because of his contribution to the liberation of the country but at his request, the members' interest was put in the second plaintiff's name, who was a minor at the time and under his guardianship. The first defendant followed up on the state of affairs with the second defendant who confirmed him that the late Mr Kheibeb filed a complaint and reported to her that he offered the member's interest to the first plaintiff however the member's interest was transferred into the second plaintiff's name at the first plaintiff's request. According to the second defendant, the late Mr Kheibeb's complaint bordered on the notion that the first plaintiff did not pay for the member's interest. Based on this information, the first defendant and his legal representatives considered it plausible that the second plaintiff was not the actual beneficiary of the member's interest and therefore could not have suffered any damages. The first defendant further testified that the statement made had no hidden meaning or motive but was merely made to raise a defence to the claim for damages under case I3265/2013.

[21] The first defendant further testified that he never saw or read any of the newspaper articles referred to by the plaintiffs and further denies that his plea was based on what was reported in these newspaper articles. He also added that he was not appointed as Ombudsman at the time yet.

[22] The first defendant stated that in his opinion there was nothing wrong with someone holding shares on behalf of someone else and therefor he did not considered the statement to be defamatory.

Evidence on behalf of the second defendant

[23] The second defendant stated that by virtue of the fact that she is an admitted legal practitioner and in order to save costs, she acted as the Ombudsman's legal practitioner together with instructed counsel and as a result, she signed and filed the plea in case I 3265/2013. She confirmed the fact that the portion of the plea forming the subject matter of the current legal action is found under paragraph 11.3 of the initial particulars of claim.

[24] The second defendant confirmed that a complaint was filed at the offices of the Ombudsman on 07 November 2007 by Mr. Axali Doeseb. The complaint related to a name change of a closed corporation allowed by Ministry of Trade and Industry from Old Man Fishing CC to Augei-Khas Sea Products CC without the permission of the members of the closed corporation.

[25] The investigation was initially assigned to one Mrs. Saunderson, who brought the problems surrounding the said matter to the attention of the second defendant toward the latter part of 2008 as the issues were not resolved. A number of documents were received by the Office of the Ombudsman. Upon perusal of the file, the second defendant proceeded to obtain further information relevant to the issue and subsequent to that had a meeting with the then Minister

of Fisheries and Marine Resources. After discussions, the Minister undertook to invite the affected parties to a meeting to see how the matter could be resolved.

[26] The Minister seemingly convened the meeting and on 03 September 2009, as Mr Benjamin Kheibeb and Mr ABC Cooper came to the Offices of the Ombudsman shortly after and wanted to see the second defendant. Mr. Doeseb was unhappy as some of the shareholders of Old Man Fishing CC did not pay for their shares and were included in the closed corporation because the Minister felt more persons should benefit from an allocated fishing right in line with the policy of the Ministry of Fisheries and Resources.

[27] During the meeting, Mr. Kheibeb told the second defendant that the first plaintiff is the one he offered the shares to but that the first plaintiff said he could not receive the shares but that it should be put in his daughter's name. Mr. Kheibeb complained that the first plaintiff never paid for the shares he received in the company but wanted the benefits.

[28] The second defendant testified that the first defendant was sued in case I3265/2013 for damages allegedly suffered as a result of the delay in the investigation of the complaint received and the purported premature closing of the file.

[29] In response to the claim, the second defendant, on the instructions of the first defendant, prepared the plea to the disputed allegations of second plaintiff, who allegedly suffered damages in her capacity as a member of Old Man Fishing CC due to the actions of the first defendant. The second defendant testified that the statement in the plea was based on what Mr. Kheibeb told her and also on the documents filed in the *ex parte* application brought by Mr. Axali Doeseb and others against Mr. Kheibeb. The following appeared from the documents:

- a) Letter dated 02 February 2001 to the Permanent Secretary of the Ministry of Fisheries wherein Mr. Kheibeb stated that the members' interest was

offered to the first plaintiff because of his significant contribution to the liberation struggle but that it could not be transferred in his name.

- b) The answering affidavit by Mr. Kheibeb in which it was indicated that the members' interest was offered to the first plaintiff but that due to his position as a judge it would be inappropriate to register it in his name. He stated in the affidavit that the first plaintiff said they should rather make use of the name of the second plaintiff.
- c) The second plaintiff was never offered the members' interest and she had no dealings with Mr. Kheibeb.
- d) All the communications as regards to the members' interest happened as between Mr. Kheibeb and the first plaintiff. The second plaintiff was not privy thereto.
- e) No indication of any monies paid over to the second defendant.
- f) The first plaintiff paid the N\$ 80.00 contribution.

[30] It is against these facts that the second defendant testified that the plea was drafted. The witness denied any knowledge of the newspaper articles referred to by the plaintiffs and further denies that the statement as per the plea was defamatory or that it was actuated by malice or any improper motive.

[31] In conclusion she denied the alleged malice on the part of the defendants that the plaintiffs want the court to infer to from facts.

Submissions on behalf of the Plaintiffs

[32] The plaintiffs submit that the information relied on by the defendants was not reduced to writing nor is there a shred of documentary evidence that the meeting between the second defendant and a Mr Doeseb took place in this regard

remains hearsay evidence. The plaintiffs further submit that the second defendant admitted under cross-examination that she could not remember the exact words allegedly used or stated by the late Mr Kheibeb nor in what language they communicated in. As a result, the defendants were not legally entitled and justified to repeat and rely on the statement made by the late Mr Kheibeb, which the plaintiffs term as a fraudster and a “Dead Man”. The plaintiffs further submit that it was incompetent on behalf of the defendants to have drawn inference from the evidence adduced before this court to sustain their allegations as such inference was irrational and malicious.

[33] The plaintiffs further submit that it is the ‘Mother of utter Incompetence’ for the defendants as upper guardians of the Constitution to allege that they were unaware of and oblivious to the newspaper articles published in the Namibian and the Windhoek Observer regarding the Old Man Fishing CC issue. The first plaintiff submitted that there is a special duty incumbent upon the defendants to keep abreast of events happening in Namibia that might adversely and prejudicially impact upon and violate the rights of citizens.

[34] The plaintiffs further submit that under no law, in a constitutional/democratic dispensation and under the rule of law is it permissible to raise a false and defamatory statement allegedly communicated orally in legal proceedings in a plea to form part of a defence raised by, in this instance, the defendants, particularly so as the first plaintiff is not a party to the proceedings in case I3265/2013. The plaintiffs are of the view that there is an imperative, special and mandatory – positive legal duty upon the defendants to defend, uphold and protect the plaintiffs’ dignity pursuant to the provisions of Article 8 of the Namibian Constitution, which the plaintiffs submit that the defendants failed to do.

Submissions on behalf of the Defendants

[35] Ms. Bassingthwaighe submitted on behalf the defendants that the statement made is not defamatory and was not intended to be understood that the

plaintiffs are corrupt and dishonest or that they have fraudulently conspired or colluded to conceal or hide the real identity of the true beneficiary to the Ministry of Fisheries and Marine Resources.

[36] The defendants submit that the plaintiffs did not adduce any evidence that may indicate an ulterior motive from either of the defendants in making the statement.

[37] It was submitted that the test to be applied in a matter of this nature is an objective one, i.e. looking at the contents of the statement in order to draw an inference about its meaning and effect and whether it tends to lower the plaintiffs in the estimation of reasonable persons of ordinary intelligence or right-thinking member of society generally.² The test to be applied is therefore whether a reasonable reader of ordinary intelligence who has knowledge of the circumstances would understand the words alleged to be defamatory.

[38] Ms. Bassingthwaighe further argued that the meaning attributed to the statement by the plaintiffs is not apparent from the face of it. It was submitted that this explains the reason why the first plaintiff was at pains to link the statement to the newspaper articles but contended that there is no connection between the newspaper articles and the statement nor is there any basis for a finding that the defendants made the statement based on the newspaper articles. She argued that there is no evidence of any person having read the statement nor has there been newspaper articles following the filing of the plea, which could have provided some support for the plaintiff's case that any person who reads the statement would think that what was alleged in the newspaper articles must be true. Ms. Bassingthwaighe argued that the claim stand to be dismissed on that ground alone.

[39] In the alternative, Ms. Bassingthwaighe submitted that should the court find that the statement was defamatory, then the question should be asked if the defendants established the defence of qualified privilege.

² *Kandando v Namibia Medical Care* (I2047/2010) NAHCMD 86 (4 April 2013) at par 47.

[40] In this regard Ms. Bassingthwaighe argued that the defendants have established the defence of qualified privilege to exclude both wrongfulness and intent. The statement was published by the litigants in the course of judicial proceedings, which is a privileged occasion. The defendants filed the plea in response to the allegations that the second plaintiff was the true beneficiary of the member's interest. Based on the information that the defendants received during their investigation, a reasonable inference could be drawn that the first plaintiff was the true beneficiary of the members' interest and not the second plaintiff. The first plaintiff placed much emphasis on the fact that what Mr. Kheibeb said was false and that the defendants failed to ascertain the truth. The court is called upon to have regard to the approach adopted in *Afshani v Vaats*³ in considering the circumstances in which the statement was made to determine whether it was germane and relevant to the issues. This must be determined objectively considering all the facts and circumstances of the particular case.

[41] Lastly on the claim for damages, the defendants submit that no evidence have been led on the aspect that the statement made grossly violated their right to a dignified/decent life, happiness and is injurious to their economic advancement, that their reputation, dignity and self-esteem has been impaired resulting in mental anguish/torture, psychological trauma, shock, distress, humiliation, emotional pain and suffering. The defendant further submit that there is also no evidence that anyone other than the parties and possibly the Registrar and the court hearing the matter has had sight of the statement. The defendants are of the view that the publication was therefore very limited, only to those to whom it was addressed.

Applicable legal principles and application to the facts

General principles regarding defamation

³ 2006 (1) NR 35 (HC).

[42] It is trite law that defamation is defined as the wrongful and intentional publication of defamatory words or conduct that refers to a plaintiff.⁴

[43] In the matter of *Nahole v Shiindi* (I 3136/2012) [2014] NAHCNLD 53 (03 October 2014) Damaseb JP stated the following:

[39] The law of defamation in Namibia is based on the *actio injuriarum* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*).⁵ The plaintiff need not allege nor prove the falsity of the defamatory statement and need not allege anything more than his or her existence in a particular society where it is alleged that his or her reputation was damaged in the eyes of the community at large.⁶ In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion.⁷

[44] At common law, the elements of the delict of defamation are:

- (a) the wrongful
- (b) intentional
- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff.

[45] Once a plaintiff establishes that a defendant has published a defamatory statement concerning himself/herself, it is presumed that this publication is both wrongful and intentional. A defendant wishing to avoid liability for defamation must raise a defence which rebuts either the requirement of wrongfulness or intention.

⁴ Loubser et al (eds) *The Law of Delict in South Africa* 2 ed at 340.

⁵ *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

⁶ Daniels, H .2007. *Becks Theory and Principles of Pleading in Civil Action*, 7th edition. Durban: LexisNexis, p 280; *Sutter v Brown* 1926 AD155 172.

⁷ *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 387B-D.

[46] Although not a *numerus clausus*, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion.⁸

[47] The general test for wrongfulness is based upon the *boni mores* or the legal convictions of the community. This means that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable.⁹

Burden of proof

[48] The burden of proof in a civil case has been stated as follows:

'[I]n general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'¹⁰

Application of the law to the facts

[49] In the matter before me the issues for determination is whether:

- a) The statement is defamatory and whether it bears the meanings attributed to it by the plaintiffs or carried the additional sting as alleged;
- b) Whether the defendants have established the defence of qualified privilege;

⁸ *Khumalo And Others v Holomisa* 2002 (5) SA 401 (CC) at [17].

⁹ Neethling et al Neethling's Law of Personality 2 ed (2005) at 135.

¹⁰ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A - D: Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz MegaBuilt v Kurz* 2008 (2) NR 775 (SC) at 790B-C.

- c) Whether the statement was made with malice and with settled intention to injure the plaintiffs' reputation and character;
- d) Whether the plaintiffs suffered the alleged damages.

Was the statement defamatory?

[50] The parties are *ad idem* with regards to the contents of the statement in the plea of the first defendant in case I 3265/2013 but the defendant denies that the said averment is defamatory in nature but in the event that the statement is found to be defamatory, the defendants pleaded qualified privilege.

[51] In case I3265/2013, the second plaintiff sued the Ombudsman in his professional and personal capacity on the basis that she was a member of Old Man Fishing CC and that she suffered damages because of the delay in the investigation by the Office of the Ombudsman into the complaints received regarding the closed corporation and the premature closing of the file. It is common cause that the first plaintiff was not a party to those proceedings.

[52] In response to the allegations set out in that case, the Ombudsman denied that Ms. Teek was the true beneficiary of the member's interest and proceeded to state in amplification the basis for his denial. This is clear from the wording of the statement, which I deem necessary to repeat:

'The second defendant denies that the plaintiff was the true beneficiary of the members' interest in Old Man Fishing and puts the plaintiff to the proof there. In amplification of the aforesaid denial, the second defendant pleads that according to information obtained from the late Benjamin Kheibeb during the investigation of a complaint from the ninth defendant, the true beneficiary of the members' interest held by the plaintiff was Pio Teek as the plaintiff was merely holding the members' interest on his behalf at the time'

[53] In considering the meaning of the words/statement complained of, the test to be applied by court is an objective one. In the matter of *Sindani v Van der Merwe and Others*¹¹ it was held that:

“[10] The question whether the article is defamatory in its ordinary meaning, involves a two-stage enquiry. The first is to establish the natural or ordinary meaning of the article. The second is whether that meaning is defamatory.

[11] The ordinary meaning of the words under consideration does not necessarily correspond with their dictionary meaning. The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply. It must also be borne in mind that the ordinary reader has no legal training or other special discipline and that 'if he reads the article at all would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there' Consequently, a court that has of necessity subjected a newspaper article under consideration to a close analysis must guard against the danger of considering itself to be 'the ordinary reader' of that article” {My Emphasis} (I omitted references to authorities)”.

[54] The first plaintiff agreed during cross-examination that the statement, when one reads it on its own, is not *per se* defamatory, however the plaintiffs also relies on (a) newspapers articles published in 2004 and (b) the innuendo therein.

[55] The plaintiffs attempted to show that the statement in the plea carries an additional connotation that they are “corrupt and dishonest; crooks, criminals, not law abiding citizens and without moral fibre”. In respect of the words “true beneficiary”, the plaintiffs imputes the innuendo that it should be understood to mean that the plaintiffs fraudulently conspired and colluded to conceal or hide the real identity of the true beneficiary or owner of the shareholding in Old Man Fishing

¹¹ 2002 (2) SA 32 (SCA).

CC from the Ministry of Fisheries and Marine Resources, the public or other persons.

[56] In *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*¹² para 87 Brand AJ said:

'Statements may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as an innuendo, derived from special circumstances which can be attributed to the statement only by someone having knowledge of the special circumstances. A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with an implied meaning of the statement which is regarded as part of its primary or ordinary meaning.'

[57] The plaintiffs stated in their particulars of claim in the matter *in casu* the following:

'4.9 MORE OVER, Defendant knew and are or ought to be aware of the false, malicious aspersions and innuendos cast upon the Plaintiffs by Benjamin Kheibeb in Pleadings before the High Court and reported in the electronic and published in the printed media, about the impartations stated by Defendants and allegedly made by the late Benjamin Kheibeb to them, in particular by: THE NAMIBIAN, dated 16 January 2004, to wit: "*Judge 'hid' share ownership*", ... and THE WINDHOEK OBSERVER, dated 17 January 2004: "*Daughter of Judge Pio Teek holds 8% in affirmative action corporation*" ... Persons who had read Benjamin Kheibeb's malign impartations, made in the Pleadings and disseminated in the said newspapers, will now believe that: those allegations were indeed true, even today, (12 years later and counting), the Ombudsman repeats the same false allegations!...'

[58] The plaintiff must prove that there were persons amongst those to whom the publication was made who were aware of the special circumstances and to whom,

¹² 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4).

it can therefore be inferred, that publication was likely to have conveyed the imputations relied upon.¹³

[59] Therefor it appears that the pleadings in the case A169/2003 as well as the subsequent newspaper articles published 9 years prior to the 2013 proceedings must be known to the recipient of the publication of the statement to acquire a defamatory meaning by reason of innuendo.¹⁴

[60] During the trial, there was no evidence presented to proof that any readers of the statement complained of understood the words in that sense.

[61] The defendants testified that they had no knowledge of the newspaper articles referred to by the plaintiff and it appears that even if they had access to the opposing affidavit of Mr. Benjamin Kheibeb in the court proceedings in case A 169/2003, they would not be able to tie that in with the newspaper articles, which were published after the fact and did not form part of the court file. The submission that the defendants have a special duty incumbent upon them to keep abreast of events happening in Namibia that might adversely and prejudicially impact upon and violate the rights of citizens has no merits. At the time of the publication neither of the two defendants were attached to the office of the Ombudsman.

[62] The plaintiffs have no basis to contradict the evidence of the defendants that the information contained in the statement in opposition to the claim of the second plaintiff in case I 3265/2013 was based on the information received from Mr Kheibeb and their investigation of the complaint from Mr. Axali Doeseb. The first plaintiff speculated that the second defendant probably did not even meet with Mr. Kheibeb, however the second defendant was able to relate to this court the interview with Mr. Kheibeb and was able to describe him. She also handed her file notes, albeit brief, in as an exhibit support of her submissions.

¹³ Amler's Precedent of Pleadings, Seventh Ed. Page 164.

¹⁴ *Du Plessis v Media 24 t/a Daily Sun And Another* 2016 (3) SA 178 (GP) at [22]: 'By secondary meaning is understood words which, by reason of special circumstances that are known to the recipient of the publication, acquire a defamatory meaning by reason of innuendo.'; *National Union of Distributive Workers v Cleghorn and Harris Ltd* 1946 AD 984 at 997.

[63] The central figure in this matter appears to be the late Mr. Kheibeb. One need read the newspaper articles to have worded the plea as the defendants did. I am satisfied that the second defendant interviewed the late Mr. Kheibeb and that she was involved in the investigation into the complaint lodge by Mr. Doeseb, which formed the basis for the drafting of the plea in case I 3265/2013.

[64] The first plaintiff was very critical of the character of the late Mr. Kheibeb and referred the court to a so-called 'deathbed confession' wherein he admitted to his wrongdoings. However, the first plaintiff referred to a document¹⁵ wherein Mr. Kheibeb appears to make peace with the rest of the members of Old Man Fishing and the plaintiff want the court to read some confession between the lines that is not there. There is a lot of speculation and conjecture on the part of the first plaintiff which have no substance in it.

[65] The defendants denied that the statement never implied that the plaintiffs were dishonest or crooks or any other the adjectives that the plaintiffs wish to ascribe to them. The first defendant testified that in his opinion, there would be nothing wrong with someone holding shares on behalf of someone else and therefor he did not consider the statement to be defamatory.

[66] I am of the considered opinion that there is no link between the plea filed by the defendants in case I 3265/2013 and the newspaper article published 9 years prior. No reasonable person reading the statement would understand the plaintiffs to be "corrupt and dishonest; crooks, criminals, not law abiding citizens

¹⁵ I, Benjamin Kheibeb state on 10 June 2011 that I have made peace with the shareholders of Old Man Fishing. My wish is that we work together as brothers and sisters for the common good. I apologize from the bottom of my heart the pain I have done to them. I want us to stop the legal battles. I hope you will accept my sincere apology.

signed: Benjamin Kheibeb

and without moral fibre” or that they fraudulently conspired and colluded to conceal or hide the real identity of the true beneficiary or owner of the shareholding in Old Man Fishing CC.

[67] Presently, what is clear in this matter is that the statement alleged to be defamatory was not one communicated to various people but directly to the parties involved in court proceedings via a plea to the particulars of claim as prescribed by the rules of this court.

[68] It is interesting that the plaintiffs did not sue the late Mr. Kheibeb or the two newspapers for defamation as the claim prescribed and it appears the current matter is the plaintiffs’ attempt to have a second bite to the proverbial cherry.

[69] Having regard to the evidence before me, I can find no evidence that the statement was made with malice and with the intention to defame the plaintiffs’ good character and reputation.

Qualified privilege:

[70] Even if this court agrees with the plaintiffs that the statement is defamatory, which I do not, then the statement published by the defendants in the course of judicial proceedings is a privileged occasion.

[71] This defence is raised on the basis that the statement in issue is contained in a plea resisting the claim of the second defendant against the first defendant in his official and personal capacity.

[72] Our law confers a qualified, albeit very real, privilege upon counsel, attorneys, witnesses and litigants in respect of defamatory statements made during legal proceedings.

[73] In *Findlay v Knight*¹⁶ Wessels CJ discussed qualified privilege as follows:

'Qualified privilege implies two principles of public policy:

- (1) That the welfare of society demands that an advocate or attorney who plead the cause of his client should have a large degree of freedom in laying his client's case before Court, even though in doing so he defames the other party or even a third party.For the same reasons the pleader must enjoy this qualified privilege when he files formal pleadings and other documents necessary to place his client's case before Court. To hamper his freedom in this respect would be to hamper the administration of justice; this would be contrary to public policy, and therefore our courts accord to attorneys and advocates a large measure of freedom in drawing pleadings and pleading causes.
- (2) The other principle of public policy which underlies qualified privilege is that the process of the courts shall not be wantonly used for the purpose of defaming either litigants or third parties.'

[74] In every case, it will be for the court to consider in the particular circumstances of the case if this licence accorded to the pleader has been transgressed or not. What is important is that the defamatory statement, having been published in the course of civil judicial proceedings, is privileged provided it satisfies the requirements for relevance.¹⁷

[75] In light of the nature wherein the statement was made, it cannot be that the said statement was defamatory but an answer to the claim only. Further, the plaintiffs adduced no evidence indicating that the statement caused a violation of the plaintiff's rights or interests neither infringement of any kind.

¹⁶ 1935 AD 58 at page 71.

¹⁷ Relevance in relation to the publication of defamatory matter has variously been described as 'relevant to the purpose of the occasion' (*Molepo v Achterberg* 1943 AD 85 at 97); 'in some measure relevant to the purpose of the occasion' (*Basner v Trigger* (supra at 97) - see also *Joubert v Venter* (supra at 705H) and *Zwiegelaar v Botha* 1989 (3) SA 351 (C) at 358E); 'germane to the matter' being dealt with (*May v Udwin* 1981 (1) SA 1 (A) at 11C - D); 'relevant . . . tot die onderwerp onder bespreking' (*Herselman NO v Botha* 1994 (1) SA 28 (A) at 35G - H). In essence they are all saying much the same thing; words such as 'relevant', 'germane' and 'pertinent' (another word used in this context) have the same basic content. To the extent that the above concepts differ, they do so in degree rather than substance.

Damages:

[76] In light of the findings already made in this matter it is not necessary for me to consider the issue of damages.

[77] My order is hereby as follows:

1. Plaintiffs' action is dismissed in respect of first and second defendant with costs.
2. Cost to include the costs of one instructed and one instructing counsel.

J S Prinsloo
Judge

APPEARANCES

PLAINTIFFS: In-Person

DEFENDANTS: N Bassingthwaighe (with her K Klazen)
instructed by Ellis Shilengudwa Inc., Windhoek