

REPUBLIC OF NAMIBIA

NON - REPORTABLE



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: I 220/2014

In the matter between:

MARTHA NAHOLE

PLAINTIFF

And

JOHANNES NEMENE SHIINDI

1ST DEFENDANT

LAINA NIITA UUKOLO

2ND DEFENDANT

Neutral citation: *Nahole v Shiindi* (I 220/2014) [2014] NAHCNLD 53 (03 October 2014)

Coram: DAMASEB, JP

Heard: 17 September 2014, 3 October 2014

Delivered: 03 October 2014

Summary: Defamation – Claim for damages – Defamatory statements issued in newspapers accusing the plaintiff to be a “witch” – Such Statements defamatory in

nature – Award of damages not quantified – Courts hesitant on granting big awards in defamatory cases – Award for damages reduced.

ORDER

I therefore enter the following judgment against the defendants separately, in favour of the plaintiff:

1. First Defendant: **JOHANNES NEMENE SHIINDI**

- (a)** N\$ 30 000 as damages;
- (b)** Interest on that amount at the rate of 20% per annum from the date of judgment to the date of payment;
- (c)** Disbursements necessarily and reasonably incurred.

2. Second Defendant: **LAINA NIITA UUKOLO**

- (a)** N\$ 30 000 as damages;
- (b)** Interest on that amount at the rate of 20% per annum from the date of judgment to the date of payment;
- (c)** Disbursements necessarily and reasonably incurred.

JUDGMENT

Damaseb JP: [1] On 3 July 2012, the plaintiff, acting in person, caused to be issued summons against the defendants alleging, amongst others, as follows:

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During the period of 2 September 2011 and 25 September 2011, defendants alleged that plaintiff gave first defendant a poisoned cooked chicken meat with intention to poison

first defendant. The said allegations were subsequently widely and prominently published in the media, to wit, “Namibian Sun”, “New Era”, and “The Namibian”. Copies of these articles are attached hereto as “Annexure MN1”, “Annexure MN2”, and “Annexure MN3”, respectively.

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In the said articles, the following allegations against and or concerning plaintiff are made:

6.2 On or around 24 September 2011 Second defendant informed members of the Ondonga Traditional Authority that the good name of the said Authority has been tarnished following the alleged attempt by plaintiff to poison first defendant and second defendant told the said members to refrain from giving guests prepared meals.

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Defendant’s allegations mean that and it was understood by the public defendant’s allegations and the context in which they were made compel a normal reasonable listener to come no other conclusion than to believe that:

- 7.1. Plaintiff is a witch;
- 7.2 Plaintiff is a person of ill repute;
- 7.3 Plaintiff is a clandestine and wanton killer;
- 7.4 Plaintiff is want of chastity;
- 7.5 Plaintiff is a danger to the public;
- 7.6 Plaintiff should be physically eliminated;’

[2] She further alleged that the allegations complained about are ‘blatantly fake and void (sic) of any fault’ and were made *animus injuriandi*. She further alleged in paragraphs 10 and 11 that:

Defendants' allegations subject plaintiff to offensive and degrading treatment and or expose plaintiff to ill-will, ridicule and disesteem which causes her to be avoided, shunned, stigmatized, ostracized over and or even physically eliminated as "witches" are not tolerated in especially Ovambo communities.

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Plaintiff was humiliated and degraded by the said allegations and damages in her reputation and dignity and, as a result of the said allegations, plaintiff suffered damages in the amount of N\$ 300 000.00.'

[3] The plaintiff claims an amount of N\$ 300 000.00, interest and costs of suit. The defendants have full knowledge of the present proceedings. In fact, when the matter was last called in the Main Division, I caused it to be transferred to the Northern Local Division (NLD) in whose area of jurisdiction the defendants reside, and required the plaintiff to serve the order postponing the matter and transferring it to the NLD on the defendants personally. At the hearing of the matter in Oshakati on 3 October, the plaintiff handed up the returns of service showing the order was served on them. Their names were called out in the court's foyer but they did not appear. It is clear therefore that the defendants have decided not to oppose and to either deny they made the allegations or to justify them.

[4] The plaintiff testified and called two witnesses. Her evidence made clear that she was informed by an acquaintance who attended the meeting at which the allegations were made, one Ms Simon, that the second defendant had made the allegation in the presence of several people that the plaintiff had offered a poisoned chicken to the first defendant and that her allegedly doing so damaged the good name of the Ondonga Traditional Authority. The second defendant stated that she was informed as much by the first defendant. The evidence amply demonstrated that the allegation that the plaintiff had given him a poisoned chicken emanated from the first defendant and was thereafter perpetuated by the second defendant. She testified about the opprobrium caused to her and her family by the baseless allegations.

[5] The plaintiff called two witnesses to corroborate her allegations against the two defendants. The first was Ms Simon to whom I already made reference. Ms Simon confirmed that she was present at the meeting where the second defendant accused the plaintiff of poisoning the chicken she had offered to the first defendant. In fact, according to this witness, the second defendant actually challenged her to go and inform the plaintiff of the accusation she was making against her. The second witness, Mr Elifas Johannes confirmed under oath that he was present together with the plaintiff and two other persons when the first defendant repeated the allegations that the plaintiff tried to poison him and refused to retract the allegation. This witness too testified about the shame the allegations brought on the plaintiff.

The law

[6] 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*).¹ The plaintiff need not allege nor prove the falsity of the defamatory statement and need not allege anything more than his or her existence in a particular society where it is alleged that his or her reputation was damaged in the eyes of the community at large.² In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion.³

Onus

[7] The plaintiff bears the initial onus to prove publication of the alleged defamation in respect of her. The two witnesses called by the plaintiff clearly proved the publication of the defamatory allegation by the second defendant at the public meeting. Those allegations, it remains undisputed, emanated from the first defendant who made the

¹ Afshani and Another v Vaatz 2006 (1) NR 35 (HC)

² Daniels, H .2007. *Becks Theory and Principles of Pleading in Civil Action*, 7th edition. Durban: LexisNexis, p 280.

³ *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 387B-D.

initial allegation that the plaintiff had offered him a poisoned chicken. Once publication of defamatory statements relating to the plaintiff has been proved, the two presumptions arise: that the publication was unlawful and the defendant acted with *animus injuriandi*. The onus is now on the defendant to establish justification or that the publication was reasonable. Since the defendants did not oppose this action, the presumptions remain intact.

[8] That the allegations attributed to the plaintiff are per se defamatory is not in dispute. The allegation of poisoning food implies criminal conduct.

[9] I am satisfied that the plaintiff has made out a case of defamation against the defendants and that there was no lawful defence available to the defendants in respect of the allegations against the plaintiff.

[10] Although the allegation is the same, it is clear from the evidence that the two defendants acting separately and on different occasions made the allegations against the plaintiff. This is therefore an appropriate case for making separate awards against the two defendants.

Quantum

[11] The plaintiff claims damages of N\$ 300 000. Courts are astute not to depart too much from previous awards in similar circumstances. The Supreme Court had already warned in *Trustco Group International Ltd and Others v Shikongo*⁴ that the courts are careful in granting monetary awards in defamation cases because of the difficulty involved in placing a monetary value on damage that has been caused to a person's reputation. In that case, O'Regan AJA noted that damage caused to one's reputation is not necessarily fully restored by a higher award of damages or less restored by a lower one. It is, the learned judge said, the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation. The court further observed (at 403) that even though monetary awards do not cure one's reputation 'they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation'.

⁴ 2010 (2) NR 377 (SC) 402-404.

[12] The courts ordinarily have regard to previous awards when assessing damages awards in defamation cases. In *Trustco*, the Supreme Court ruled that the award of N\$ 175 000 was considerably in excess of awards generally made for defamation and accordingly reduced it to N\$100 000.⁵

[13] Recently, Geier, J in *Mbura v Katjiri*⁶ made a comparative analysis of the awards granted by our courts in para 30-37 in the following terms:

'[30] Reliance was also placed on the *Nghiwete v Nekundi*⁷, in which Manyarara AJ had awarded N\$250 000.00 in damages.

[31] It should be mentioned that the most recent judgment - to which the court's attention was not drawn - was delivered in this court on 23 July 2014 in *University of Namibia v Kaaronda*⁸ in which Smuts J granted N\$120 000.00 to one of the plaintiffs and N\$40 000.00 in favour of certain others.

[32] These are the awards on the high end of the scale.

[33] On the other end there are the following judgments:

(a) *Unoovene v Nangolo*⁹ in which a prominent businesswoman was awarded N\$60 000.00 for a defamatory statement made at a public meeting.

(b) The case of *Nghimtina v Trustco Group International Ltd and Others*¹⁰ delivered on 23 January 2014 in which Parker AJ awarded N\$60 000.00 to a cabinet minister who had been defamed.

⁵ At 404G.

⁶ (I 4382/2013) [2014] NAHCMD 265 (30 July 2014)

⁷ (I 1142/2009 [2009] NAHC 105 (24 July 2009) reported on the SAFLII website at <http://www.saflii.org/na/cases/NAHC/2009/105.html>

⁸ Case (I 1838/2010) [2012] NAHCMD 221 (23 July 2014) reported on the SAFLII website at <http://www.saflii.org/na/cases/NAHCMD/2014/221.html>

⁹ 2008 (2) NR 497 (HC)

¹⁰ Case (I 2976/2010) [2014] NAHCMD 11 (23 January 2014) reported on the SAFLII website at <http://www.saflii.org/na/cases/NAHCMD/2014/11.html>

(c) The case of *Nuule v Kambwela*¹¹ delivered on 21 July 2014, where statements relating to the plaintiff's infidelity had repeatedly been made to various persons on various occasions for about two years. In that case Van Niekerk J awarded N\$40 000.00.

....

[37] It should also be mentioned that the High Court in the Transvaal Provincial Division, in the case of *Judas Mabena and 3 Others v The Minister of Safety and Security and 4 Others*¹² only awarded an amount of R20 000.00 to the second plaintiff there in circumstances where the second plaintiff, during a search by members of the police, of her home, had been called a witch.'

[14] In that case, the plaintiff, a business woman claimed damages of N\$ 150 000.00 on account of being called a witch at a funeral of her half-brother where it was intimated that she had been responsible for his death. Taking into account various factors pertaining to the case and also after having had regard to the more recent awards made by this court and also one in South Africa, the court awarded damages in the amount of N\$50 000.00.

[15] The plaintiff in my case is a retired teacher; a married woman with ten children. She told me about the anxiety and anguish these allegations have caused her and her family. She testified that she invited the defendants to apologise publicly and to retract the allegations but they refused. There is no truth to the allegations made against her. The defendants who have notice of these proceedings have opted not to come to court and to justify the allegations.

[16] I am satisfied that the damages claimed are not justified by the circumstances of the case and, more importantly, an award in the amount claimed will set a dangerous precedent for the future. I am satisfied that the facts of this case justify an award of N\$ 30 000.00 against each defendant.

¹¹ (Case 629/2009) [2014] NAHCMD 219 (21 July 2014) reported on the SAFLII website at <http://www.saflii.org/na/cases/NAHCMD/2014/219.html>

¹² Case 819/2004 delivered on 24/01/2008

Costs

[17] The plaintiff seeks 'Costs of suit'. She has acted in person and is, under the common law, only entitled to disbursements.¹³ I will make such an order only.

Order

[18] I therefore enter the following judgment against the defendants separately, in favour of the plaintiff:

1. First Defendant: **JOHANNES NEMENE SHIINDI**

- (a)** N\$ 30 000 as damages;
- (b)** Interest on that amount at the rate of 20% per annum from the date of judgment to the date of payment;
- (c)** Disbursements necessarily and reasonably incurred.

2. Second Defendant: **LAINA NIITA UUKELO**

- (a)** N\$ 30 000 as damages;
- (b)** Interest on that amount at the rate of 20% per annum from the date of judgment to the date of payment;
- (c)** Disbursements necessarily and reasonably incurred.

PT Damaseb

Judge-President

APPEARANCE:

¹³*Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd 2008 (1) NR 290 (SC), para 41.*

PLAINTIFF

IN PERSON