

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2020/01069

In the matter between:

ZELNA HENGARI

PLAINTIFF

and

NAMIBIA WILDLIFE RESORTS

FIRST DEFENDANT

MINISTER OF ENVIRONMENT AND TOURISM

SECOND DEFENDANT

MINISTER OF PUBLIC ENTERPRISES

THIRD DEFENDANT

Neutral citation: *Hengari v Namibia Wildlife Resorts and Others* (HC-MD-CIV-ACT-DEL-2020/01069) [2022] NAHCMD 381 (29 July 2022)

Coram: USIKU, J

Heard: 13 - 14 and 16 - 17 September 2021, 22 and 31 March 2022

Delivered: 29 July 2022

Flynote: Practice – Application for absolution from the instance – Delict – Defamation – elements – It is not an element for the delict of defamation that the impugned statement be false – Absolution from the instance in respect of defamation claim dismissed.

Summary: The plaintiff instituted action against the first defendant. The plaintiff alleges that the first defendant published statements concerning her which are defamatory. At the end of the plaintiff's case, the defendants applied for absolution from the instance. The court dismissed the application insofar as it relates to the claim of defamation and upheld the application insofar as it relates to certain ancillary relief.

ORDER

1. Absolution from the instance is granted in favour of the first defendant in respect of prayer 4 of the particulars of claim.
 2. Absolution from the instance is granted in favour of the second defendant in respect of prayer 2 of the particulars of claim.
 3. The application for absolution from the instance is dismissed in respect of prayers 1, 3 and 5 of the particulars of claim.
 4. I make no order as to costs.
 5. The matter is postponed to 05 September 2022 at 08:30 in chambers for allocation of dates for the continuation of the trial.
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JUDGMENT

USIKU, J:

Introduction:

[1] This is an application, by the defendants, for absolution from the instance made after the plaintiff closed her case.

[2] The plaintiff served as a Managing Director for the first defendant as from 16 July 2014 until 15 July 2019, when her contract of employment terminated and was not renewed by the first defendant.

[3] In the main matter, the plaintiff sues the first defendant for damages for an alleged defamation arising from a 'press release' issued by the first defendant on 5

April 2019. In regard to the second defendant, the plaintiff seeks an order directing the second defendant to issue a public repudiation in respect of the alleged defamatory statements made by the first defendant. The plaintiff does not seek relief against the third defendant. The third defendant is cited for the interest he may have in the outcome of this matter. All defendants defend the action.

[4] The plaintiff seeks relief in the following terms:

'1. An order directing the first defendant to issue a public apology to the plaintiff using the publication media such as a press release in at least two national newspapers one being "the Namibian newspaper" within one month of the Order of the Honourable Court directing the first defendant to do so.

2. An order directing the second defendant to issue a public repudiation of the false assertion by the first defendant that their approval of the Glamping Project was occasioned by misrepresentation on the part of the plaintiff. The second defendant must issue the public repudiation using the publication media such as a press release in at least two national newspapers one being "the Namibian newspaper" within one month of the Order of the Honourable Court directing the second defendant to do so.

3. An order directing the first defendant to pay an amount of N\$500 000 being damages for defamation and/or slander.

4. An order in terms whereof the first defendant and its board members are interdicted and restrained from performing any further actions which may injure, defame or slander the plaintiff.

5. Costs of suit.

6. Further and/or alternative relief.'

[5] It is common cause that on 5 April 2019, the first defendant issued a press release concerning the plaintiff which was also published in local newspapers. The press release reads as follows:

'NWR BOARD OF DIRECTORS PRESS RELEASE

It has been widely reported in the media that Namibia Wildlife Resort (NWR) is expected to lose revenue in excess of N\$12 million. This loss is alleged to be directly as a result of a unilateral cancellation of a Joint Venture Agreement between NWR and Sun Karros Lifestyle Safaris (Pty) Ltd by the Board of Directors of NWR.

The letter dated 26 March 2018, from NWR Board addressed to the Honourable Minister of Environment and Tourism as appeared in the local newspaper was sent pursuant to the misrepresentations made to the current NWR Board by the NWR Managing Director Ms Zelna Hengari that the Joint Venture Agreement between NWR and Sun Karros Lifestyle Safaris (Pty) Ltd in terms of which Sun Karros Lifestyle Safaris (Pty) Ltd is to develop glamorous tented camps at Sesriem, was approved and authorised during the term and by the previous Board of Directors of NWR, whose term terminated on 14 January 2016.

Similarly, the letter dated 12 April 2018 from the Minister of Environment and Tourism to NWR was authored on the strength of the NWR Board letter dated 26 March 2018.

The Joint Venture Agreement was signed by NWR Managing Director, Mrs Zelna Hengari on 11 June 2018 and by the Managing Director, Bertus Struwig of Sun Karros Lifestyle Safaris (Pty) Ltd on 30 May 2018. The cancellation of the Joint Venture Agreement by the NWR Board was as a result that the said agreement was concluded by the Managing Director, Ms Zelna Hengari without the knowledge and authorization of the Board of Directors of NWR and the Minister of Environment and Tourism.

The Board of Directors of NWR is at this stage not at liberty to comment on the urgent application by San Karros Lifestyle Safaris (Pty) Ltd before the High Court of Namibia.'

Plaintiff's action

[6] In March 2020, the plaintiff initiated the present action seeking the relief referred to above.

[7] At trial the plaintiff was the only witness who testified. She testified that the statements made in the press release are, in their ordinary meaning, defamatory of and concern, her. She further testified that the statements made by the first defendant were intended, and were understood by the persons who acquired knowledge thereof, to mean that the plaintiff:

- (a) was involved in misconduct;
- (b) was not professional in her work;
- (c) failed or refused to co-operate with her employer in the execution of her duties;

- (d) was involved in inappropriate and unlawful activities to the prejudice of the first defendant (her employer at that time);
- (e) is untruthful and a person of questionable disposition;
- (f) concluded the agreement with Sun Karros Lifestyle Safaris (Pty) Ltd ("Sun Karros") nefariously and for an improper purpose; and
- (g) is untrustworthy and not truthful in her dealings with her employer.

[8] The plaintiff contends that the impugned statements were published by the first defendant, and were "seemingly" condoned or endorsed by the second defendant and are untrue and defamatory of her and therefore she is entitled to the relief she seeks.

The defendants' case

[9] It is not in dispute that the press release was authored and published by the first defendant. The first defendant, however, denies that the statements contained in the press release were published with the intention to injure the plaintiff's name and profession. The first defendant, further,, denies that the statements are untrue and maintains that the statements are true and were published in the interest of the public and were for the benefit of the public.

[10] The second and third defendants plead that the plaintiff was not authorised by the first and second defendants to conclude the agreement with Sun Karros. They assert that the purported agreement between first defendant and Sun Karros is illegal and void, as it was concluded without following the provisions of the Public Procurement Act and the State Finance Act.

[11] At the end of the plaintiff's case, the defendants applied for absolution from the instance.

Application for absolution

[12] The first defendant contends that the plaintiff admits, in her testimony, that the first defendant was not aware of the signing of the agreement which she purportedly signed on behalf of the first defendant. Therefore, the first defendant submits, the

defence as set out in the plea, that the impugned statements are true, should succeed. According to the first defendant, a statement which is true can never be defamatory.

[13] The first defendant further contends that the plaintiff has not adduced evidence on what a reasonable person would have understood the impugned statements to mean. The first defendant asserts that statements complained of by the plaintiff are not reasonably capable of conveying the meaning attributed to them by the plaintiff. The first defendant, therefore, submits the plaintiff has not established a *prima facie* case and that the absolution from the instance should be granted.

[14] Furthermore, the first respondent submits that the plaintiff has not established that the second defendant is obliged, in law or on the facts, to issue a repudiation of the allegation made by the first defendant. According to the first defendant, the plaintiff has not set out grounds that justify the granting of an order directing the second defendant to issue a repudiation in respect of statements made by a distinct juristic person. The second defendant should therefore be absolved from answering to the plaintiff's claim in that respect.

[15] The first defendant also submits that the plaintiff has not met the requirements for granting a final interdict. Therefore, the relief sought by the plaintiff for the interdict sought against the first defendant and its board members, from performing future actions that may defame or slander her, has no basis and that absolution from the instance be granted in that respect.

[16] The second and third defendants contend that the plaintiff has failed to adduce evidence that she had obtained written approval from the first defendant to conclude the impugned agreement. It is further submitted by the second and third defendants, and that the plaintiff admits, that she did not present the agreement to the first and second defendants before she signed it.

[17] The second and third defendant also contend that the repudiation that the plaintiff seeks from the second defendant is a corollary of the defamation claim, which the plaintiff has failed to prove, therefore, the relief relating to repudiation

should also fail. The second and third defendants pray that absolution from the instance be granted in their favour.

[18] The plaintiff contends that it is not necessary to prove that the impugned statements are false, because the onus is on the defendants to prove the statements are true. The plaintiff further submits that, in any event, truth by itself is not a sufficient defence in our law. The plaintiff therefore submits that the application for absolution be dismissed.

Analysis

[19] Absolution from the instance may be granted at the end of the plaintiff's case, if the plaintiff has failed to adduce evidence upon which a court could or might grant judgment in favour of the plaintiff.¹ In other words, absolution from the instance may be granted if the plaintiff has not adduced evidence establishing all the elements of the claim.

[20] The reasoning is different from that applicable when the court comes to consider, after having heard the evidence for the plaintiff and the evidence, if any, for the defendant, whether to grant absolution from the instance at the close of the defendant's case. The enquiry then is: 'is there evidence upon which the court ought to give judgment in favour of the plaintiff.'²

[21] In order to ascertain whether the plaintiff has adduced evidence relating to all the elements of her claim, the starting point is to consider the elements of the delict of defamation.

[22] 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

¹ *Chombo v Minister of Safety and Security* I 3883/2013 [2018] NAHCMD 37 (20 February 2018) para [5].

² *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, 4th Edn p. 681.

(b) which is made with the intention to injure his/her good name or reputation.³

[23] It is trite law that a defamatory matter consists in words or conduct that tend to lower a person in the estimation of reasonable persons in the society generally.⁴

[24] From the foregoing, the elements of the delict of defamation may be summarised as follows:

- (a) the wrongful and,
- (b) intentional,
- (c) publication of;
- (d) a defamatory matter/statement(s),
- (e) concerning the plaintiff.⁵

[25] In the present case, the defendants applied for absolution from the instance, mainly, on the basis that:

- (a) the plaintiff admits that the first defendant was not aware of the signing of the agreement which she signed on its behalf,
- (b) if the statements in the press release are true, then the defendant(s) will succeed in their defence, as a statement that is true can never be defamatory,
- (c) the plaintiff did not adduce evidence on what a reasonable person would have understood the statements contained in the press release, to mean or imply,
- (d) the plaintiff failed to produce evidence that she had obtained written approval from the defendant(s) to conclude the agreement, and,
- (e) the statements in the press release are not defamatory.

[26] As regards the first, second and fourth points raised above, it is not an element of the delict of defamation, that a statement be false, for it to be defamatory. However, the truth of a statement may be an important factor in deciding the legality for its publication. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was

³ *Bednarek v Hannam* (I 2615/2013) [2016] NAHCMD 12 (03 February 2016) paras [14] to [16].

⁴ *Ntinda v Hamutenya* (I1181/2012) [2013] NACHMD 150 (6 June 2013) para [9].

⁵ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para [18].

both unlawful and intentional.⁶ The first, second and fourth points raised by the defendants therefore have no merit and fall to be dismissed.

[27] Insofar as the third point is concerned, it is trite law that the court does not concern itself with the issue of whether the actual reader of the alleged defamatory statement thought less of the plaintiff or whether the person to whom the statement relates, felt defamed.⁷ The test for defamation is an objective one and therefore a question of law which requires determination by the court. The test is a two-fold enquiry, namely:

- (a) the court would first establish the natural and ordinary meaning of the impugned statements, and how a reasonable person would have understood the statements, and,
- (b) secondly, whether the meaning given to the statements is defamatory in the sense that it tends to lower the plaintiff in the estimation of the right-thinking members of the society generally.⁸

[28] There was therefore no need for the plaintiff to call witnesses to prove what a reasonable person would have understood the meaning of the impugned statements to be.

[29] On the issue whether the impugned statements are *prima facie* defamatory, it is trite law that defamatory statements include statements affecting moral character, imputing dishonesty, unethical or unprincipled behavior reflecting on office, profession or occupation, or which expose a person to enmity, ridicule or contempt.⁹

[30] In the present matter, the impugned statements as they appear in the press release are to the effect that:

- (a) the plaintiff made misrepresentations to the board of the first defendant,
- (b) the board of directors relied and acted upon those misrepresentations, by addressing a letter dated 26 March 2018 to the second defendant, and that,

⁶ *Ibid.* para [18].

⁷ *Le Roux v Dey* 2011 (3) SA 274 at 306 para [90].

⁸ *Nthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 at 329 SCA paras [26] to [29].

⁹ *Katz v Welz* (22440/2014) [2021] ZAWCHC 76 (26 April 2021) para [24].

(c) the plaintiff concluded a Joint Venture Agreement with a third party, without the knowledge and authorization of the first defendant and the second defendant.

[31] In my opinion, on the basis of the evidence adduced, a reasonable court could or might find, that a reasonable reader of ordinary intelligence would have understood those statements in the context in which they appeared in the press release, that the plaintiff was guilty of deliberate misrepresentation of facts, and had concluded an agreement with a third party without the knowledge and authority of her employer and therefore was dishonest or conducted herself in an unethical or unprofessional manner.

[32] I am therefore that of the opinion that a court applying its mind reasonably to the evidence adduced, could or might find the impugned statements to be defamatory of the plaintiff. I, therefore, find that the plaintiff has established a *prima facie* case, insofar as her claim for defamation is concerned. Absolution from the instance, regarding the claim of defamation, therefore, stands to be dismissed.

[33] As regards to the 'repudiation' relief that the plaintiff seeks against the second defendant, I agree with the defendants that the plaintiff has not established a *prima facie* case for such relief, I shall therefore grant absolution from the instance in favour of the second defendant, in respect of that relief.

[34] Similarly, I find that the plaintiff has not established a *prima facie* case in respect of the interdictory relief that she seeks against the first defendant. I shall, therefore, grant absolution from the instance in favour of the first defendant in respect of the interdictory relief.

[35] In conclusion, the application for absolution from the instance is dismissed in respect of prayers 1, 3 and 5 of the particulars of claim.

[36] The application for absolution from the instance is upheld in respect of prayers 2 and 4 of the particulars of claim.

[37] As regards the issue of costs, I am of the opinion that the application for absolution from the instance was only half-successful. In my opinion neither party can claim to be the successful party. In so far as the second defendant is absolved from the instance in respect of prayer 2 of the particulars of claim, I have taken into consideration that the second defendant did not confine himself purely to that claim but argued on other aspects of the matter as well, which were did not succeed in the present application. In the circumstances I shall not make any order as to costs. Each party shall bear its own costs.

[38] In the result, I make the following order:

1. Absolution from the instance is granted in favour of the first defendant in respect of prayer 4 of the particulars of claim.
2. Absolution from the instance is granted in favour of the second defendant in respect of prayer 2 of the particulars of claim.
3. The application for absolution from the instance is dismissed in respect of prayers 1, 3 and 5 of the particulars of claim.
4. I make no order as to costs.
5. The matter is postponed to 05 September 2022 at 08:30 in chambers for allocation of dates for continuation of the trial.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

T Phatela (with him K Kanguuehi)
Instructed by Kanguuehi & Kavendjii Inc.,
Windhoek

1ST DEFENDANT:

N Tjombe (with him L Auwanga)
Of Tjombe-Elago Inc., Windhoek

2ND and 3RD DEFENDANT:

J Ncube
Of the Office of the Government-Attorney,
Windhoek