

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-DEL-2021/04399

In the matter between:

SHAKWA REON NYAMBE

PLAINTIFF

and

DASCAN MUSHABATI

DEFENDANT

Neutral Citation: *Nyambe v Mushabati* (HC-MD-CIV-ACT-DEL-2021/04399) [2022]
NAHCMD 389 (4 August 2022).

Coram: MASUKU J

Heard: 3 May 2022

Delivered: 4 August 2022

Flynote: Action – Law of Delict – Defamation – Quantification of the damages.

Summary: The plaintiff sued the defendant for statements made by the defendant which were alleged to be defamatory to the plaintiff. It was alleged that the defendant implied that the plaintiff is corrupt and thus unfit to hold the office of a legal practitioner, additionally, that the plaintiff was using his status as a legal practitioner to influence and control some members of the Namibian Police and the Judiciary. The plaintiff claimed compensation in the amount of N\$200 000 in respect of each claim.

Held: Defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status good name and reputation.

Held that: Any words or conduct that have the effect of reducing or negatively affecting a person's status in the minds of right-thinking members of society, are regarded as defamatory.

Held further that: The words published by the defendant of and concerning the plaintiff, properly weighed in the scales, had the ominous effect of subverting, disparaging or denigrating the plaintiff in his good name and reputation.

Held: There is no fixed formula in terms of which awards are made. Awards are assessed *ex aequo et bono* (according to what is right and fair).

Held that: The court, in assessing the damages takes into account whether there are extenuating or aggravating circumstances in the case at hand and previous awards in like cases may also offer a general guidance.

ORDER

1. The defendant is ordered to pay an amount of N\$70 000 as damages in respect of Claim 1.
2. The defendant is ordered to pay an amount of N\$70 000 as damages in claim 2.
3. The defendant is ordered to pay the interest at the rate of 20% a tempore morae from date of judgment to date of payment.
4. The defendant is ordered to pay costs of the action.
5. The defendant is further ordered to issue a retraction and unconditional apology to the plaintiff within 10 days of this judgment, which retraction an apology must be submitted to court for approval.

6. In the event the defendant fails and/or refuses to issue an unconditional apology to the plaintiff, the amount of damages and the amount on which interest is payable mentioned in paragraphs 1 and 2 above, shall increase to N\$80 000 in respect to each claim.
7. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J;

Introduction

[1] Written judgments have the unique ability to speak to different constituencies at the same time. Primarily, they speak to the litigants involved in the particular dispute submitted to court for determination. At a secondary level, they speak to members of the public, similarly circumstanced as the litigants in question.

[2] In the latter case, members of the public should wisely embrace any lessons, directions freely offered to them and identify behaviour or actions or conduct on their part worth ceasing or shunning.

[3] In that sense, judgments may have a full and effective dual function, namely, restorative and preventative. Restorative in the sense of applying a salve or balm that any harm inflicted on a plaintiff by a defendant may have caused. Preventative in the sense of members of the public drawing lessons on what not to do to avoid being on a collision course with the rails of the law. It is the latter function that one would hope the defendant in the current matter would have benefitted from – at no personal cost to him.

[4] A few months ago, Sibeya J penned a judgment in record time. It was a case that attracted the attention of most people in this Republic. This was in *Geingos v Hishoono*.¹ The learned judge began his masterpiece in a cautionary mode, by quoting

¹ *Geingos v Hishoono* (HC-MD-CIV-ACT-DEL-2021/00538 NAHCMD (11 February 2022)).

the words that fell from the lips of the Speaker of the House of Commons, Sir Lyndsay Hoyle of the United Kingdom.

[5] The Speaker, in his address to the then Prime Minister of Great Britain, Mr. Boris Johnson, issued a stark warning, 'Our words have consequences and we should always be mindful of the fact'.

[6] Serving before this court is another defamation matter, which is, in this case, undefended. The plaintiff is Mr. Shakwa Nyambe, an officer of this court. He sues the defendant, Mr. Dascan Mushabati for words allegedly written by the latter of and concerning him and which he alleges are defamatory.

[7] It would seem that the powerful rendition, so powerfully and freely given by Sibeya J to the defendant, may, like in the parable of the sower in the Bible, have either fallen by the way side or was, at worst, eaten by the birds of the air. Despite his best efforts, we realise that Sibeya J's words did not have the resonance we would have expected. They did not fall on good ground and may have been spoken in vain as the defendant did not take heed.

Background

[8] The plaintiff, as hazarded above, is Mr. Shakwa Reon Nyambe, a Namibian male adult, resident in Windhoek. He is a practising legal practitioner, and thus an officer of this court, in good standing. The defendant is Mr. Dascan Mashabati, a male Namibian adult in the employ of the Directorate of Education, Arts and Culture, based at No.2 Ngoma Road, Katima Mulilo, Zambezi Region.

[9] By combined summons dated 15 November 2021, the plaintiff sued the defendant for two claims of defamation. In respect of the first claim, the plaintiff alleges that the defendant made a statement under oath to the Eenhana police pertaining to the plaintiff. This statement was also given to the Law Society of Namibia in the course of a complaint lodged by the defendant to the latter professional body against the plaintiff.

[10] Certain portions of the statement are quoted in the particulars of claim, which I will reproduce in the judgment. These are alleged by the plaintiff to be defamatory of him. At para 5 of the particulars of claim, the following appears:

‘ . . . Shakwa Nyambe has been interfering on (*sic*) the case no. 216/2018 opened at Ngoma Police Station.

Shakwa Nyambe called detective Limbo and instructed Detective Limbo to arrest me without following the procedures.

He called Lunguwe Nyambe and tell (*sic*) her that she is a lawyer and why Lunguwo Nyambe is failing to arrest him.

I was denied bail because state prosecutor Ester Japhet were (*sic*) a colleague with Shakwa Nyambe by the time he worked as an advocate with the Ministry of Justice. . . they had conversation on their mobile phone over the case.

My wife approached the investigation officer Lungowe Nyambe to know the grounds of denying me bail. . . We discovered that Shakwa Nyambe was involved.

Shakwa Nyambe called Commissioner Karl Theron in Zambezi telling him to arrest me for stealing cattle . . . with instruction from Shakwa Nyambe Commissioner Theron order (*sic*) police to make a road block to arrest me.

I was denied bail because of Shakwa Nyambe using the title of a lawyer on the case between me and his father.’

[11] It was the plaintiff’s case that the statements made by the defendant and quoted above, implied that he irregularly interfered in police investigations and subsequent processes by instructing the Regional Commander Mr. Theron to arrest the defendant. He further instructed Detective Limbo, who was not involved in the investigations, to arrest the defendant following complaints. He is further alleged to have phoned officer Limbo and that he used his title as a legal practitioner to ensure that the defendant was denied bail. Furthermore, the statement insinuated that the plaintiff improperly made

contact with the Control Prosecutor in Zambezi, Ms. Jafet to influence her office to oppose the defendant's bail application.

[12] The plaintiff averred that the statements made by the defendant quoted above, were wrongful and defamatory of him in that they implied and were understood to mean that he is corrupt and thus unfit to hold the office of a legal practitioner; that he has no respect for adherence to proper procedures in the investigation, arrest and court proceedings relating to the defendant; or that he abuses his status as a legal practitioner to corrupt and compromise State institutions against those he wills and places the reputation of the legal fraternity in disrepute by his conduct alleged.

[13] The plaintiff, in respect of this claim demanded payment of an amount of N\$200 000, costs and interest thereon.

[14] In respect of the second claim, the plaintiff alleges that on 3 May 2021, at Katima Mulilo police station, the defendant made a statement of and concerning the plaintiff which contains unfounded allegations. This statement was forwarded to the Law Society Disciplinary Committee.

[15] The statement alleged the following:

'I had elaborated that some Judiciary and Namibian Police members were under Shakwa Nyambe's control by using his position as a lawyer to threatening (*sic*) them.

In July 2020 I wrote a complaint to the Law Society. . . I am sceptical about the delayed response regarding the conduct of the lawyer who is continuously misusing his position to intimidate and incite violence.

I am not in a position to cast aspersion if there is friendship between LSN and Shakwa Nyambe . . .'

[16] The plaintiff avers that the above statement implied and was understood to mean that he was brandishing his status as a legal practitioner and wielded influence and control over some members of the Namibian Police and the Judiciary. Furthermore, that

after the defendant had written his letter of complaint against the plaintiff to the Law Society of Namibia, the latter delayed in responding because of an unprofessional association between the plaintiff and the Law Society.

[17] It was the plaintiff's averral that the statements made by the defendant were understood to mean that he conducts himself in an unseemly manner in that he interferes and unduly influences State institutions, including the Judiciary and the law enforcement agencies to benefit himself and members of this family; that he uses his position as a legal practitioner for improper purposes, namely, to subvert the ends of justice, alternatively that he conducts himself improperly as a legal practitioner and is guilty of unprofessional, dishonourable and unworthy conduct and that he places the Law Society of Namibia and its membership into disrepute.

[18] The plaintiff thus claimed an amount of N\$200 000 interest and costs in respect of the second claim. He further records that he offered the defendant an opportunity to tender an unconditional apology before instituting the action but the defendant was steadfast in his refusal to take the Olive branch as it were. The plaintiff thus seeks an order for the defendant to withdraw the statements referred to above under oath within seven (7) days of the judgment.

[19] It is common cause, that notwithstanding service of the combined summons on the defendant in terms of the rules of court, he did not defend the action. As such, it is an undefended matter and his version, even on the pleadings, let alone in evidence, is starkly absent. It must be stated that the plaintiff, in view of the fact that the claims were undefended, filed a damages' affidavit, setting out the basis for the quantum claimed.

[20] The task of the court, in the premises, is to consider the pleadings and to decide whether a case for defamation, as claimed by the plaintiff has been made out. If the conclusion in this regard is in the affirmative, the court will have to proceed to consider the appropriate quantum of damages, coupled with whether an unconditional apology is appropriate in the circumstances.

The applicable law

[21] The learned authors Neethling *et al*,² state the following regarding the definition of the action known as defamation:

‘Defamation is the intentional infringement of another person’s right to his good name. To elaborate, defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status good name and reputation. From this definition, the elements of *iniuria* are apparent, namely, the act (publication of words or behaviour), an injury to personality (the defamatory effect of the words or behaviour), wrongfulness (the infringement of the personality right to good name) and intent (*animus injuriandi*). It is not an element of defamation that the defamatory allegations must be false.’

[22] From the foregoing, it appears that for a plaintiff to succeed in a claim for defamation, he or she must have been injured in his or her good name by the intentional use of wrongful words or conduct by another, which is published and has the deleterious effect of injuring the plaintiff in his or her personality right to good name and reputation.

[23] In other words, the words or conduct of the defendant must negatively affect a person’s *fama* or good name, meaning that the respect and status that he or she enjoys in the estimation of the right-thinking members of the society is diminished by the said words or conduct. Any words or conduct that have the effect of reducing or negatively affecting a person’s status in minds of right-thinking members of society, are regarded as defamatory.

Determination

[24] As indicated earlier, there is no other version before court than that of the plaintiff. I have considered the words that were employed by the defendant of and concerning the plaintiff in both instances. I am under no illusion that the defendant’s words were pernicious in nature and effect and had the debilitating effect of tarnishing the plaintiff’s good name and reputation in society.

² Neethling *et al*, Law of Delict, LexisNexis, 5th ed, Pretoria, 2006, p 307.

[25] A reading of the statements made by the defendant in both occasions, which were made under oath, are not *per se* defamatory. The plaintiff has pleaded a secondary meaning to them i.e. *innuendo*. Considered in the light of the secondary meaning attached, the words depict the plaintiff on the canvass as a person with a warped character. In this regard, he was painted as a legal practitioner (and not just an ordinary member of society), who abuses his status as a legal practitioner and causes innocent persons to be deprived of their rights otherwise accorded to them by law.

[26] In this connection, the plaintiff was painted as a corrupt and corrupting force among the institutions of State. In this regard, he was depicted as someone who controlled the police – to needlessly arrest his foes; the prosecution to wrongfully oppose bail and the judiciary to unlawfully refuse him bail. In this connection, the plaintiff was presented as a person who ensured that the defendant's rights were violated without demur.

[27] Furthermore, he was depicted as a person who had an unseemly and unhealthy relationship, if not control over the Law Society in that after the defendant reported the plaintiff to the Law Society, the latter appeared to be affected by numbness in not immediately acting on the complaints lodged by the defendant against the plaintiff.

[28] I am of the considered view that the words written by the defendant in respect of the plaintiff, were clearly defamatory in the senses mentioned above. There is no denying that these were published in that they were placed before both the police in Katima Mulilo and the Law Society of Namibia. As indicated above, there is no explanation or justification that the defendant impressed on the court, which could ameliorate or clarify the pernicious effect of these words on the plaintiff.

[29] I am of the considered view that the words published by the defendant of and concerning the plaintiff, properly weighed in the scales, had the ominous effect of subverting, disparaging or denigrating the plaintiff in his good name and reputation. This is especially the case when regard is had to the esteem in which he is generally held by the community, particularly given his chosen profession as a legal practitioner in good

standing. It accordingly stands to reason that the plaintiff is entitled to some compensation for the harm he suffered at the defendant's hands.

The quantification of damages

[30] The learned authors Neethling *et al* state the following regarding damages in cases like the present:³

'The *actio iniuriarum* is an action which really has satisfaction as its object and it is primarily concerned with providing personal (psychological) satisfaction to a plaintiff by compelling the defendant to pay a certain amount of money as *solatium* (solace money) to him. Compensation (in the form of giving to one other equivalent for the impaired personality interest) is completely in the background. The *actio iniuriarum* generally has the object of effecting retribution for the injustice sustained by the plaintiff and of satisfying him for the feeling of injustice, injury and suffering which he (actually or presumably) sustained as a result of the defendant's conduct. There is no fixed formula in terms of which awards are made. Awards are assessed *ex aequo et bono* (according to what is right and fair). Erasmus, Gauntlett and Visser, provide the following summary of the legal position in general:

"There can be no basic formula for the assessment of damages under the *actio iniuriarum*, the award being entirely *arbitrio iudicis*. It has been described variously as an assessment of imponderables which is so discretionary as to be almost arbitrary, and as a conjectural estimate. There is no limits beyond which damages cannot be awarded. Earlier cases of a similar nature may serve as an approximate guide, but they must be applied with circumspection.'

[31] In the above quotation, the learned authors state the reason why damages are granted to a defamed person and what they are designed to do, namely, to give a salve as money can give for the injured feelings and injustice the plaintiff has been subjected to as a result of the defendant's conduct. The point is also made that there is no set mathematical formula that the court is compelled to follow in determination of the appropriate award. At the end of the day, it is a process almost arbitrary and must be. It must in my view be discretionary and governed by what is fair and just in any given case. Previous awards in like cases may offer a general guidance in that regard.

³ *Op cit* p 233.

[32] The court, in assessing the damages takes into account whether there are extenuating or aggravating circumstances in the case at hand. The former will naturally lower the quantum, whereas the latter, will inevitably heighten the amount of damages. Where for instance the defendant is aware that his allegations of and concerning the plaintiff are false, that serves as an aggravating circumstance. Issues of extensive distribution of the publication of the defamatory material also comes into the equation, as well as the position and status of the plaintiff.

[33] Where the plaintiff, on the other hand, has a bad reputation; is a person of bad character; where the bad conduct of the plaintiff justifies it; where there is truth in the defamatory allegations; any provocation by the plaintiff; the restricted extent of the publication; an apology to the plaintiff by the defendant; unnecessary delay in launching the action and the fact that the defamation has been circulating for a long time tend to lower the quantum and are regarded as extenuating circumstances and serve to lower the quantum the court may.⁴

[34] In the instant case, it appears to me that there are some aggravating circumstances. These include the fact that the plaintiff is a legal practitioner, an officer of this court in good standing. For a legal practitioner, reputation is the currency of his or her profession. Legal practitioners, unfortunately, do not have nine lives like a cat. The publication of one defamatory sentence may be enough to denigrate and soil their hitherto impeccable reputation and consummate integrity.

[35] I wish to mention that legal practitioners are not treated as super humans or extra-ordinary individuals to which different laws apply. It is because of the extraordinary calling they answered to that especial care is taken to ensure their integrity is not needlessly assailed. They are expected, in carrying out their duties to exhibit impeccable honesty and unquestionable integrity in all their dealings. Once these values are placed in issue, especially in the absence of any evidence, the consequences to the legal practitioner may be dire and grave.

[36] It is for that reason that even in cases where there is substance to any allegations of impropriety, the allegations are handled with great circumspection so that

⁴ *Op cit*, p 233-234.

it is only after a thorough investigation that the results of the investigations may be made public. Sensitivity in dealing with these professionals is accordingly called for and this the defendant ought to have considered as he does not appear to be a person without any level of education at all.

[37] In this connection, it must be noted that the allegations levelled against the plaintiff by the defendant are very serious. They impute a serious character defect on the plaintiff, which should, if true, disqualify him for the exalted position he holds as he is alleged to be corrupt and a manipulator of persons and institutions, including professional bodies by the defendant. This is a very serious allegation indeed but which is devoid of any truth.

[38] The fact that the defendant was afforded an opportunity to place his version before court and did not so, including his failure to issue an apology before the launch of the action must be also taken into account. Another factor is that the defendant repeated these allegations. It was not a case of a once-off publication, probably made in a fit of anger.

[39] In his favour, all I can find is that the defendant's defamatory statements were limited in their publication. They did not enjoy a wide circle and as such limited the amount of damage that the plaintiff would have sustained. What should the appropriate quantum be, having regard to the factors mentioned above?

[40] It is at this juncture that previous awards can be adverted to. In *Kandondo v Namibia Medical Care*⁵ it was noted that the general trend of the courts in granting damages for defamation did not exceed N\$100 000 at the time. The latest matter in this category is the *Geingos* matter where the plaintiff was awarded damages in the amount of N\$250 000. In my view, it should be awards that are as far as possible close to the facts of this matter that should, where available, be taken into account. They are difficult to find however.

[41] One case, which is hot from the oven, as it were, is that of *Angula v Tjaronda*⁶. This case involved a legal practitioner and defamatory statements, alleging amongst

⁵ *Kandondo v Namibia Medical Care* (I 2047/2010) NAHCMD 86 (4 April 2013).

other things that the legal practitioner was a liar and a practising attorney and that she acted unethically, maliciously and committed perjury. The defamatory material was widely circulated on social media to thousands of readers. The court, after weighing all the pros and cons, found N\$100 000 as suitable *solatium*, after reviewing previous cases of defamation.

[42] The plaintiff, in this matter also sought an apology from the defendant as part of the order in his favour. I am not certain whether in a case such as the present that would be appropriate. I say so in view of the fact that the defendant did not even participate in the proceedings, although he was served with the summons. Any order regarding the retraction may not be heeded by him as he did with the summons.

[43] Having said so, I find it appropriate to, however, afford the defendant one last opportunity to retract his statement and offer an unconditional apology. Should the defendant take advantage of this opportunity, this will be reflected in the quantum of damages. His refusal to do so will show his lack of penitence and will serve to aggravate the injury he perpetrated on the plaintiff.

[44] In his able written argument, Mr. Nekwaya, for the plaintiff, after reviewing a number of cases in this jurisdiction, implored the court, given all the circumstances, to issue an award in the amount of N\$70 000 in respect of each claim. As indicated, although the imputations are serious, the level of publication is less than in the *Angula* matter. Furthermore, the allegations against the plaintiff were less direct in relation to his profession than in the *Angula* matter.

Conclusion

[45] Having discussed the relevant issues above, together with the conclusions, it becomes clear that the defendant made two separate defamatory statements of and concerning the plaintiff. They were published, albeit to a limited audience. These statements were false, with no iota of truth in them. They pertain to a person who is an

⁶ *Elize Mutaleni Angula v Tommy Veunda Tjaronda* (HC-MD-CIV-ACT-DEL-2019/05338) [2022] NAHCMD 364 (25 July 2022).

officer of this court and who is accused of serious impropriety inconsistent with his office.

[46] I am of the considered view that the amount of N\$70 000, suggested by Mr. Nekwaya, is condign in the present matter in respect of each claim. As stated, the publication was limited. Furthermore, the defendant did not waste the court's time with putting up any defence and this became a proverbial walk in the park. For reasons advanced above, I will not issue any order for an apology in the instant case.

[47] In the event, however, that the defendant does not, within 10 days of service of the order on him, file a retraction and unconditional apology, the quantum will be elevated to N\$80 000 per claim. The apology must be drafted and brought to the court for approval before it is issued by the defendant.

Costs

[48] The rule applicable to costs is well-settled. It is that costs follow the event. There is no reason why the defendant, being the losing party, should not be ordered to pay the costs in this matter.

Order

[49] In the light of all the discussions and conclusions recorded above, the following order is issued.

1. The defendant is ordered to pay an amount of N\$70 000 as damages in respect of Claim 1.
2. The defendant is ordered to pay an amount of N\$70 000 as damages in claim 2.
3. The defendant is ordered to pay the interest at the rate of 20% a tempore morae from date of judgment to date of payment.
4. The defendant is ordered to pay costs of the action.

5. The defendant is further ordered to issue a retraction and unconditional apology to the plaintiff within 10 days of this judgment, which retraction and apology must be submitted to court for approval.
6. In the event the defendant fails and/or refuses to issue an unconditional apology to the plaintiff, the amount of damages and the amount on which interest is payable mentioned in paragraphs 1 and 2 above shall increase to N\$80 000 in respect to each claim.
7. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCES:

PLAINTIFF: E. Nekwaya

Instructed by: Shakwa Nyambe & Company Incorporated, Windhoek.

DEFENDANT: No Appearance