

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

CIVIL JUDGMENT

Case no: I 16/2014

In the matter between:

GERHARD AMADHILA

PLAINTIFF

and

MESCHITILDE AMWAANDANGI

1ST DEFENDANT

TRUSTCO GROUP INTERNATIONAL LIMITED

2ND DEFENDANT

NGHIDIPO NANGOLO

3RD DEFENDANT

MEJA IILEKA

4TH DEFENDANT

Neutral citation: *Amadhila v Amwaandangi* (I 16/2014) [2017] NAHCNLD 36 (08 May 2017).

Coram: CHEDA J

Heard: 20.02.2017; 21.02.2017; 22.02.2017

Delivered: 08 May 2017

Flynote: At the end of plaintiff's case, defendant is entitled to apply for an absolution from the instance if defendant is of the view that there is no *prima facie* evidence before the court upon which a court applying its mind reasonable to such evidence could or might (not should, nor ought to) find for the plaintiff.

Summary: Plaintiff – was a leader of a church and a custodian of church funds. There was a break-in the church which was reported to the police and this led to his arrest and appearance in court. He sued first to fourth defendants for defamation on the basis that first defendant had caused his arrest by reporting the matter to the police. He also sued two to fourth defendants on the basis that they published a false story about him. During the trial it was established that plaintiff's arrest was not caused by first defendant as she merely made a report to the police as per the common legal obligation when a crime has been committed.

Second to fourth defendants published the story as per the allegations contained in the court record. The arrest and appearance of plaintiff was a normal routine by the police during their investigations. Plaintiff failed to make a *prima facie* case and the claim was dismissed.

ORDER

1. Defendants' application for absolution from the instance is granted and the claim against defendants is dismissed with costs as follows:
 - 1.1. Plaintiff to pay costs for one legal practitioner with regards to first defendant.
 - 1.2. Plaintiff to pay costs for one instructing and one instructed legal practitioner with regards to second to fourth defendants.

JUDGMENT

CHEDA J:

[1] In this matter, the court is called upon to determine a civil action taken against the four defendants for defamation in the sum of N\$2000 plus costs of suit.

[2] Plaintiff is a man, a former teacher and regularly serves as a church elder in the Roman Catholic Church [hereinafter referred to as "The Church"].

[3] First defendant is a lady who resides at Uupale Village in the Omusati Region, and is also a member of the Church of which she is the Chairperson of the Finance Committee and her duties amongst which is accountability for finances to the church management.

[4] Second defendant is a public company duly registered and incorporated in accordance with the laws of Namibia and is the owner and publisher of a newspaper called Informante [hereinafter referred to as "the newspaper"].

[5] Third defendant is employed by the second defendant as the editor of the newspaper.

[6] The fourth defendant is a lady, a journalist and the author of the article that appeared in the newspaper on the 17-23 February 2011 headed "Catholic Priest under probe for theft."

[7] The circumstances that led to this action against defendants are as captured in plaintiff's particulars of claim and his statement and are further amplified in his evidence in-chief with some clarifications which were illuminated under cross-examination by counsel and re-examinations by his legal practitioner.

[8] It is common cause that, first defendant's newspaper of the 17-23 February 2011 published an article which was penned by fourth defendant, which in a nutshell stated that plaintiff was alleged to have stolen money belonging to the church. It went further to state that he was arrested, appeared in court and was granted bail in the sum of N\$500.

[9] It also stated that he was arrested together with one Edwina Iita, a member of the church. The money alleged to have been stolen was part of church offerings and

it amounted to several thousands of Namibian dollars. An official church stamp was also stolen.

[10] It is further common cause that sometime in January 2011 the church was broken into by unidentified people. Plaintiff claimed that first defendant made false allegations against him which ultimately led to his unlawful arrest. This, therefore, accordingly led to him being viewed by the community and others as a dishonest person, a criminal, a thief, a corrupt person and a person who is not fit to serve as a church leader.

[11] It is, for the above, that he is of the view that defendants' publications were wrongful, and defamatory.

[12] It is also a fact that the charges against plaintiff were subsequently withdrawn and was, therefore, exonerated from any wrongdoing. For the above reasons, he claimed N\$200 000 as defamatory damages and costs of suit from all the defendants jointly and severally, the one paying the others to be absolved.

[13] Plaintiff was represented by Ms. Shailemo. It was his evidence that he is a retired school teacher and that at the relevant period he had been recalled to the teaching field and at the same time he was actively involved in pastoral work as a church leader. Therefore, his position commanded a lot of respect in the community and beyond. Plaintiff narrated how the money was removed from one of the rooms in the church as he considered it not being safe and put it into one which he considered safe as it was lockable and therefore fairly secure. He was, therefore, surprised by the break-in and theft. It is his belief that his arrest was as a result of first defendant making a false allegation of theft against him.

[14] As regards the second to fourth defendants, it is his assertion that they published a defamatory article whose contents were defamatory because they were intended and understood by readers to mean that he was dishonest as stated above. Plaintiff did not call any other witness and thus closed his case.

[15] Defendants opened their case. They did not call witnesses, but instead, opted to make an application for an absolution from the instance which I will deal with hereinunder. First defendant was represented by Mr. Shakumu who extensively cross-examined plaintiff and extracted an admission from him to the effect that:

- a) first defendant was indeed a chairperson of the Finance Committee;
- b) she was accountable to the authorities with regards to general management and finances in particular;
- c) a break-in took place in the church and thousands of dollars were stolen;
- d) it was her duty to report the theft to the Police;
- e) she did not advise second to fourth defendants to report on this incident in their newspaper and;
- f) that she confirmed the incident to second to fourth defendants but, did not tell them that plaintiff was the prime suspect.

[16] Plaintiff admitted that the Police arrested him and one Edwina lita as a result of a formal report of a crime that had occurred at the church, but, first respondent did not direct them as to how they should carry out their investigations amongst which, as to whom they should pick-up for interrogation and subsequent arrest if need be.

[17] It was further, Mr. Shakumu's submission that by reporting theft, first defendant did not mention plaintiff as a thief. He referred the court to Exhibit 3 which is a Nampol 2 form (case docket) which contains the complainant's name, the nature, description of the offence, method and/or instrument used, nature of property stolen and the value thereof.

[18] The report was made on the 16 January 2011. The second page of the said form relates to the particulars of the accused and/or suspects. It clearly indicates that plaintiff and Edwina lita also known as Nalweendo, were arrested on the 31 January 2011 after the report was made to the Police.

[19] In order to determine whether, defendants can succeed in this application for absolution from the instance, plaintiff has to prove a *prima facie* case against defendants at the close of plaintiff's case.

[20] That, there, was a house breaking and theft in the church, is not in dispute and equally so, the fact that first defendant was obliged to report the theft to the Police in order to enable them to investigate and thereafter naturally the law had to take its course admits of no doubt. The question, therefore, is, did first defendant defame plaintiff by merely making a report about the theft whose perpetrators were unknown at the time. Infact, the information that found its way into the press (newspaper) was extracted from a court record which is public document and not from first defendant.

[21] Second to fourth defendants were represented by Advocate Schimming Chase. It was her submission that it is plaintiff's case that as a result of false charges laid by first defendant that second to fourth defendants published an article whose contents were defamatory in nature as outlined above.

[22] It was her argument that the publication complained of was in fact not defamatory in nature as it was based on court records.

[23] In their pleas, second to fourth defendants admitted publishing the said article, but, vehemently denied that they defamed plaintiff as their publication was based on what they termed standard media defences being absence of *animus iniuriandi*, truth, public benefit and reasonable publication.

[24] It is also her submission that plaintiff's evidence revealed the following pertinent and material facts:

- a) that the theft occurred in church while plaintiff was a church elder/leader and that he is referred to as a Pastor;
- b) he was a School Principal who although he had retired he was recalled to continue in that role;
- c) he was suspended as a church leader, but, was reinstated after the charges were withdrawn against him on the 11 December 2011;
- d) despite this new development, he did not approach the second to fourth defendants in order for them to correct the previous article and retract the offending article;

- e) accepted that fourth defendant sought his comment on the allegations before publication and that his version was properly captured; and
- f) that it was in the public interest that the public be informed that public money was stolen in the church.

[25] Advocate Schimming Chase, therefore, argued that with those admissions, plaintiff was not defamed as the publication was based on what was in the court record. Plaintiff's response was sought and was properly captured. There was no negligence on the part of the second to fourth defendants in their publication and as such it was a reasonable publication.

[26] Both counsel for defendants applied for an absolution from the instance as they argued that there is no *prima facie* evidence presented by plaintiff upon which a court, applying its mind reasonably to such evidence could or might find for the plaintiff. The test for absolution from the instance is now trite, it is, that the trial court at the end of plaintiff's case is not whether the evidence led by plaintiff establishes what would finally be required to be established, but, whether, there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

[27] This is the approach which was followed in *Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 92E-93A* as formulated in *Claude Neon Lights SA Ltd v Daniel 1976 (4) SA 403 (A) at 4099* – where it was formulated in the following terms:

“The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H* where Millers AJA stated:

“...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and*

Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)”

[28] In *Gordon Lloyd Page & Associates v Rivera and Associates* case (*supra*) at 92G-93A Harms JA remarked:

“This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91—As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue.

The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.” (my emphasis)

[29] This court is therefore constrained to make an enquiry as to whether plaintiff has made a *prima facie* case upon which a court applying its mind reasonably to such evidence could find for the plaintiff. In making this determination the court should bear in mind the evidence led by plaintiff so far without more. Needless to say that the test is an objective one.

[30] It will not be in the interest of justice to allow the trial to rumble on where it is objectively clear that there is no iota of evidence which can persuade the court at this stage to knee-jerk as it were, towards plaintiff’s direction. However, the courts should always be slow in shutting out legitimate proceedings at every stage whenever words “absolution from the instance” is mentioned. This, therefore calls for caution from the court. The words “absolution from the instance” should not be viewed as a mantra.

[31] First defendant, through her legal practitioner convincingly submitted that plaintiff's arrest was not instigated by herself, but, was a natural and logical consequence of an investigation by the Police after receiving a genuine report of housebreaking and theft. Plaintiff admitted this as well.

[32] Defamation is adequately described in Nettling's Law of Property, Lexis Nexis, 2nd edition, 2004 at p131 where the esteemed authors stated that defamation is;

“the intentional infringement of another's right to his good name, or more comprehensively, the wrongful, intentional publication of words or behaviour which has the tendency to undermine his status, good name or reputation,”

see also *Conroy v Stent Printing Co. Ltd* 1946 AD 1015 at 1018.

[33] In determining whether a person has been defamed the court will always ask whether a reasonable, right thinking man or woman hearing or reading the words complained of think less of the plaintiff. It is, therefore, imperative that the offending words must be clear in their meaning in order for the court to determine that they harm the said person.

[34] It admits of no doubt that first defendant reported the housebreaking and theft to the Police, that plaintiff was arrested and that second to fourth defendants published this story as a result of plaintiff's appearance in court. Of note is that there is no proof that first defendant gave the Police plaintiff's name as a prime suspect and let alone cause his arrest. All what happened in my considered view was as a result of the Police's unfettered investigations following their own leads which unfortunately netted plaintiff. To this end, plaintiff under cross-examination conceded that, first defendant as chairperson of the church had a duty to report this crime to the Police. With that admissions, I see no ground for holding first defendant liable for defamation.

[35] I now move further to second to fourth defendants. The information which formed the basis of their story was extracted from the court record, which is a public document. They reported it as it is with no alteration, addition or subtraction. In all

fairness, they even sought plaintiff's comment on the allegations levelled against him, who while admitting the arrest commented as follows:

"Those are pure, accusations. I did not steal any money from the church."

[36] If this is not fair and objective reporting, then nothing will so qualify. On the basis of the facts stated above, all defendants applied for an absolution from the instance as it is not in dispute that:

- a) there was indeed a housebreaking and theft in the church which occurred while plaintiff was the custodian of the money/church collections;
- b) first defendant had a duty to report such a crime to the police and that plaintiff has not proved that his arrest was as a result of him having been pointed out as a thief by first defendant;
- c) fourth defendant obtained information about the theft, arrest and appearance in court from the court record, which itself is a public record;
- d) fourth defendant had invited plaintiff to comment on the allegations before publication and his comment was printed verbatim;
- e) second and third defendants published the story which was in fact a true reflection of what had taken place in the church;
- f) plaintiff had charges withdrawn against him on the 01 December 2011, but, did not advise second to fourth defendants of the latest developments which would have led them into correcting the perceived wrong report about him. This was very important as it would have resulted in them mitigating the alleged damage; and
- g) plaintiff admitted that the publication was a fair comment in the circumstances.

[37] The principles laid down by the authorities clearly show that an application for an absolution from the instance is based on an objective test. It therefore remains to be seen whether there is defamation in this case. It is plaintiff's assertion that he was defamed and the *onus*, therefore, firmly rests on his shoulders to prove on a balance of probabilities that he was indeed defamed. After the close of his case and confronted by an application for an absolution from the instance the court is enjoined

to examine whether defendants' application indeed meet the immutable guidelines set out in the authorities (supra).

[38] The question to be asked is whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. It is not whether the evidence led by plaintiff established what would finally be required to be established, see *Claude Neon Lighter (SA) Ltd v David* (supra). These courts are generally reluctant to make conclusions without hearing the other side, this is in line with the principles of natural justice. It is for that reasons that absolution from the instance should not be granted at the whims and caprices of a party applying for it.

[39] The onus is on plaintiff to make a prima facie case at that stage. It seems to me that this is the test which has been adopted in our jurisdiction and I am highly persuaded to apply it as a determining factor in this matter. In doing so, an examination of plaintiff's evidence which has been led to substantiate his aim is in point.

[40] While indeed, plaintiff led evidence and withstood the rigorous cross-examination by both defence counsel, he unwittingly made material admissions which will either make or destroy his case.

[41] I have already dealt with those admissions above, suffice to say that he is in total agreement with defendants that:

- a) first defendant did not cause his arrest;
- b) second to fourth defendants published the truth as per the court record;
- c) before publication he was invited to comment, confirm or refute the allegations, which he did on his telephone conversation with fourth defendant

[42] All this was published and it was therefore fair. He further admitted that it was in the public interest, congregates included that such incidents be reported to the police and the person had a duty to publish it.

[43] In light of these admissions, I find that plaintiff has removed the sting from his claim and there is no legal basis upon which the proceedings can proceed beyond this hurdle in the absence and / or failure to place or prove a *prima facie* case before the court at this juncture.

[44] Plaintiff has an onus of placing evidence before the court, which relates to all the elements of the claim. Unfortunately, plaintiff has failed to discharge that onus and in the absence of evidence on which the court at this juncture could or might find for him, the case cannot proceed further, as to do so will amount to allow him to engage on a fishing expedition.

[45] It is clear, therefore, that, once plaintiff fails to place a *prima facie* case at the close of its case then the case should not see the light of day. I am convincingly pursued by defendants' counsel's argument that this matter should end here. Accordingly, I make the following order:

Order:

1. Defendants' application for absolution from the instance is granted and the claim against defendants is dismissed with costs as follows:
 - 1.1. Plaintiff to pay costs for one legal practitioner with regards to first defendant.
 - 1.2. Plaintiff to pay costs for one instructing and one instructed legal practitioner with regards to second to fourth defendants.

M Cheda
Judge

APPEARANCES

PLAINTIFF: T. Shailemo
Of Inonge Mainga Attorney, Ongwediva

1ST DEFENDANT: S.K. Shakumu
Of Shakumu & Associates, Windhoek
c/o Samuel Legal Practitioner, Ondangwa

2ND, 3RD & 4TH DEFENDANT: E. Schimming Chase
Of Engling Stritter & Partners, Windhoek
c/o W Horn Attorneys, Oshakati