

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SPECIAL PLEA

JUDGEMENT

Case no: HC-MD-CIV-ACT-DEL-2019/02754

In the matter between:

GERHARD DE WET

PLAINTIFF

and

ALEXANDER WERNER KLEIN

DEFENDANT

Neutral citation: *De Wet vs Klein* (HC-MD-CIV-ACT-DEL-2019/02754) [2021]
NAHCMD 72 (25 February 2021)

Coram: UNENGU AJ

Heard: 03 November 2020

Delivered: 25 February 2021

Flynote: Civil Practice – Plaintiff suing defendant for damages arising from alleged defamatory statement by the defendant – Application for absolution from the instance made at close of the plaintiff's case by defendant – Test for the absolution from the instance – Absolution from the instance granted with costs.

Summary: Plaintiff has sued the defendant for an amount of N\$1 million for alleged unlawful defamatory statement made by the defendant. Plaintiff required to proof publication of defamatory statement beyond the board members or to the association members – Discussions of board members during meetings are confidential or close to members of associations as attested to by the plaintiff.

Held: The test for absolution from the instance is whether the plaintiff placed evidence upon which a court applying its mind reasonably to such evidence, could find or might find in favour of the plaintiff.

Held further that the plaintiff failed to adduce evidence proving that the defendant did publish the statement beyond the members of the board.

Held furthermore the plaintiff has failed to prove a prima facie case therefore, the application for the absolution from the instance succeeds and is granted with costs.

ORDER

The application for the absolution from the instance is granted with costs.

(ABSOLUTION FROM THE INSTANCE)

JUDGMENT

UNENGU, AJ

[1] The plaintiff instituted action for defamation against the defendant which was defended and heard on 3 November 2020. The plaintiff sued the defendant for damages for injury to his good name and reputation and patrimonial damages arising from alleged unlawful and defamatory statements by the defendant. The total amount claimed from the defendant is N\$ 1 million.

[2] During the trial the plaintiff was represented by Mr T Barnard while the defendant was represented by Mr P De Beer. The plaintiff was the only witness who testified. At the close of the plaintiff's case, the defendant made an application for absolution from the instance.

[3] A brief summary of factual background revealed the following. On 30 November 2019 the defendant addressed a document to the Board of Directors of the Home Owners Association for the attention of "All board members". At all material times, the plaintiff was the Chairperson of the Board of Directors while the defendant was an elected Director of Homeowners Association. The latter authored a letter in that capacity to the attention of the board members. The letter was marked G1 and another document attached to it was marked G2. It is prudent to state the content of verbatim:

'As provided for under the provisions of the Omeya Homeowners Associations (*sic*) (the company) memorandum and articles of associations, in particulars (*sic*) article 12.2.2 and 12.2.6 thereto, kindly find under cover hereof the formal submission of the no confidence motion against the Chairperson of the Board, as tabled at the Company's board meeting of 22 November 2018. Formal request is hereby lodged for a special meeting of the board of directors to be convened for the deliberation of no confidence motion. Should any further information pertaining to the aforementioned be required, do not hesitate to contact me.'

[4] The attached document marked G2 introduced a statement titled Written Submission in Respect of No Confidence Motion in Chairman. That read as follows:

'I the undersigned Alexander Werner Klein (ID 81083010611), home owner elected director of Omeya Homeowners Association since August 2017, hereby lodge a vote of no confidence in the chairman of the board and move for a resolution for his removal under the provisions of section 228 of the Company's (*sic*) Act.'

[5] In his particulars of claim, the plaintiff claimed that the basis of the defendant's no-confidence motion against the plaintiff are the clauses in the Memorandum and Article of Association of the Home Owners Association, namely:

Clauses 12.2.2 and 12.2.6 stating... A director shall be deemed to have vacated his office as such upon: his being removed from office as provided in section 228 of the Act and his conviction for any offence involving dishonesty.

[6] According to the plaintiff's particulars of claim, the document and the attachments marked G1 and G2 respectively, are concrete evidence that the defendant sought his removal as the Director from the association. This is demonstrated by reliance on the provisions of clause 12.2.6, that the plaintiff was convicted of an offence involving dishonesty.

[7] It is the plaintiff's contention that the allegation/contention and or *innuendo* that the plaintiff had been convicted of an offence involving dishonesty were scandalous and defamatory. Such is also false to the knowledge of the defendant and was made with malice and in bad faith. Furthermore, the intention is to defame the plaintiff, injure his reputation and cause him patrimonial loss and damages. The wholesome interpretation of G1 and G2 content is intended to mean that the plaintiff is as a matter of general behaviour reckless, untrustworthy and likely to disregard his fiduciary duties and or legal responsibilities upon occupying a position requiring such responsibilities.

[8] The plaintiff further alleged in the particulars of claim that the content of G1 and G2 was distributed amongst and published to all various members of the Homeowners Association, also the residents of Omeya Golf and Residential Oasis. Any readers of such content would understand it as referencing to the plaintiff being a dishonest and or corrupt and or guilty of malfeasance (*sic*). The plaintiff further alleged that the offending statements is intended to mean that the plaintiff is precluded as per Companies Act from occupying any position within the hierarchy of a company, on account of conviction of an offence involving dishonest conduct.

[9] The plaintiff testified that he advised the defendant to make written submissions in respect of the motion of no-confidence. It was his testimony that even though he was the chairperson of the board, he failed to call the meeting to ventilate the motion. The main reason for not convening the meeting according to him, was that it was close to the end of the year and the board members were unavailable for such a meeting. The

same excuse was raised in January the following year. The plaintiff resigned from the board in February 2020. The plaintiff also admitted during cross-examination that the content of the meeting is closed to association members, save the board members. The plaintiff did not admit during his testimony that the defendant published the content of the letter beyond the board members

[10] It is also the plaintiff's position that the defendant is precluded from reliance on any defence of privilege to which the defendant otherwise would have been entitled to.

[11] The defendant denied the plaintiff allegations in his plea, save to admit certain obvious details. The defendant denied that he made defamatory statements and that he published any content that is defamatory to the plaintiff. His position seems to be that the motion of no-confidence was meant for the board members only.

[12] At the close of the plaintiff case, the defendant applied for absolution from the instance in terms of rule 100(1) of the High Court Rules. For clarity sake I quote this provision hereunder:

'At the close of the case for the plaintiff, the defendant may apply for absolution from the instance in which case the -

- (a) defendant or his or her legal practitioner may address the court;
- (b) plaintiff or his or her legal practitioner may reply; and
- (c) defendant or his or her legal practitioner may thereafter reply to any matter arising out of the address of the plaintiff or his or her legal practitioner.'

[13] The trite test for absolution from the instance is not whether the evidence led by plaintiff established what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could find or might find in favour of the plaintiff.

[14] I am left with no choice but to agree with applicant's submissions following the Supreme Court conclusion in the case of *Trustco Group International Ltd & Others vs Shikongo*¹. For the sake of brevity, I quote what the court said: "...

'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*).'

[15] Publication of defamatory content is an embedded element of defamation. I am not convinced that the plaintiff has placed before court *prima facie* evidence upon which a court applying its mind reasonably to such evidence, could find or might find in favour of the plaintiff. The main reason for the position is that the plaintiff could not establish that the alleged defamatory content was published in any way beyond the board members by the defendant.

[16] Therefore taking into consideration all the above mentioned, the plaintiff has failed to meet the requirements necessary to succeed to establish a *prima facie* claim for defamation. As a result the application for the absolution from the instance succeeds and I make the following order:

The application for the absolution from the instance is granted with costs.

E P UNENGU
Acting Judge

¹ *Trustco Group International Ltd & Others vs Shikongo* 2010 (2) NR 377 SC at par 24.

APPEARANCES:

PLAINTIFF: T Barnard (with him C Coetzee)
Theunissen, Louw & Partners, Windhoek.

DEFENDANT: P De Beer
De Beer Law Chambers, Windhoek