

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2019/03226

**GODFREY MUNU KUYONISA**

**PLAINTIFF**

and

**KUVEE KANGUEEHI**

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

**PARAGON INVESTMENT HOLDINGS (PTY) LTD**

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

**Neutral Citation:** *Kuyonisa v Kangueehi* (HC-MD-CIV-ACT-OTH-2021/03226) [2024] NAHCMD 109 (13 March 2024)

**Coram:** MASUKU J

**Heard:** 26, 27, 28, 29 September and 9 November 2023;

**Delivered:** 13 March 2024

**Flynote:** Law of Delict – Defamation – Necessity for the plaintiff to set out the evidence regarding the damages claimed in the witness’ statement – Effect of failure to do so – Civil Procedure - Whether the court may grant absolution from the instance at the end of the trial.

**Summary:** The plaintiff sued the defendants for payment of an amount of N\$500 000 as damages for the publication of two articles in the Windhoek

Observer, of and concerning him, which the plaintiff alleges were defamatory. The trial proceeded in earnest, with the plaintiff adducing evidence as the sole witness. The defendants called two witnesses to testify. At the close of the case and during submissions, the court raised the question whether the plaintiff had adduced evidence relating to the quantum of damages and what the effect thereof is if held that he had not done so.

*Held:* That a party in an action is required to adduce evidence relating to all the elements of the claim, including damages sought. Failure to do so, may result in the court granting an order for absolution from the instance even if this becomes apparent at the end of the entire case.

*Held that:* In the procedure prescribed in our rules of court, a plaintiff who seeks damages should state the basis upon which the amount claimed as damages is based in the witness' statement filed in terms of rule 92. This would enable the defendant to prepare to meet the plaintiff's case even on the question of damages.

*Held further that:* The procedure followed in Namibia, allows a defendant to fully prepare its case regarding the evidence to be led and eliminates the element of surprise heralded by a situation where no witness' statements are required or prescribed.

*Held:* That the case of *Simmonds v White and Another* 1980 (1) SA 755 is inapplicable as it relates to further particulars sought in relation to pleadings and not to trial. The request for further particulars for purposes of pleading have been excised from our jurisdiction.

*Held that:* It is permissible for the court to order absolution from the instance at the end of the trial where it appears that a certain requirement for the granting of a claim has not been proved by the plaintiff.

Absolution from the instance granted with costs.

---

**ORDER**

---

1. An order for absolution from the instance is granted in favour of the defendants.
  2. The plaintiff is ordered to pay the defendants' costs.
  3. The matter is removed from the roll and is regarded as finalised.
- 

**JUDGMENT**

---

MASUKU J:

Introduction

[1] Mr Charles Barkely, is quoted as having stated the following words about his intentions, probably following utterances that he considered defamatory of and concerning himself, 'My initial response was to sue her for defamation of character, but then I realised that I had no character'.

[2] Mr Godfrey Munu Kuyonisa, the plaintiff herein, considers himself to belong to a different class from Mr Barkley. He is of the view that he has a character capable of being defamed and which he seeks to protect by all lawful means.

[3] Certain newspaper reports, were published in two editions of the Windhoek Observer. They are entitled 'Massive looting suspected at "illegal SOE"' and 'Illegal SOE bosses demand pay-out', respectively. They are the primary reason this matter is serving before this court.

[4] Aggrieved by the contents of the publications by the newspaper articles, the plaintiff approached this court, claiming that the defendants had

sullied his good name and character. He alleged that the words published by the defendants were intended to and portrayed him as a person who was dishonest and intent on serving his own parochial interests. He accordingly moved the court to award him damages in the amount of N\$500 000.

[5] The question confronting this court head-on is this - was Mr Kuyonisa defamed by the articles published by the defendants? If the answer returned, is in the affirmative, the question that follows is how much money is he entitled to in damages as a salve for his wounded good name and character?

[6] In the succeeding parts of this judgment, I attempt to answer the above questions.

#### The parties

[7] The plaintiff, is Mr Kuyonisa, as stated above. He is a male Namibian adult and resident in Windhoek. The first defendant is Mr Kuvée Kanguēhi, an adult Namibian male, who is the editor of a newspaper circulating in Namibia, known as The Windhoek Observer. Its place of business is situated at no 40 Eros Road, Windhoek.

[8] The second defendant, on the other hand, is Paragon Investment Holdings (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of this Republic. The second defendant's place of business is the same as that of the Windhoek Observer stated above.

[9] I will refer to the litigants as the plaintiff and defendants, respectively. Where it is necessary to refer to a particular defendant, that defendant shall be separately identified. In cases where the court refers to both sets of protagonists, they shall be referred to as 'the parties'.

[10] The plaintiff was represented by Mr Cupido in the proceedings, whereas the defendants were represented by Ms Izak. The court records its indebtedness to both counsel for the assistance they dutifully rendered to the

court and particularly the dignified and respectful spirit in which the trial was conducted – animosity and invective finding no place, home or refuge in the course of the proceedings.

The pleadings – the particulars of claim

[11] As intimated in the opening paragraphs of this judgment, the plaintiff sued the defendants jointly and severally for payment of N\$500 000, interest on the said amount and costs. The plaintiff averred that the defendants published articles in their aforesaid newspaper on 22 July 2016 and 17 March 2017, respectively, whose headings were quoted above.

[12] The plaintiff averred that the said newspaper is one circulating widely within the entire Republic. Furthermore, it is published online and through various social media accounts and websites. It is the plaintiff's further averral that the articles so published accused the plaintiff, together with others, of mismanaging public funds of a parastatal referred to as the Development Brigade Corporation (DBC). The mismanagement of funds related to board fees demanded by the plaintiff and his colleagues on the DBC board of directors.

[13] It was the plaintiff's case that the words used by the defendants in the articles were incendiary in nature and effect and were as such unlawful, wrongful and defamatory of him. This it was alleged, was so because the words employed in the articles, depicted the plaintiff, with his name being mentioned, as a dishonest man and the mastermind behind a fraudulent and corrupt scheme designed to purloin public funds belonging to the DBC. The effect of the words used and the defendants' intention, the plaintiff further averred, was to impute to the plaintiff and paint him in the minds of the reasonable readers, as a corruptible and dishonest person, who places his own interests above those of the DBC, he was appointed to serve.

### The defendants' plea

[14] The defendants did not take the accusations idly. They defended the proceedings. In their plea, they admitted publishing the two articles complained of. They however denied the imputation alleged by the plaintiff to the said articles. It was their case that the articles were a true and accurate reflection of a report issued by the Auditor-General, (AG), together with deliberations by the Parliamentary Committee on Public Accounts. To this extent, the defendants averred that the contents of the article, were true and correct.

[15] It was the defendants' further averral that the contents of the articles were not only true but that they inured to the benefit of the public. The defendants further pleaded that in the event the contents of the articles were found to have been false, they had reason to believe that same were true and in this regard, they took the trouble to verify the correctness of the facts published. This exercise, they averred, included affording the plaintiff an opportunity to present his side of the story.

[16] It was the defendants' further case that the articles in question amounted to a fair comment and repetition of statements contained in the AG's report and the deliberations of the parliamentary committee aforesaid. As such, further averred the defendants, the articles would be understood by a reasonable reader no more than being a reporting of the AG's report and a report on the parliamentary committee's deliberations. Last, but by no means least, the defendants pleaded that the articles were comments that were fair and reasonable and mere repetitions of the AG's report and the deliberations of the parliamentary committee. As such, the articles were published in the public's interest.

### The plaintiff's replication

[17] In response to the plea, the plaintiff denied the averrals by the defendants in their plea. They maintained that the articles were defamatory of

the plaintiff and that there is nothing contained in the AG's report and the deliberations of the parliamentary committee that is defamatory of the plaintiff. The plaintiff further denied that the articles were published in the public's interest but were understood by readers to be a depiction of the plaintiff as a dishonest and corrupt person.

[18] The plaintiff further denied that the defendants took reasonable steps to verify the contents with him before the publication of the articles in question. He averred that whereas the defendants contacted him with questions, requiring his answers thereto, he requested them to hold the questions in abeyance whilst he addressed the parliamentary queries and would provide his answers after he had dealt with the parliamentary process.

[19] Whilst the plaintiff agreed that the articles were comments of the AG's report as alleged, it was his case that they were not however, a true and accurate reflection of the AG's report, nor of the deliberations of the parliamentary committee. The contents of the articles were defamatory, he maintained and served to depict him as a corrupt and dishonest person, who engaged in fraudulent activities involving public funds in the hands of the DBC.

#### The pre-trial order

[20] The joint pre-trial order issued by the court placed the following issues of fact in contention and thus in need for the court's determination, namely whether the said publications by the defendants implicated the plaintiff by name; whether the said publications damaged the reputation of the plaintiff by name as a senior official at the Ministry of Trade and Industry and as a member of the governing party and whether the said publication and innuendoes are defamatory of the plaintiff.

[21] Issues of law to be determined were whether the first defendant had the necessary authority to act for the second defendant; whether the publications were malicious, false and harmful to the plaintiff's reputation,

dignity and esteem in the community and lastly, whether the plaintiff is entitled to damages, in the amount claimed.

### The evidence led

#### *The plaintiff*

[22] The plaintiff was the only witness. He testified that he is a retired civil servant and was formerly in the employ of the Ministry of Trade and Industry. ('the Ministry'). It was his evidence that the defendants published the two articles complained of and copies of which were submitted in court as evidence. It was his further evidence that the defendants' newspaper circulates widely within the Republic and is further published on line and on social media accounts and websites.

[23] It was his evidence that the articles stated that he and others were demanding payments and mismanaging funds of the DBC. In particular, he quoted the following excerpt from the article:

'The report shows that the three-member "interim" board led by Munu Kuyonisa (chairman), Alison Hishekwa and Gilbert Mukwa-were still paying themselves board sitting fees amount to N\$470 000.00 in 2012 and demanding once off payments of N\$86 000.00'.

[24] The plaintiff testified that the above excerpt implicates him by name and therefor damaged his reputation as a senior official at the Ministry and as a member of the ruling party. In this connection, he further testified, a reasonable person reading the articles would consider the words used as wrongful and defamatory in that they were intended to convey the plaintiff as a dishonest man and the master mind behind a fraudulent and corrupt scheme to mismanage and/or illegally appropriate funds of the DBC.

[25] Finally, it was his evidence that these articles were defamatory of him and that the innuendos made therein, served to tarnish his good name and



reputation. It was his contention that by reason of the publication of the articles, he had suffered in his good name.

#### The defendants' evidence

[26] The defendants, for their part, called two witnesses, namely, Ms Sonja Angula and the first defendant. I intend to chronicle their evidence below, commencing with the evidence of the former.

#### *Ms Angula*

[27] Ms Angula's evidence, was to the following effect: that she is a journalist and is in the employ of the Windhoek Observer. In July 2016, she, in her capacity as a journalist, attended a parliamentary committee on Public Accounts at the National Assembly, where the details of the AG's report were read out.

[28] Of particular interest, were the deliberations focussing on the expenses relating to the fees of the board of directors of the DBC; the delay in winding down the DBC and the absence of supporting documents for the company's financial statements. It was her evidence that according to the AG's report, the interim board of directors, led by the plaintiff at the time, was paid itself sitting fees in the amount of N\$470 000 in 2012. It was her further evidence that there were additional allegations during that session which led to the publication of the articles complained of.

[29] Ms Angula testified that as part of her professional responsibility and fairness, she contacted the plaintiff via telephone after the deliberations in parliament. She intended to afford him the right to comment on the AG's report and the committee's deliberations regarding the affairs of the DBC, which were addressed at the said session. To that end, she further testified, she introduced herself to the plaintiff and briefed him about the articles, which were being prepared for publication.

[30] It was her evidence that during the interview, on 20 July 2016, the plaintiff was requested to respond to the allegations contained in the AG's report regarding the DBC and its board. The plaintiff advised that he and the other board members would provide a report in response. According to Ms Angula, the plaintiff failed to directly answer questions she posed to him. He insinuated that the newspaper had already taken a decision to publish the article in question.

[31] Ms Angula testified that as a media practitioner, she receives many invitations to attend events of public interest and that the parliamentary committee in question, was one such event which led to the articles in question being written and published by the second defendant. She testified further that the articles relating to the plaintiff published by her newspaper, were solely based on information contained in the AG's report and this appertained specifically the plaintiff's position as the chairperson of the DBC.

[32] It was her evidence that she diligently executed her duties to the best of her abilities in the context of the articles in question and that the articles were either an extract or paraphrase of the AG's report. She testified further that after the publication, the plaintiff did not communicate with her or offer a counter-report on behalf of the DBC, which if he had provided, she would have been compelled to report accordingly.

[33] Ms Angula testified further that prior to the publication of the articles, she did not have a professional or personal association with the plaintiff. For that reason, she did not therefor harbour any agenda geared to defaming him and his reputation. Her actions were solely professional and purely based on the ethical principles of journalism. It was her further evidence that she and her team, in an effort to afford the plaintiff objectivity and fairness, apprised him of the articles they were preparing and allowed him a fair opportunity to provide input thereto but which he declined to fully exercise.

*Mr Kuvee Kanguuehi*

[34] Mr Kuvee Kanguuehi, the first defendant testified that he is the editor of the Windhoek Observer. On 13 March 2017, he further testified, Ms Sonia Smith (who is supposed to be Angula) attended the parliamentary standing committee hearing, which was open to the media. At the said meeting, the said committee reported on governance and activities which were submitted. Ms Angula reported about these in the edition of the newspaper dated 17 March 2017.

[35] It was his evidence that the contents of the article were a true reflection of what is contained in the AG's report and also captures the deliberations of the parliamentary committee. He testified that the articles are true and that the publication thereof was to the benefit of the public. It was Mr Kanguuehi's further evidence that to the extent that it may be held that the information relied on for the publication of the said articles was false or that the articles were false, he and his team at the newspaper had reason to believe that the articles were true and that reasonable steps were taken to verify the correctness of the facts stated in the articles. These included affording the plaintiff an opportunity to state his side of the story.

[36] The editor further testified that the articles constituted fair comment and a repetition of the statements contained in the AG's report, together with the deliberations of the parliamentary committee as aforesaid. It was his evidence that the articles would have been understood by a reasonable reader, as such. He further testified that the comments in the article were fair and reasonable and mere repetitions of the AG's report and the parliamentary committee's deliberations, which were all published in the public interest. Last, but by no means least, Mr Kanguuehi denied that the plaintiff suffered the damage to his good name and reputation alleged. It was his plea that the claim should thus be dismissed with costs.

### Approach to the matter

[37] The manner in which a court approaches a matter may be influenced by certain pertinent facts. In the present matter, having chronicled the evidence led, I should, all things being equal, be conducting an evaluation of the evidence led and coming to a conclusion as to whether or not the plaintiff has established that the defendants defamed him as alleged and further that the defendants are therefor liable for the damages claimed. In this regard the court ordinarily has to arrive at a conclusion regarding the question whether the plaintiff, on whom the onus lies, has made out a case for the relief claimed.

[38] From the rendition of the evidence led, captured above, it is plain that the parties' versions, are mutually destructive. For that reason, the proper approach to dealing with the irreconcilable versions of the parties, would be to resort to the formula set out in the celebrated case of *Stellenbosch Wineries Group Limited v Martell Cie*<sup>1</sup> for resolving disputes of fact.

[39] I have, after a careful analysis of the facts of the instant matter and much rumination, decided that it is unnecessary, at this juncture, to embark on an analysis of the evidence led by the parties, in order to determine the probabilities in the case. This is so for the reason that a critical issue looms large and it is this – the question whether the plaintiff has made out a case at all regarding the quantum of damages, to which he can be entitled to, should the court come to the conclusion that the articles in question were defamatory of him.

[40] During the oral submissions made on behalf of the parties, I put the issue squarely to Mr Cupido and he correctly submitted that the issue of damages was not included in the plaintiff's witness' statement and evidence adduced in court. He, however argued that the issue of the quantum is a matter that the court is able to decide on the evidence presented, considering

---

<sup>1</sup>*Stellenbosch Wineries Group Limited v Martell Cie* 2003 (1) SA 11 (SCA).

the awards by the courts in related matters. That was unfortunately a half-hearted response to a significant issue, in my view.

[41] The learned author LTC Harms, dealing with the issue of damages in defamation suits, states the following:<sup>2</sup>

‘The plaintiff need not give particulars relating to the quantification of general damages or provide particulars in respect of his or her reputation, standing in the community, or character or the extent of the publication.’

[42] In support of the above proposition, the learned author places reliance on the case of *Simmonds v White and Another*.<sup>3</sup> The court in that case, reasoned that for a claimant that seeks general damages, such as the plaintiff in the instant case, it is unnecessary that he or she should furnish particulars of the general damages claimed in the particulars of claim. Friedman J, presiding in that matter, reasoned as follows at p 758 H – 759 A:

‘In the present case, it is apparent from the particulars of claim what the true nature of the claim is. It is one for general damages alleged to have been sustained by the plaintiff because of the injury to his good name and reputation as a result of the publication of statements in the book which he alleges are defamatory of him. The claim therefore clearly falls under the category of general damages.

Although it might be useful for the first defendant – before making a tender – to have answers given to him by the plaintiff to the questions asked, as these answers might enable him to make a more accurate assessment of the damages likely to be awarded by a trial Court in the event of a plaintiff succeeding in the action, this does not provide a basis for insisting on such replies. The Rules do not contemplate that a defendant can sit back and expect to be supplied with all the information he might require in order to make an adequate tender. It is expected of a defendant that he should make his own investigations.’

---

<sup>2</sup> LTC Harms, *Amler's Precedents of Pleadings*, 7<sup>th</sup> ed, LexisNexis, Durban, 2009, p165.

<sup>3</sup> *Simmonds v White and Another* 1980 (1) SA 755 (CPD).

[43] In throwing out the argument by Mr Farlam for the defendant in the *Simmonds* matter, the court said the following:<sup>4</sup>

‘There is, in my view, no basis for compelling plaintiff to furnish details of what would in effect amount to the evidence to be led in support of the claim. First, defendant may conceivably at a later stage be entitled to certain of this information by way of particulars for trial (a question on which I refrain from expressing a view) but the particulars cannot at this stage be said to be “strictly necessary” for the purpose envisaged, namely, to enable first defendant to make a tender.’

[44] Two things need to be pointed out in respect of the above-cited case. First, it related to a situation where further particulars were being sought not for the purposes of the case of trial, but for the case of pleading. This is because the defendant was considering making a tender for an amount as a result of the defamation alleged. Requests for further particulars in respect of pleadings have, for policy reasons, been excised from our practice by the rules of court. To that extent, the relevance and applicability of this case, must be carefully scrutinised. Further particulars for purposes of trial, however remain.

[45] Second, in the instant case, the trial commenced without any further particulars being requested for purposes of trial. It was at the trial stage that the issue of damages arose. In other jurisdictions, the issues which are important for establishing or determining the quantum of damages, would, if not obtained as particulars for trial, be elicited from the plaintiff during his evidence in chief, subject of course to him or her being cross-examined thereon. It is in that light that the *Simmonds* judgment must be understood in relation to particulars of claim.

[46] When the trial has commenced, however, the plaintiff is required to place some evidence before court, that can eventually assist the court in determining the quantum of damages. Factors like the extent of the publication, its effect on the name and reputation of the plaintiff and how other

---

<sup>4</sup> *Ibid* at p 759 F-G.

people related to the plaintiff after the publication, while they may not be required for purposes of pleading or for determining a tender for settlement, in line with *Simmonds*, are critical for purposes of trial as they are necessary ingredients the court may place in the mix and use to determine the quantum, if satisfied that the statements in question, were defamatory.

[47] In this jurisdiction, the rules require parties to file witness' statements, which are ultimately used during the trial. Rule 92, of our rules of court provides the following:

'(1) After the case management conference or at the pre-trial conference the managing judge must order the parties on Form 20 to serve on the other party with (*sic*) a witness statement of the oral evidence which the party serving the statement intends to adduce during the trial in relation to any issue of fact to be decided at the trial.'

[48] It must be mentioned in this regard, that the witness' statement in terms of rule 93, ordinarily takes place of the evidence in chief that the witness would have adduced. As such, it is in this statement that the issue of the quantum of damages, must be established in evidence. That would be the juncture where evidence regarding the quantum of damages would be elicited in jurisdictions where there is no provision in the rules for written witness' statements standing as evidence-in-chief.

[49] When proper regard is had to the subrule quoted above, it becomes plain that witness' statements deal with the evidence in relation to issues of fact that a party intends to adduce at the trial. One of the issues for the court to resolve at trial, as recorded in the pre-trial order, is the issue whether the plaintiff is entitled to damages in the amount claimed. I say this noting though that this was recorded as a legal rather than a factual issue.

[50] Having this in mind, it occurs to me that what the plaintiff was accordingly required to do in the witness' statement, was, in addition to adducing evidence about the nature of the defamatory material, deal

specifically with the effect of the statements on his reputation and good name; the extent of the publication; how the statements affected him or how they influenced the reaction or relation of other people to him thereafter. This was not done by the plaintiff, nor was oral evidence led in this regard adduced during the trial.

[51] I hasten to add though that this latter approach would have generally been impermissible in any event, as the defendants are, in terms of our procedure, entitled to know what the entire evidence the witness intends to adduce, including the evidence on damages. The element of surprise heralded by the absence of witness' statements was minimised if not eliminated altogether. This is such that the defendants would know in advance of the trial what the plaintiff would say regarding damages, take instructions thereon and prepare for cross-examination.

[52] We accordingly sit with a case where the plaintiff seeks a whopping N\$500 000 in damages but says not a mumbling word regarding the computation of the amount in evidence and from which the court, after considering the cross-examination, could form an opinion on a fitting quantum. I am, in the circumstances, of the considered view that there is no need to deal with the issue of whether the contents of the articles were defamatory as there was no application for the separation of issues, ie for the court to determine liability and to deal with quantum in the event the court found that the articles were defamatory.

[53] In the premises, and for the foregoing reasons, I am of the considered view that the plaintiff has failed to prove an essential part of the claim, namely, the damages that he suffered as a result of the publication of the articles in question. A plaintiff is ordinarily required to prove all the essential elements of a claim and where he or she fails to do so, the court is entitled, to enter an order absolving the defendant from the instance.



## Conclusion

[54] Having regard to the discussion above and the findings made, I am of the considered view that it is unnecessary to make any finding regarding the alleged defamatory nature of the articles in question and I refrain from doing so. This is so because the plaintiff has failed to make out a full case for the relief he seeks.

[55] The next question that confronts the court is this – what is the appropriate order to grant, given the peculiar circumstances of this case? The learned authors Cilliers *et al*<sup>5</sup> state the following:

‘Although there is no express provision in rule 39 for an order for absolution from the instance at the conclusion of the whole case, the practice to grant absolution from the instance when a plaintiff has not established the facts in support of his case to the satisfaction of the court, has been extended to cases in which evidence for the defendant has also been given.’

[56] For that reason, I consider this to be an appropriate case in which the court should grant an order for absolution from the instance. It would be unfair and probably harsh, in the circumstances, to issue a dismissal of the claim when considering the nature of the deficiencies in the plaintiff’s case. Absolution from the instance would, all other considerations in order, afford the plaintiff an opportunity, should he be so advised, to place all the requisite evidence, including on damages, before court. This conclusion, in my view, accords with the justice of this case and endorsed by the learned authors as cited immediately above.

## Costs

[57] The ordinary rule applicable is that costs follow the event. This does not, however, take away the court’s discretion, in appropriate cases, to issue an order for costs as the justice of the case, including the behaviour of the

---

<sup>5</sup> Cilliers *et al*, *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed, Juta & Co, Vol 1, 2009, p 924.

parties, warrant. In the instant case, the court has found it fit to issue an order for absolution from the instance, which spells success for the defendants. The plaintiff must, accordingly pay the defendants' costs.

### Order

[58] Having proper regard to the findings and conclusions made above, I come to the considered view that the following order is condign to grant in the instant case:

1. An order for absolution from the instance is granted in favour of the defendants.
2. The plaintiff is ordered to pay the defendants' costs.
3. The matter is removed from the roll and is regarded as finalised.

---

T S MASUKU  
Judge

## APPEARANCES

PLAINTIFF: B Cupido  
Of Isaaks & Associates, Windhoek

DEFENDANTS: L Izak  
Of Kadhila Ammomo Legal Practitioners, Windhoek