



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 3968/2015

In the matter between:

**WERNER S KANIITA  
ANANIAS N IIYAMBO**

**FIRST PLAINTIFF  
SECOND PLAINTIFF**

and

**PHIL YA NANGOLOH**

**DEFENDANT**

**Neutral citation:** *Kaniita v Ya Nangoloh* (I 3968/2015) [2019] NAHCMD 182  
(11 June 2019)

**Coram:** OOSTHUIZEN, J

**Heard:** 12-15 and 19-20 June 2018, 21-22 August 2018, 31 January 2019

**Delivered:** 11 June 2019

**Flynote:** Defamation on social media (Facebook)

**Summary:** The plaintiffs claimed against the defendant for damages due to alleged defamatory remarks made and posted by the defendant on Facebook of and concerning the plaintiffs. The alleged defamatory material is contained in a series of consecutive postings.

Held, that defendant made and published defamatory remarks and comments of and concerning the plaintiffs on Facebook.

Held, that the defamation was that especially first defendant is fanning anti-kwanyama hysteria; leads a group which aims to create tribal hatred between the two largest Owambo tribes; first defendant was the author of a highly inflammatory letter published under the false name of 'Mpingana Shalongo' in the Namibian Sun newspaper on 2 May 2013; first plaintiff is an inflammatory mole; the activities of Mpingana Shalongo and first plaintiff have the potential of leading to inter-tribal conflict; they have a joint criminal enterprise; eviction orders co-signed by plaintiffs are dangerous, tribalistic and inflammatory; a reasonable person can only come to the conclusion that first plaintiff is anti-kwanyama; first plaintiff is hateful of the Kwanyama people; first plaintiff is a mole and a bugger, and that first plaintiff is prone of advising another Facebook reader to produce credible documentary or audio/video recording evidence.

Held, that defendant could not prove that the defamatory matter was the truth and the publications cannot be justified as being in the public interest.

Held, that insofar as the defamatory matter was comment, concerning matters of public interest, it was not fairly made.

Held, that a defence of qualified privilege did not avail the defendant in as much reasonable men and women in the circumstances would expect and require justifiable publications and commentary on well researched, well founded and responsible endeavours aimed at supplying accurate dissemination of information.

Held, that reasonable publication (commentary) requires of the defendant, prior to publication, to seek the views of the subject of critical reportage and to allow reasonable time for a response, which was not done.

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**ORDER**

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In the premises the following orders are made:

- [1] Defendant shall pay an amount of N\$ 60 000 to the first plaintiff.
- [2] Defendant shall pay an amount of N\$ 5 000 to the second plaintiff.
- [3] Interest at the rate of 20% per annum from 11 June 2019 to date of final payment.
- [4] Defendant shall pay only the taxed reasonable and necessary expenses actually incurred by the plaintiffs' in pursuing their claims.

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**JUDGMENT**

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Oosthuizen J;

**Background**

[1] First plaintiff, Werner S. Kaniita and second plaintiff, Ananias N Iiyambo, claim against the remaining (first) defendant, Phil Ya Nangoloh for payment of N\$250 000 each, interest thereon from date of judgment, costs of suit and further or alternative relief. Plaintiffs' claim is founded on defamation.

[2] Defendant, Phil Ya Nangoloh is the founder and executive director of NamRightsInc (formerly the Namibian National Society for Human Rights).

[3] Both plaintiffs were, with 6 others, appointed by the King of Ondonga during 2012 to serve on a Commission to hear and resolve complaints originating from the eastern parts of Ondonga.<sup>1</sup>

[4] The Commission in April 2013 notified two senior Kwanyama speaking leaders with grazing rights in Eastern Ndonga that they may receive notices to vacate the grazing area in Ondonga soon due to distress, drought and hunger in that region. The notifications were signed by first and second Plaintiffs in their capacity as spokesperson and secretary of the Commission. The notifications were copied to the King of Ondonga Traditional Authority.<sup>2</sup>

[5] The notifications quote Section 29(3) of the Communal Land Reform Act, Act No 5 of 2002 which give the Chief of the Traditional Authority the right to, upon application, grant a grazing right to non-residents of an area and to withdraw such right due to drought or any other reasonable cause.

[6] The written mandate given to the Commission arguably did not give the Commission the right to withdraw a grazing right.<sup>3</sup>

[7] While the notifications aforementioned were already in existence and on 2 May 2013, a certain Mpingana Shalongo's letter was published in the Namibian Sun Newspaper.<sup>4</sup> The letter reads:

**'Letter: Kashuupulwa is not to blame for new region.**

**Submitted by NamibianSun203 on Thu, 2013-05-02 08:19**

**Mpingana Shalongo writes;**

As a born Oshindonga-speaking Oshiwambo Namibian, I am saddened by the group of power-hungry Oshindonga-speaking youngsters, who are moving around manipulating Namibians, young and old, to support their negative idea for the creation of an exclusively Oshindonga-speaking region, to be called Peter Nanyemba, Oshitambi, or Martin

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<sup>1</sup> Record, p 290.

<sup>2</sup> Record, pp 18-25.

<sup>3</sup> Record, p 290.

<sup>4</sup> Record, pp 47-48.

Rautanen/Nakambale kaNene - and this all within a peaceful and stable Namibia. As an Omundonga who lives in Ondonga, I have been closely following this tribalistic project, which has the energy to destabilise the whole of Namibia and I therefore wish to share with other Namibians the information I have on this project.

There is a group of young Oshindonga speakers who feel that they are from a supreme tribe, an Oshiwambo sub-tribe who were the first to mingle with whites/missionaries and they therefore have a strong feeling that they were the first to become 'civilised'. They feel they were the **first to wear trousers**, while others were still wearing goat skins; and thus they believe that they should be the ones ruling others.

Furthermore, this group believes that it was the Ndonga who created OPO (Owambo Peoples Organisation) and according to this belief, they are supposed to be the leaders of Namibia, because it is them who started the liberation struggle. The group also believes that the premature death of PLAN Commander Peter Nanyemba robbed them of the real first president of Namibia. They also believe Nahas Angula has been too passive and soft in his campaign for Statehouse and that he was not supposed to lose against Pohamba or Geingob and that Nahas has dismally failed to restore the Peter Nanyemba legacy and that he failed to put the Ndongas back into supremacy.

This group of power-hungry supreme Oshindonga youngsters, who hold night meetings at Ondangwa, Windhoek and Swakopmund, aim to control Namibia by hi-jacking power from the Omusati Clique. This group is mobilising business leaders to fund their campaign and religious leaders to bless their project. They have effectively managed to manipulate and overrule the Ondonga Traditional Authority and they have hijacked the King to become their voice; a spokesperson of their supreme tribal project.

The same group is also working with some people in Kunene and other regions to reduce and neutralise what they constantly call in meetings to be the Omusati Clique's influence and domination. With all due respect to the Ondonga King, he has been hijacked by this group as they aim to selfishly achieve their own personal political ambitions through blatant tribalism. Their ultimate aim is to get into Statehouse.

As in the case of the struggle kids, there are also big politicians (active and retired) in this project (including ministers), who are stirring this hot-pot of tribalism, (behind the scenes). Why are prominent politicians such as Nangolo Mbumba, Kangulohi Helmut Angula and Armas Amukwiyu not condemning this tribalism which is being spearheaded by the

unknowing advocate? Do they also support this selfish and heavily opportunistic tribalist project?

Now that this group is trying to hide its negative deeds, they have a strategy to use Oshana Governor Clemens Kashiupulwa as a scapegoat and tarnish his good name. They must leave Kashiupulwa, a man with a sense of great unity, alone. While we know that there are certain development that have not taken place because of some lazy councillors, we know that they want to blame it on Kashiupulwa who sits very far in Oshakati. We know that some councillors have been promised governor or chief regional officer's position in the new proposed by these power hungry advocates. Kashiupulwa has nothing to apologise for. Those who manipulated the kind must apologise. We the progressive Aandonga want to continue working together with other Namibians irrespective of tribe, race or ethnic origin. We don't have a problem with the Kwanyamas, Kwambis or Hereros. I urge the Office of the President to use all resources at its disposal to investigate, counsel and neutralise this terrible spate of tribalism.

I appeal to all progressive Aandonga and all Namibians to advice the Ondonga King to reject and throw away the idea of a new region, a tribalism project that is dividing a united and peaceful Namibia.'

[8] Defendant, Mr Ya Nangoloh, on the same date wrote the following on his Facebook page under "News Feed"<sup>5</sup>



'Ya Nangoloh Phil|| May 2, 2013 ||BEWARE OF THIS VENOMOUS MPINGANA SHALONGO

I say comrades, who is this extremely inflammatory Ananias Nghifitikeko-style propagandist and anti-Aandonga tribalist calling himself "MPINGANA SHALONGO" and who is claiming to be an ethnic omuNdonga? But yet he is attacking the whole Ndonga tribe? He does so through a venomous letter published in Namibian Sun Newspaper of today, page 6. [http://sun.com.na/.../letter-kashiupulwa-is-not-blame-for new...](http://sun.com.na/.../letter-kashiupulwa-is-not-blame-for-new...)

<sup>5</sup> Record, p 28.

He claims that Aandonga people feel that they are supreme tribe; that they were the first to become civilized; that they were the first to mingle with whites; that they were the first wear trousers; while others were still wearing goat skins; that they should be the ones ruling others; that they created Ovambo People's Organization (OPO); that they were supposed to be leaders of Namibia; that they started the liberation struggle; that the death of Peter Nanyemba robbed them of the real first president of Namibia; that Nahas Angula has dismally failed to restore Nanyemba's legacy; that they aim to control Namibia; that they want to hi-jack power from Omusati Clique's influence and domination; that prominent Aandonga politicians, such as Nangolo Mbumba, Kangulohi Helmut Angula and Armas Amukwiyu are not condemning tribalism and that they want to create an exclusively Oshindonga-speaking region, and so on!

This venomous 'letter' reminds me of another venomous 'letter', attacking the whole Ovakwanyama people. This 'letter', written by Hilaria Iyambo, was published in New Era in July 2010<sup>7</sup>!

So comrades, this is really a sad day for Namibia! Let us all be vigilant against these vices!

FOR A NATION TO SURVIVE, THE TRIBE MUST DIE!

[9] The letter in paragraph [7] and first defendant's response on Facebook are quoted in full because they create important background for the alleged defamatory matter which is the subject of this judgement.

### **Applicable Law**

[10] Chapter 3 of the Namibian Constitution, Article 5, irrevocably dictates that the fundamental rights and freedoms enshrined in chapter 3 shall be respected and upheld by the Executive, Legislature, Judiciary and all organs of Government and its agencies and where applicable to them by all natural and legal persons in Namibia and shall be enforceable by the courts in the manner prescribed.

[11] Article 8(1) dictates that the dignity of all persons shall be inviolable.

[12] Article 10 provides for equality before the law of all persons and prohibit discrimination against any person on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

[13] Article 12 guarantees fair trial rights in the determination of all persons' civil rights and obligations when they are faced with criminal charges.

[14] Article 18 guarantees and provides for fair and reasonable actions by administrative bodies and officials.

[15] Article 19 endorses the rights of every person to enjoy practice, profess, maintain and promote any culture language, tradition or religion subject to the Constitution and subject to the condition that such rights do not impinge upon the rights of others or the national interest.

[16] Article 21 deals with fundamental freedoms and Article 21(1)(a) accords the right of freedom of speech and expression to all persons including the press and other media. This right to freedom of speech and expression however shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of freedom of speech and expression, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. (Court's underlining)

[17] It is thus clear that Article 21(2) subjected the right to freedom of speech and expression to the law of Namibia in so far as reasonable restrictions, necessary in a democratic society and required in relation to defamation, apply.

[18] It is this last condition which the press and media practitioners usually neglect to state when they invoke their Article 21(1)(a) rights, and which the courts must apply when called upon in deciding defamation cases where the inviolable right to dignity of all persons is naturally at stake.

[19] In *Free Press of Namibia (Pty) Ltd v Nyandoro* 2018 (2) NR 305 SC at 326 [41], the Namibian Supreme Court adopted the known position of the South African



Supreme Court of Appeal in Tsedu and Others v Lekota and Another 2009 (4) SA 372 (SCA) at 377 C-F.

[20] The dicta from Free Press and Tsedu aforementioned applied to the multiple postings in the present case, requires from the court, in deciding whether the postings were defamatory, how they would be understood in their context by the reasonable reader. Reasonable readers should not be treated as naïve or unduly suspicious. A reasonable reader is capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. An over-elaborative analysis of the postings should be avoided. Judges should have regard to the impression the postings have made on themselves in considering what impact it would have made upon the hypothetical reasonable reader.

[21] In the event that the court found that the postings or some of them was concerning the plaintiffs and defamatory of the plaintiff's, the first defendant should show that the postings were not made with an intent to injure the plaintiffs and were not wrongfully made.<sup>6</sup>

[22] In Modiri v Minister of Safety and Security and Others,<sup>7</sup> referred to in Free Press<sup>8</sup> it was said that if a defamatory statement is found to be substantially untrue, the law does not regard its publication as justified. And further that 'publication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story'.

[23] A defendant, in order to rebut the presumption of wrongfulness 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 it was made on a privileged occasion.<sup>9</sup>

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<sup>6</sup> Trustco Group International v Shikongo 2010 (2) NR 377 SC at 388 [24].

<sup>7</sup> 2011 (6) SA 370 (SCA) at 379 F.

<sup>8</sup> Free Press opcit, 337 [67].

<sup>9</sup> Trustco. Op cit, cit, [24].

[24] A defendant may now also rebut the presumption of unlawfulness by showing that a statement or publication was reasonable or responsible and in the public interest.<sup>10</sup>

[25] O'Reagan AJA fittingly held that the defence of reasonable publication 'holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals.'<sup>11</sup>

### **Discussion and pleadings**

[26] Comparing the letter of Mpingana Shalongo with the comment aimed at the person of the said Shalongo by the defendant, leave the reasonable reader with the feeling that the attack is unwarranted and uncalled for and based on defendant's misapprehension of what Shalongo have written. Shalongo has clearly disassociated himself from the "power hungry Oshindonga speaking youngsters" and their "negative idea for the creation of an exclusively Oshindonga-speaking region". Shalongo made it clear that "We the progressive Aandonga want to continue working together with other Namibians irrespective of tribe, race or ethnic origin" And "We don't have a problem with the Kwanyamas, Kwambis or Hereros". The whole second paragraph of defendant's posting in paragraph[8] is wrong and a distortion of what Shalongo has said in paragraph [7].

[27] Having labelled Mpingana Shalongo a tribalist on 2 May 2013, the defendant on 3 May 2013 repeat his plea on Facebook to reject this venomous tribalist "Mpingana Shalongo".

[28] Plaintiff's particulars of claim, from paragraph 10 to 25 is quoted verbatim hereunder with record page references inserted where it refers to annexures.

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<sup>10</sup> Trustco. Op cit, cit, [53] [54] and [55].

<sup>11</sup> Trustco, op cit, [56].

'10. On 4 May 2013 the first defendant authored and published a further comment on Facebook titled ""KANIITA" FANNING ANTI-KWANYAMA HYSTERIA IN ONDONGA?"".

The first defendant further wrote –

"My sources say that the group aims to create as much tribal hatred as possible between the two largest Owambo tribes with the view to undermine support for Pohamba-Geingob Team."

See the attached ANNEXURE "E"

(Record, p 35)

11. The first defendant further published on his Facebook wall –

"My sources also say that "Kaniita" was the author of the recent highly inflammatory letter which was published in Namibian Sun on May 2 2013 and the false name of "Mpingana Shalongo".

See the attached ANNEXURE "E"

(Record, p 35)

12. On 5 May 2013 the first defendant further published on his Facebook wall –

"Cde Malakia T Hamukoto further above. Don't you worry, I will eventually and hopefully very soon, expose who this inflammatory mole is, called Kaniita." May 5, 2013 at 6:02am"

See the attached ANNEXURE "F"

(Record, p 36)

13. On 5 May 2013 the first defendant further commented on his Facebook wall –

"I believe, that I am now nearing establishing the identities of this poisonous letter writer called Mpingana Shalongo." May 5, 2013 at 6:02am"

See the attached ANNEXURE "F"

(Record, p 42)

14. On 5 May 2013 the first defendant further commenting on his Facebook wall –

“All I can clearly see now is that both "Kaniita" and "Mpingana Shalongo" have inside information about King Immanuel Kauluma Elifas and the Ondonga Traditional Authority. So far, I have heard therefore I believe that "Kaniita" and "Mpingana Shalongo" are two references for one person or a group of persons very close to the Ondonga Kingdom! Ondive li mokashoko!.May 5, 2013 at 6:02am”

See the attached ANNEXURE “F”

(Record, p 42)

15. On 5 May 2013 at particular and material time 6:12am” Ya Nangoloh further commenting: on his own Facebook wall:

“Ya Nangoloh Phil Cde Joseph Nakalemo, above. Part of my work and I am sure the same applies to Cde Shitefa Sha Mvula is to gather information about what is going on in this country, especially about situations that are likely to endanger the human rights we are promoting!”

See the attached ANNEXURE “G”

(Record, p 43)

16. On 5 May 2013 the first defendant further commented on his own Facebook wall –

“The activities of Mpingana Shalongo and Kaniita have the potential of leading to inter-tribal conflict (Jah Forbid!) in this country.” May 5, 2013 at 6:12am.”

See the attached ANNEXURE “G” (Record, p 43)

See the attached ANNEXURE “K” (Record, p 47)

17. On 5 May 2013 the first defendant further commented on his Facebook wall –

“Yes, as I told Cde Malakia T Hamukuto above, I deeply suspect that "Kaniita" and "Mpingana Sahalongo" are two different references to one person or a group of persons with a joint criminal enterprise! They are clearly promoting the agenda of someone, most probably in the Omusati clique camp. But let us wait and see!May 5, 2013 at 6:12am”

See the attached ANNEXURE “G” (Record, p 43)

18. On 12 May 2013 the first defendant posted an article on his FACEBOOK wall titled "PRESS RELEASE-NDONGA TRADITIONAL AUTHORITY MUST NOW ALSO SAY". stating –

"In order to rinse themselves of the widespread accusations and perceptions of tribalism and other divisive vices, the Ondonga Traditional Authority ("OTA1") and the King of Ondonga must repudiate and disown the dangerous and tribalistic eviction order published in the media last week. The far-reaching order, which is purportedly issued by the Ondonga King's Special Commission, is co-signed by Ananias N Iiyambo and Werner S Kaniita who are said to be its chairperson and spokesperson, respectively."

See the attached ANNEXURE "Q" (Record, p 49)

See the attached ANNEXURE "W" (Record, p 51)

19. On 13 May 2015 the first defendant posted an article on his FACEBOOK wall titled "Ya Nangoloh Phil||May 13, 2013 · ||NOW AUTHORITY NIXES NELULU EVICTION", stating inter alia –

"Now what OTA1 and King Immanuel Kauluma Elifas must do is to institute legal and other steps against those responsible for the inflammatory eviction order. I have in my possession a copy of an eviction order against Nelulu and Nghaamwa. The tribally incendiary order is co-signed by a certain Ananias Iiyambo and Werner Kaniita! Who are these people?"

See the attached ANNEXURE "CC" (Record, pp 73-76)

See the attached ANNEXURE "X" (Record, p 55)

See the attached ANNEXURE "Z"(Record, p 56)

20. Also on 13 May 2013 the first defendant published a statement attributed and made by the second defendant (of and concerning the plaintiffs), to the effect that –

"I want to tell you that both the king and this traditional authority do not know anything about such a commission and have never ordered anybody to go and evict the two farmers from Oukwanyama district. You can put it in the newspaper that they must have nothing to fear, as both the King of Ondonga and his traditional authority have not issued those eviction orders to them."

See the attached ANNEXURE "CC" (Record, pp 73-76)

21. On 23 May 2013 the first defendant posted an article on his FACEBOOK wall titled “Ya Nangoloh Phil added 2 new photos.May 23, 2013 “IS WERNER SIMANEKA KANIITA ANTI-KWANYAMA??” and made references to ANNEXURE ‘E’, stating inter alia that –

“I say, comrades, careful inspection of the cartoon posted below and reading several posts authored by Cde Werner Simaneka Kaniita (who is shown in the color picture below in the middle) a reasonable person can only come one conclusion: that Tatekulu W S Kaniita is extremely anti-Kwanyama! Why is he so hateful of the Kwanyama people?

Comrades, I am still hot on the heels of the "Kaniita" who allegedly wrote that inflammatory letter against the King of Ondonga, the Ondonga Traditional Authority and the Ondonga people under the pseudonym of "Mpingana Shalongo". This mole must be identified and exposed sooner rather than later! Please help me identify this bugger!”

22. The first defendant further commented on his own Facebook wall on 24 May 2013 as follows –

“• Ya Nangoloh Phil Cde JohnLee Mushashi Ishila above. While I cannot categorically dismiss your allegations above. I demand that you produce credible information especially documents or audio/video recording. Consult Cde Werner Simaneka Kaniita as he might use his ICT techniques to help you produce such evidence! In the meantime, I can assure you that our investigation are under way to prove or disapprove the type of anti-Kwanyama allegations you and Cde Werner Simaneka Kaniita are hurling at ethnic Kwanyamas! Please also familiarize yourself the provisions of the Racial Discrimination Prohibition Amendment Act 1998!- May 24, 2013 at 10:32am · Like · 2”

See the attached ANNEXURE “U” (Record, p 60)

## THE PLATFORM

22. Further, the first defendant wrongfully and unlawfully created a public platform for the further dissemination, publication and discussion of the afore-pleaded defamatory matter.

## CAUSE OF ACTION

23. The PLAINTIFFS, SUING the DEFENDANTS for defamation, on the grounds that the DEFENDANTS published and posted statements, including articles and made commentary published on FACEBOOK, and subsequent comments posted on online articles, in the local newspaper and mainly on the FACEBOOK (referred to below, and of and concerning the plaintiffs, read as a whole and the extracts identified below), the said words, in the context of the articles, comments, publications and posts (of and concerning the plaintiffs), being wrongful and defamatory of the plaintiffs (and infringed the plaintiffs' rights to dignity as enshrined in Article 8 of the Namibian Constitution), in that they were intended and were understood by readers of the afore-pleaded to mean inter alia (and with the additional sting) that –

23.1 The plaintiffs are inciting tribalism;

23.2 The plaintiffs are inciting hatred and violence;

23.3 The plaintiffs are acting without authority or mandate, and unlawfully;

23.4 The plaintiffs are contravening legislation prohibiting racial discrimination;

23.5 The plaintiffs are criminals;

23.6 The plaintiffs are subverting the Namibian Government and treasonous;

23.7 The plaintiffs are subverting King of Ondonga, the Ondonga Traditional Authority and the Ondonga people;

23.8 The plaintiffs are subverting the SWAPO political party;

23.9 The first plaintiff is dishonest and manufactures evidence;

23.10 The plaintiffs are “anti-Kwanyama”;

23.11 The plaintiffs are intent on undermining and subverting the “Pohamba-Geingob Team” and are divisive;

23.12 The first plaintiff is a spy;

23.13 The plaintiffs are of low morals, ethics and integrity.

24. Further, the afore-pleaded publications impute, and were intended to impute, and were understood by the persons to whom same was distributed to impute, what is pleaded in 23.1 – 23.13 above.

25. The afore-pleaded publications were widely distributed and widely read by the general public.'

[29] First defendant's pleaded defences were that:<sup>12</sup>

- (a) the postings were not of and concerning the plaintiffs,
- (b) the postings were not defamatory, wrongful or published with the intention to defame plaintiffs and alternatively,
- (c) that insofar as it contained statements of fact, the facts were essentially the truth and publication thereof was in the public interest and,
- (d) that insofar as the postings contained allegations of the nature of a comment, the comments concerned matters of public interest and were fairly made.

[30] Defendant further denied that he wrongfully and unlawfully created a public platform for the further dissemination, publication and discussion of the alleged defamatory matter. Defendant denied the meaning attributed to the postings by the plaintiffs, the imputations pleaded and that the postings were widely distributed and widely read by the general public.<sup>13</sup>

[31] Defendant endeavoured to introduce additional defences of reasonable publication of facts in the public interest and qualified privilege in his pre-trial report, preliminary heads of argument, heads of argument subsequent to evidence and in evidence. The pre-trial order of the court on 28 November 2018, however subjected the issues to the pleadings.<sup>14</sup>

[32] When the matter first went on trial on 24 July 2017, the trial dates were vacated. The matter was referred back to the case management roll of Oosthuizen J.

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<sup>12</sup> Record, pp 118-132.

<sup>13</sup> Record, pp 132-133.

<sup>14</sup> Record, p 196.



At that stage only the erstwhile second defendant had legal representation. First defendant

(present defendant) apparently indicated an exception, somehow it became an issue whether or not points in limine in respect of non-joinder and locus standi were to be dealt with separately from the merits and whether the parties would wish to mediate.<sup>15</sup>

This court's pre-trial order of 28 November 2016 however already effectively ordered that procedural technicalities, in limine points of law and non-compliance with court rules, were not available to the parties before trial.<sup>16</sup> It should be noted that at all material times, except when the amended particulars of claim and pleas were filed, the plaintiffs and first defendant, all students of law, were self-represented. On request of the court, they were assisted by amici curiae from the Society of Advocates during pleading stage in order to instil some rule compliance in the pleadings.

[33] The court order of 24 July 2017<sup>17</sup> has effectively had the effect that for the remainder of 2017 nothing meaningful happened. Mediations were still born due to the unavailability of either the parties or their counsel.

[34] On 4 December 2017 orders number 1-3 of the court order of 28 November 2016 were reinstated and the matter placed back on the action floating roll for 11-15 June 2018.<sup>18</sup>

[35] Several court orders were made between the 4<sup>th</sup> of December 2017 and 11 June 2018 in order to keep the matter on track and to case manage it for readiness to commence as scheduled.<sup>19</sup>

[36] The separate hearings concerning points in limine never materializes by agreement between the parties and under guidance of the court. On the 23<sup>rd</sup> of May 2018 the court issued the following order:

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<sup>15</sup> Record, pp 200 and 201.

<sup>16</sup> Record, p 196, orders 1 and 2.

<sup>17</sup> Record, p 200.

<sup>18</sup> Record, p 239.

<sup>19</sup> Record, pp 241-248.

- '1. The matter shall proceed on trial on the action fixed roll from 12 June 2018 at 09H30 and on 13, 14 and 15 June 2018 from 09H00 on all dates until 16H00 and on 15 June 2018 until 15h00.
2. None of the parties to this proceedings shall henceforth and in relation to the disputes to be adjudicated publish, cause to publish, create and or post and discuss in any of the daily newspapers, weekend papers, social media (inclusive of, but not limited to Facebook, Twitter, Instagram, Linked-In, WhatsApp, Snapchats and YouTube) any matter concerning the issues to be adjudicated in this case. Likewise the parties shall desist from interviews with reporters.
3. The limitation in order 2 above shall endure until judgement is delivered herein.
4. The pre-trial orders issued in this case previously remains in force mutatis mutandis.'

On the same date and following a discussion in curiam the record was trimmed by removing a substantial portion of unnecessary documentation and case law and defendant was informed of the necessity to focus on the real and material issues.

[37] Due to the fact that plaintiffs and eventually the one remaining defendant (erstwhile first defendant) remained unrepresented and in a liberal approach not to gag the parties with the strict application of rules and procedure, the parties and especially the defendant was accorded latitude which would not have been allowed had they been legally represented.

[38] Having heard evidence the court is satisfied that despite procedural complaints by the defendant, the court has jurisdiction, non-joinder and or misjoinder does not avail the defendant, and other peripheral issues raised by defendant are not determinative or available to defendant. The real issues between the parties are to be determined. They are summarized in paragraphs [29]-[31] above and dealt with hereinafter.

[39] The court accepts, after hearing evidence and perusing the pleadings that plaintiffs claim against the defendant in their personal capacities.

[40] The publications/postings by defendant on 4 May 2013, 12 May 2013, 13 May 2013, 23 May 2013 and 24 May 2013 are of and concerning the first plaintiff in particular and to a lesser extent of and concerning second plaintiff.

[41] The reasonable reader test as explained in paragraphs [19] and [20] applied to the postings/publications on the aforementioned dates were defamatory, of the plaintiffs in that they convey and were understood as set out in paragraphs [48] and [50] hereunder.

[42] The fact that plaintiffs withdrew their claim against the second defendant on the third day of the trial and did not call witnesses of the Ondonga Tribal Authority in support of their alleged mandate to act on behalf of the King of Ondonga in ousting persons from East Ondonga due to drought etcetera, assisted the defendant in asserting that inasmuch as he commented and published that plaintiffs acted without authority he did not act wrongful and with an intent to defame them.

[43] Defendant's publications / postings aforementioned will remain defamatory unless he could show that it was essentially true and the publication thereof was in the public interest or that the comments were concerning matters of public interest and were fair, or was done under qualified privilege, or constitute reasonable publication.

#### Truth and public interest

[44] Defendant created a series of postings which defamed the plaintiffs, commencing with the commentary he posted on 2 May 2013 concerning Mpingana Shalongo (quoted in paragraph [8] above).

[45] The court has pronounced itself in paragraph [26] above on defendant's comments based on his misapprehension and distortion of what Shalongo has caused to be published.

[46] Shalongo was erroneously labelled by defendant as a tribalist and venomous tribalist.

[47] On 4 May 2013 the defendant published the following:

“KANIITA” FANNING ANTI-KWANYAMA HYSTERIA IN ONDONGA?

I say comrades, a highly placed group of people allegedly in or around the Ondonga Traditional Authority and led by a certain Kaniita (who is this Kaniita?), has allegedly issued Ohangwena Governor Cde Usko Nghaamwa, Oukwanyama Traditional Authority Chairman, Snr Headman George Nelulu and other ethnic Kwanyamas with an eviction order from their grazing farms in the Mangetti farming district in Eastern Ondonga, in the Oshikoto Region.

In doing so, this group purports to act in the name and or on behalf of King Immanuel Kauluma Elifas. However, my impeccable sources say that King Elifas has never authorized such eviction order. By issuing the eviction order against ethnic Kwanyamas, this group purports to be acting in accordance with Section 29(3) of the Communal Land Reform Act 2002 (Act 5 2002). In terms of that Section, “the Chief or the Traditional Authority may at any time withdraw a grazing right due to drought or any other reasonable cause”.

My sources say that the group aims to create as much tribal hatred as possible between the two largest Owambo tribes with the view to undermine support for Pohamba-Geingob Team. My sources also say that “Kaniita” was the author of the recent highly inflammatory letter which was published in Namibian Sun on May 2 2013 and the false name of “Mpingana Shalongo”. So, who is this “Kaniita”, comrades? Whose political agenda is he or she promoting?’

[48] The defamatory matter in the aforesaid posting/publication is that first plaintiff is fanning anti-Kwanyama hysteria; the group of which the first plaintiff is the leader aims to create as much tribal hatred between the two largest Owambo tribes (with a view to undermine support for the Pohamba-Geingob Team). Also that first plaintiff was the author of the recent highly inflammatory letter published in the Namibian Sun on 2 May 2013 under the false name of ‘Mpingana Shalongo’.

[49] The reference to eviction orders were wrong, they were notices of intent to issue eviction notices in future. The publication of first defendant being the author ‘Mpingana Shalongo’ according to undisclosed sources of defendant was wrong and a contradiction in terms. The tribalistic accusations against first defendant did not fit the letter of Shalongo. The import of defendants’s posting/publication was unfounded

and not reasonably researched. No attempt was made by defendant to obtain the comment of first defendant before publishing. Reasonable diligence from defendant could have placed the contact numbers of first and second plaintiffs in his possession (which was clearly printed in the said notices).

[50] Defendant continued unabated with his defamatory publications/ postings/ comments on Facebook on 5,12,13,23 and 24 May 2013 to the extent that first plaintiff is an inflammatory mole; one and the same as Mpingana Shalongo; the activities of Shalongo and first plaintiff have the potential of leading to inter-tribal conflict; they have a joint criminal enterprise; the eviction orders co-signed by plaintiffs are dangerous and tribalistic and inflammatory; posing questions whether first plaintiff is anti-kwanyama and in the same posting saying that a reasonable person can only come to one conclusion that first plaintiff is anti-kwanyama; imputing that first plaintiff is hateful of the kwanyama people; repeating that Shalongo and first plaintiff are the same person; first plaintiff is a mole and a bugger and advising another on his Facebook page to consult first plaintiff for assistance to produce credible documentary or audio/video recording evidence.

[51] Defendant could not prove that the defamatory matter was the truth and applying *Modire, op cit*, [22], the publications cannot be justified as being in the public interest.

#### Fair comment concerning matters of public interest

[52] The defamatory matter identified before, insofar it was comment concerning matters of public interest, was not fairly made. See paragraphs [44]-[46] and [48]-[51] above.

#### Qualified Privilege

[53] Defendant's attempt to convince the Court that his statements / comments/ postings were published in the discharge of a duty or in protecting a legitimate interest (anti-tribalism) and that his readers had a duty or interest to receive the communication, was crippled by what reasonable men and women in the circumstances would expect or require. Reasonable people/readers require and

expect justifiable publications and commentary on well researched and well founded, responsible endeavours aimed at supplying contextually accurate dissemination of information.<sup>20</sup> This threshold was not reached as can be seen from the foregoing paragraphs.

#### Reasonable publication (commentary)

[54] The 'Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media' which the defendant admitted is applicable to him and the postings/publications he generates in his capacity as a human rights defender, requires of him, prior to publication, to seek the views of the subject of critical reportage. Thereafter reasonable time should be afforded for a response.<sup>21</sup>

[55] This the defendant has not done or attempted to do despite the fact that the plaintiffs' contact details were available upon a simple inquisitive exercise concerning the notices of intent to issue eviction notices in future underlying the contents of the posting of 4 May 2013 [47], if it was not in his possession at that stage.

#### **Conclusion**

[56] Plaintiffs' succeed with their defamation claim to the extent set out in paragraphs [48] to [55] before. The publications / postings containing the defamatory matter were probably widely distributed and read by the general public. The court accepts that the internet constitutes an endless platform for dissemination of information.

[57] The parties were not legally represented and acted in person.

[58] Plaintiffs are aspiring to become legal practitioners. Both plaintiffs are gainfully employed in spheres requiring professionalism and integrity. Plaintiffs were part time engaged in advisory capacities to the Ondonga Tribal Authority and although they

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<sup>20</sup> Free Press, op cit, [59].

<sup>21</sup> Op cit, p 7, paragraph 2.8.

arguably have misunderstood their mandate, they should have been aware that their actions may subject them to reasonable criticism (not defamation).

[59] In the result the court orders as follows:

[59.1] Defendant shall pay an amount of N\$ 60 000 to the first plaintiff.

[59.2] Defendant shall pay an amount of N\$ 5 000 to the second plaintiff.

[59.3] Interest at the rate of 20% per annum from 11 June 2019 to date of final payment.

[59.4] Defendant shall pay only the taxed reasonable and necessary expenses actually incurred by the plaintiffs' in pursuing their claims.

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GH Oosthuizen  
Judge

APPEARANCES:

PLAINTIFF(S):

Werner S Kaniita

In person

Ananias N Iiyambo

In person

DEFENDANT:

Phil Ya Nangoloh

In person