

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**RULING: ABSOLUTION FROM THE INSTANCE**

Case No: HC-MD-CIV-ACT-DEL-2017/03585

In the matter between:

**FLORIAN BEUKES**

**PLAINTIFF**

and

**ENWICH KAZONDU**

**1<sup>ST</sup> DEFENDANT**

**METAL & ALLIED WORKERS UNION OF NAMIBIA**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Beukes v Kazondu and Another* (HC-MD-CIV-ACT-DEL-2017/03585) [2019] NAHCMD 213 (28 June 2019)

**Coram:** USIKU, J

**Heard on:** 18 – 19 March 2019

**Delivered:** 28 June 2019

**Flynote:** Practice – Application for absolution from the instance – Delict – Defamation – meaning and elements – Absolution from the instance granted.

**Summary:** The plaintiff, a legal practitioner, instituted action against the defendants for defamation. The first defendant is employed as a union representative by the second defendant. The second defendant is a registered trade union. The plaintiff alleged that the first defendant whilst on official duty made wrongful and defamatory statements about the plaintiff. At the end of the plaintiff's case, the defendants applied for absolution from the instance. The court granted absolution from the instance.

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## ORDER

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1. The application by the defendants for absolution from the instance is hereby granted.
  2. The plaintiff is ordered to pay the costs of suit of the defendants.
  3. The matter is removed from the roll and regarded finalised.
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## RULING: ABSOLUTION FROM THE INSTANCE

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USIKU, J:

### Introduction

[1] The issue presently before court for determination is an application by the defendants for absolution from the instance, made when the plaintiff closed his case in this defamation action for damages.

[2] In the main action the plaintiff alleges that on or about 22 July 2017 at Birds Mansion Hotel, Keetmanshoop, whilst a disciplinary hearing was on a break, the first defendant had uttered the following words/statements:

(a) 'Jacomo De Lorenzi (a witness at the disciplinary hearing) changed his testimony after he disappeared with Florian Beukes (the plaintiff) before testifying in the disciplinary hearing.'

and

(b) 'I will even argue further on other witnesses that were tampered with.'

[13] The plaintiff testified that those words/statements are in their ordinary meaning defamatory of and concern the plaintiff. He further testified that those words were intended by the first defendant to mean and were understood by the plaintiff and by persons who heard and acquired knowledge thereof to mean that the plaintiff had *intentionally and dishonestly influenced witnesses during the disciplinary hearing to adversely change their testimonies against the employees involved.* Alternatively, the plaintiff contends, such words are defamatory and were intended to mean and were understood by persons who heard and acquired knowledge of them to mean that the plaintiff is '*unethical and dishonest and is a sly legal practitioner, with low moral scruples and not to be trusted.*'

[4] The plaintiff claims to have suffered damages to his reputation as a consequence of the defamatory words or imputations in the amount of N\$ 60 000, plus interest thereon, which he now claims.

[5] The defendants contend, among other things, that the statements allegedly uttered by the first defendant are not defamatory and that no reasonable person will understand them to convey the message that the plaintiff is unethical, dishonest or is a sly legal practitioner. The defendants therefore pray that their application for absolution from the instance be granted with costs

### Background

[6] During the period of 27 June 2016 to 1 July 2016 a member of Salini Namibia (Pty) Ltd ("Salini") embarked upon a strike which was considered as illegal by Salini.

[7] In July 2016, the plaintiff, who is an admitted legal practitioner, practising under the name and style of Metcalfe Attorneys in Windhoek, was instructed by Salini to act as

the initiator on behalf of Salini in a disciplinary hearing concerning certain Jafet Paulus and 39 other employees.

[8] The majority of the accused employees including Jafet Paulus, were members of the Metal Allied and Workers Union (the second defendant) and as such were represented at the disciplinary hearing by a representative of the second defendant. The first defendant who is an employee of the second defendant was later instructed by the second defendant to represent the accused employees.

[9] On the 22 July 2017, the disciplinary hearing continued at the Birds Mansion Hotel, Keetmanshoop. While the first defendant was re-examining a certain witness, certain Jacomo De Lorenzi (Mr De Lorenzi) arrived at the Hotel to testify on behalf Jafet Paulus (Mr Paulus). Mr Paulus was one of the accused employees represented by the first defendant.

[10] The plaintiff stepped outside the venue, when he noticed Mr De Lorenzi, to inform him to wait outside and to not leave the area till Mr Paulus and the first defendant had talked to him. While the plaintiff was talking to De Lorenzi in front of the door of the venue, the first defendant and Paulus joined them outside. The plaintiff informed De Lorenzi in the presence of the first defendant and Paulus that the latter would talk to him and require him to testify. The plaintiff thereafter returned to the venue.

[11] Later, De Lorenzi was called to testify and he testified to the effect that he could not remember if Paulus was at work on Friday the 01 July 2016.

[12] One further witness was called to testify, thereafter the chairperson of the disciplinary proceedings adjourned the proceedings to afford the parties opportunity to discuss whether there were further witnesses to be called.

[13] According to the plaintiff, it was during such break that the first defendant uttered that he:

*'had so much hope in the testimony of Jacomo De Lorenzi but that Jacomo De Lorenzi changed his testimony after he disappeared with Florian Beukes before he came to testify'.*

[14] Thereafter, the plaintiff asked the first defendant to withdraw his remarks. The first defendant refused to retract his statement and later added that:

*'I will argue further on other witnesses that were tampered with.'*

[15] The plaintiff states that the aforesaid statements were made in the presence of, and were heard by, about eleven (11) persons who were present at the disciplinary hearing.

[16] The plaintiff claims that such statements are defamatory of and concern him, and were intended by the first defendant to mean and were understood by the plaintiff and the persons who were present to mean that the plaintiff had intentionally and dishonestly influenced De Lorenzi and other witnesses during the disciplinary hearing to adversely change their testimonies against the accused employees. The plaintiff denies having tampered with any witness.

#### Defendants' application for absolution

[17] The defendants contend that there is no evidence at the close of the plaintiff's case, upon which a court might find in favour of the plaintiff. The defendants argue further that no reasonable person will understand the words allegedly uttered by the first defendant to convey the meaning attached thereto by the plaintiff. The plaintiff, according to the defendants, has not proved that the first defendant had intention to damage the reputation, dignity or feelings of the plaintiff or to lower his esteem in the eyes of right-thinking members of the society.

[18] In the event that the court finds that the words allegedly used by the first defendant were defamatory, the defendants submit that such words were made in the course of the disciplinary hearing, a quasi-judicial proceedings and enjoy the defence of a qualified privilege. In this respect, the defendants submit that the plaintiff did not prove that the statements in question were not relevant to the matter in issue during disciplinary proceedings.

#### Plaintiff's position on the application for absolution

[19] In response to the defendants' application for absolution, the plaintiff maintains that the statements in question are defamatory of the plaintiff. The plaintiff submits that a defamatory statement is *prima facie* wrongful and the defendants must rebut the presumption of wrongfulness of the statements. The plaintiff further contends that the first defendant acted with malice in that he refused to retract his remarks when called upon to do so.

#### The legal principles

[20] The test for absolution from the instance is whether at the end of the plaintiff's case, there is evidence upon which a court could or might find for the plaintiff. This implies that a plaintiff has to make out a *prima facie* case, in the sense that there is evidence relating to all the elements of the claim, without which no court could find for the plaintiff.<sup>1</sup>

[21] Defamation is defined as the publication of a defamatory matter referring to a person:

- (a) which is wrongful in that it infringes on his/her legally protected right to good name or reputation and
- (b) which is made with the intention to injure his/her good name or reputation.<sup>2</sup>

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<sup>1</sup> Coertzen v Neves Legal Practitioers I 3398/2010 [2013] NAHCMD 283 (14 October 2013) at para 11.

<sup>2</sup> Bednarek and Others v Hannam and Another (I2615/2013) [2017] NAHCMD 12 (03 February 2016) paras 14 to 16.

[22] The law defines a defamatory matter as words or conduct that tend to lower the person in the estimation of reasonable persons in the society generally.<sup>3</sup>

[23] In practice, the courts have recognized the following as some of the imputations that tend to lower a person in the estimation of reasonable persons in the society generally, namely:

- (a) imputations against moral character; for example of commission of crime, dishonourable conduct, dishonesty, immorality, cowardice etc.
- (b) imputations that arouse hatred or contempt; for example alleging that someone is a “Nazi”, “racist”, “kaffir” etc, or
- (c) imputations that expose a person to ridicule; for example calling someone a “baboon”, “shark” etc.

[24] The question whether a statement complained of is defamatory is determined objectively by the court by analysing the statement, its meaning, effect and whether it tends to lower the plaintiff in the estimation of right-thinking member of the society generally.<sup>4</sup>

#### Application of the law to facts

[25] The first issue for consideration is whether the plaintiff has adduced evidence that the statements he complains of are defamatory per se. In answering that question the court is not concerned with whether the plaintiff himself felt personally injured by the words allegedly used by the first defendant, but rather whether the court is of the view that there is evidence before court that a “defamatory” matter was published by the first defendant concerning the plaintiff.

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<sup>3</sup> Ibid.

<sup>4</sup> Ntinda v Hamutenya and Others (I 1181/2012) [2013] NAHCMD 150 (06 June 2013), para 9.

[26] In his evidence and in his particulars of claim the plaintiff claims that the statements made by the first defendant were wrongful and defamatory of the plaintiff in that they were intended and were understood by those present to mean that the plaintiff intentionally and dishonestly influenced witnesses during the disciplinary hearing to change their testimonies against the accused employees. Alternatively, the plaintiff asserts that in the context in which the statements were made, the statements are defamatory of him in that they imputed that the plaintiff is '*unethical and dishonest and is a sly legal practitioner with low moral scruples and not to be trusted*'.

[27] According to the evidence of the plaintiff and according to the particulars of claim, the defamatory statements made by the first defendant are:

- (a) '*Jacomo De Lorenzi changed his testimony after he disappeared with Florian Beukes (the plaintiff) before testifying in the disciplinary hearing,*' and,
- (b) '*I will even argue further on other witnesses that were tampered with.*'

[28] In the present matter, the plaintiff does not rely on an innuendo, in the sense that the words allegedly uttered by the first defendant have a secondary meaning. Where the plaintiff does not plead an innuendo, the test is whether a reasonable person who has heard the words would understand such words to be defamatory in their natural and ordinary meaning.

[29] Having considered the words allegedly uttered by the first defendant, I do not see how a reasonable person might find those words as imputing '*dishonest influence on witnesses to change testimonies*' or imputing that the plaintiff is '*unethical and dishonest*'. From the words allegedly used by the first defendant, the act attributed to the plaintiff is that of having '*disappeared*' with Jacomo De Lorenzi. In the absence of averments that "*disappear*" has a secondary meaning (an innuendo) which supports the defamatory meaning alleged, I am of the view that the application for absolution from the instance is justified and stands to succeed.

## Conclusions

[30] In their ordinary sense, the words allegedly uttered by the first defendant do not reflect adversely on the moral character of the plaintiff, nor do they arouse hatred or contempt. They also do not expose the plaintiff to ridicule. In my opinion, the words complained of are not reasonably capable of conveying the meanings attributed to them by the plaintiff.

[31] I therefore find that at the close of the plaintiff's case, the plaintiff has not set forth evidence that a defamatory matter was published concerning him.

[32] For the foregoing reasons I am of the view that the application for absolution from the instance should be granted with costs.

[33] In the result I make the following order:

1. The application by the defendants for absolution from the instance is hereby granted.
2. The plaintiff is ordered to pay the costs of suit of the defendants.
3. The matter is removed from the roll and regarded finalised.

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B.Usiku  
Judge

APPEARANCES:

PLAINTIFF: L Shikale  
Of Shikale & Associates  
Windhoek

1<sup>st</sup>, and 2<sup>nd</sup> DEFENDANTS: T Nanhapo  
Of FB Law Chambers  
Windhoek