

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case no: I 93/2015

In the matter between:

JOHANNES NGUTI

PLAINTIFF

and

KAYEVROU MBARORO

FIRST DEFENDANT

KALISTA NEKONGO

SECOND DEFENDANT

Neutral citation: *Nguti v Mbaroro* (I 93/2015) [2019] NAHCNLD 137 (9 December 2019)

Coram: **CHEDA AJ**

Heard: 19 June 2019; 21 - 23 June 2019; 29 June 2019; 28 November 2019

Delivered: 9 December 2019

Flynote: In a defamation suit – wrongfulness is an essential element – where the conduct was based on a genuine mistaken belief and defendant was acting in the interests of the public policy of the community – will be excused. A defendant who refused to accept an apology attracts a dim view from the courts - defamation claim was dismissed.

Summary: Defendants had experienced numerous thefts at their work place. One of the employees advised them that she knew the identity of the thief. Defendants

acted on that information which led them into confronting plaintiff at his work place. It turned out that, the information was wrong. Upon noticing this mistake, defendants apologised, but, plaintiff was not prepared to accept the apology – plaintiff sued for defamation. The essential element of wrongfulness in delict was missing and the claim was dismissed with each party paying its own costs.

ORDER

1. Plaintiff's claim for defamation is dismissed;
2. Each party must pay its own costs.

JUDGMENT

CHEDA AJ:

[1] On 22 April 2015 plaintiff issued summons out of this court against three defendants and the particulars of claim are stated hereinunder:

'(a) Payment of the sum of N\$100 000 against the defendants, jointly and severally the one paying the other to be absolved with interest thereon at the rate of 20 percent per annum from the date of judgment to date of final payment and

(b) cost of suit and any other alternative relief.'

[2] Plaintiff is an adult who at the time of issuing summons was employed by CMEC and resides at Omusati Region. First defendant is a company trading as Kunene Pharmacy at Opuwo, Kunene Region, Namibia. Second and third defendants are adults who were employed by first defendant.

[3] All three defendants entered appearances to defend. Plaintiff subsequently withdrew his action against first defendant, therefore, second and third defendants

become first and second defendants in that order. Plaintiff gave evidence and he testified that on the 24 September 2014, second and third defendants accused him of having stolen Bio-Oil lotion at Kunene pharmacy. This accusation was in the presence of his co-workers amongst which were Victor Mingeli, Oiva Ikwambi and Negumbo Pelvis Trives.

[4] It was his evidence that the said allegation was wrongful and defamatory of him. He further stated that the said statement was indeed made with the intention to defame and injure his reputation. The statement was made and understood by those who were present that plaintiff is dishonest, a thief and a criminal. He, therefore, suffered defamatory damages in the sum of N\$100 000.

[5] In his evidence he stated that on 24 September 2015 he received a call from a lady who identified herself as Nangula and he was in Bank Windhoek at Opuwo at the time. The said lady advised him that she wanted him to come to her as she could not see him in her vicinity. He stated that he was in fact at Omakange area at a construction site, a distance of 100km ± from Opuwo. This was at around 14h48 and when he knocked off at about 17h40 he drove to Okapumbu Village.

[6] On his way he received a message that there were people who were waiting for him at Okapumbu. He drove there, upon his arrival he found two security guards, in the company of first and second defendants. There were people in the bus who were ordered to alight from the bus as they were alleging that he (plaintiff) was hiding in the bus.

[7] It was further his evidence that first and second defendants did not find the person who resembled him in the bus. When he arrived, first defendant pointed him out as the person who had stolen from Kunene Pharmacy and this accusation was corroborated by second defendant. Despite his explanation, defendants insisted that he was a thief. At that stage, his co-workers started staring at him as they were told that he was a thief.

[8] He further stated that as a result of these accusations, which were false, Victor Ngundame the Manager, withheld his monthly salary as he believed that he

was a thief. He, therefore, did not receive his salary on that day or the following day although he subsequently did.

[9] On a Monday, the 28th September 2014, he proceeded to Kunene Pharmacy whereat he found first and second defendants who took him to a white man who was in a managerial position. The reason why he went to the pharmacy was because he wanted to view the video footage on the CCTV as he was adamant that they were mistaken about his identity.

[10] The white man unfortunately was not co-operative. Firstly, he stated that the person who operated the CCTV was not available, but, later changed his story and stated that the footage was no longer in existence as it had been erased. Having found no joy in this, he went to make a report to the police who then came to the Pharmacy.

[11] After a discussion with all the parties involved, they advised them that there was no case against him and further that he can proceed as he deemed fit. He denied that they never offered an apology to him.

[12] It was put to him that he had claimed N\$8000 from first defendant, but, he denied that he only claimed N\$1000 for his fund/travel to Opuwo.

[13] In an aid to his case he called the following witnesses whose evidence, I analyse below:

Mingeli Johannes

[14] Mingeli Johannes, gave evidence. He stated that at the relevant period he was employed by CMEC at their construction site at Omakange area and plaintiff was also employed there.

[15] On 24 September 2014 he was present when first and second defendants went into the bus and started ordering every worker to alight from the bus. He approached these people and asked them what they were looking for and they told him that they were looking for Johannes Nguti (plaintiff) who stole from Kunene Pharmacy.

[16] They were uncooperative and protested that he was disturbing them as they were looking for Johannes Nguti who stole their items from their work place. They insisted that plaintiff was the person who appeared on the Pharmacy's CCTV footage. In fact he stated that they become rowdy and one of them even hailed insults at him.

[17] They demanded that plaintiff shows them his motor vehicle which was parked at his residence. Despite all the evidence against their allegations, they were adamant that plaintiff was a thief.

[18] It was his further evidence that he advised them to send the footage to him in order to see whether it was indeed plaintiff who appeared therein. He exchanged telephone numbers with them, but, none of them contacted him.

Kayevrou Mbaroro

[19] The next witness was Kayevrou Mbaroro whose evidence was that she is employed at Kunene Pharmacy and at the time she was working with second defendant. They had experienced a lot of thefts of bottles of Bio-Oil lotion. The pharmacy is equipped with CCTV cameras. On this fateful day they again experienced a similar theft. She together with other employees viewed the CCTV footage. In that footage one of the cleaners advised them that the man they saw on the CCTV was known to her and she knew where he was employed at a construction site at Omakange. At that juncture that she believed that the thief had been identified by one of the employees. As a result of this development, she together with her colleague Kalista Nakongo and two Security Guards left for Omakange in search of the thief whom they believed was the plaintiff.

[20] Upon arrival, they went to his manager's office, one Victor and told him what their mission was. The cleaner had advised them that the alleged thief was the owner and driver of a white Land Cruiser which plaintiff also happened to have.

[21] They were taken to a place where all employees alighted from their buses. It was further her evidence that they realised that the person they were looking for was not in the bus and that when plaintiff arrived they noticed that he was not the same

person, they were looking for. Some confrontation took place though between her team and plaintiff, but, they advised plaintiff that he was not the person they were after.

[22] It was further her evidence that, plaintiff did not take kindly to that development as he was of the opinion that he was being accused of theft.

[23] It was also her evidence that they went back to their employer where the whole issue was reviewed and they concluded that, plaintiff was not the person they had seen on the CCTV footage. They, in fact, had offered an apology, but, however, plaintiff did not accept it as he followed them to Opuwo the following day where a further discussion was held and now included the police.

[24] It was further her evidence that the police also advised plaintiff to accept the apology, but, he was not prepared to listen to such advise as he wanted them to be punished for lying against him.

Karista Nekongo

[25] The next witness was Kalista Nekongo. Her evidence was that at the relevant period, she was employed by Kunene pharmacy. Her evidence corroborated that of Ms Mbaroro in a material and relevant manner. In brief, she stated that there were numerous thefts on her work place. While they were watching CCTV footage, one of the cleaners advised them that she knew the person appearing on the CCTV footage. It was also her testimony that they apologised upon realising that an error with regards to the identity of the thief was made.

Peter Shilumbu

[26] Peter Shilumbu, a Security Guard who used to work at Falcon Security also gave evidence. His evidence is largely similar and corroborative of Ms Mbaroro.

Johannes Hedimbi

[27] Johannes Hedimbi also gave evidence. He was also employed as a Security Guard together with Peter Shilumbu and was in a supervisory position in the Cash-In-Transit section. He joined his colleague Peter Shilumbu during the investigation of this matter and after their investigations they established that plaintiff was not

responsible for the theft at Kunene Pharmacy and apologised to him, but, plaintiff has not prepared to accept the apology as he argued that he had been defamed and wanted first and second defendants to be punished.

Sonja De Beer

[28] The last witness was Sonja De Beer. She is a candidate attorney at W Horn Attorneys Legal Practitioners and her evidence was not to do with the substantial matter, but, that of the conduct of the proceedings. It was her evidence that during the proceedings she was sitting at the gallery and she observed that plaintiff was communicating with the witness who was giving evidence. She said that he was either nodding or shaking his head in response to the answers being given. She stated that this was the case whenever, a question relating to identify was being asked. In fact her evidence was that, some witnesses were being directed to answer questions in a particular manner. This was denied by plaintiff. This evidence does not take us very far as it was her word against that of plaintiff. Her evidence does not in anyway sway me to believe that plaintiff did that to an extent of influencing the witness at the time.

Hendrik Marius Anthonissen

[29] The last witness was Hendrik Marius Anthonissen. He is the owner of Kunene Pharmacy. It was his evidence. That he received a report of what had happened. Plaintiff and second defendant came to see him and the issue was discussed and second defendant apologised to plaintiff, but, plaintiff was not prepared to accept the apology. He went further and stated that he was prepared to pay plaintiff for what had happened.

Analysis of evidence

[30] Plaintiff gave evidence very well in the manner he understood the matter. It is not in doubt that a series of thefts were taking place at Kunene Pharmacy. These thefts caused employees headaches which resulted in them viewing the CCTV footage together with their employer in order to identify the thief. A cleaner identified the thief and the identity led to plaintiff's harassment by first and second defendants. This also took place before his colleagues. This issue caused him some discomfort and some embarrassment in that he was being accused of theft. (own underling)

[31] It admits of no doubt that the identity that had been given to them by the cleaner, genuine as it was, was in fact and in truth not accurate. It is this identity which led to such embarrassment to the plaintiff and hence this law suit.

Applicable law

[32] The question which falls for determination is whether or not the defendants defamed plaintiff. In order to adequately answer this question it is important to interrogate the elements which constitute defamation. The following elements are now an integral part of our law:

(a) the defendant must have caused harm or damage to the plaintiff by means of an act or omission;

(b) the act must be wrongful; and

(c) unlawful.

[33] The current legal thinking seems to have adopted a strict view of the requirements for a delictual claim with regards to wrongfulness.

[34] The question of damage also needs interrogation, but, this will only arise after the issue of wrongfulness is dealt with and I hereinunder propose to do so.

[35] Wrongfulness has to be determined by the legal convictions of the community (*boni mores*)¹. What it means is that the court is obliged to take a pragmatic and robust approach in determining whether plaintiff was wronged in the manner which qualifies him to successfully sue for damages. In other words the concept *boni mores*, as legally applied has a juridical content². It has been espoused by the learned authors that it does not merely mean good morals, but, is concerned with the legal convictions of the community which serve as a yardstick in establishing whether or not the community regards a particular act or omission to be a delictual wrong.

¹ see J Neethling and J M Potgieter, *Neethling-Potgieter-Visser Law of Delict* sixth edition

² see *supra* at p36

[36] This approach was adopted in *Graham v Cape Metropolitan Council* 1999(3) SA 356 (C) 369-370 and in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) 528-529. While these are foreign authorities, I am, however, highly persuaded by the reasoning therein to an extent that I find myself in complete agreement with this objective test.

[37] The concept of public policy carries in its legal womb, sub-concepts of justice, equity, good faith and reasonableness. These sub-concepts are the embodiment of co-existence which in itself is a hybrid to harmonious community relations.

[38] The next question, then is, were defendants unreasonable in their actions taking into account the community's sense of justice and good faith?

[39] Defendants as employees and faithful ones for that matter, were troubled by numerous thefts that were taking place and with no solution. This, on its own, is against public policy in the community as much as it is very much against commercial principles of running a good business. Defendants, therefore, had a duty to act. This, however, calls for the court to engage in some balancing act by weighing on one hand the interests which the defendants were trying to promote by their actions and on the other those which they infringed. The court must take on board various factors which also take into account defendant's attitude and conduct towards the infringement. Above all the circumstances surrounding the delict are invariably the determining factor.

[40] I am persuaded in adopting this approach by the reasoning in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) 384 and *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) 753-754.

[41] The question of reasonableness of the defendants in the circumstances kicks in. Defendants were misled by the cleaner and upon noticing that the information they were acting upon was not accurate, immediately ceased their pursuit of their target. Would one, therefore, say their actions were unreasonable? In my view, they were not and it was in the public interest that they did so. They apologised, thereby showing remorse although plaintiff was not prepared to accept that apology.

Conclusion

[42] By apologising they showed that it was not in their intention to deliberately infringe on plaintiff's rights. Mr Anthonissen went further and offered to pay plaintiff in addition to the apology already made. Plaintiff was being unreasonably difficult in the circumstances. A *prima facie* wrongful infringement is not necessarily conclusively wrongful as in some instances the consequential damage is legally excused or justified in particular circumstances, see *Neethling*. In *casu* the interests of the community and the running of defendants' employer's business was compelling to an extent that their actions were reasonable and excusable.

[43] In coming to this conclusion, plaintiff's conduct cannot be ignored. In as much as he was aggrieved by defendants' conduct he was not prepared to accept an apology from them. An apology in this civilized world is an expression of remorse and the court takes a dim view of plaintiff's attitude of refusal to accept an apology, as he insisted that the matter must go to court. While the courts' are open to all citizens like the Ritz Hotel, the legal process allows and encourages people to settle their grievances amongst themselves where possible even at the court room's door step. The aggrieved are also obliged to be reasonable in their approach to asserting their legal rights. Defendants' did not intend to defame plaintiff, they indeed, made a genuine error as they relied on the genuine mistaken identify by the cleaner.

[44] I am of the view, therefore, that in as much as plaintiff was aggrieved, the circumstances under which this occurred does not qualify as a delict in light of defendant's conduct. The courts must be careful to punish a party whose action or omission were, as a result of a genuine mistake by law abiding citizens, lest their duty to uphold justice will be shaken and they will desist from playing their moral and legal duty to each other.

[45] The following is the order of court:

1. Plaintiff's claim for defamation is dismissed;
2. Each party must pay it's own costs.

M Cheda
Acting Judge

APPEARANCES

PLAINTIFF: S Aingura
Of Aingura Attorneys, Oshakati

FIRST DEFENDANT: C H J Visser
Of ENSafrica Namibia, Windhoek