

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

Case no: HC-NLD-CIV-ACT-OTH-2018/00219

In the matter between:

HILENI NELAGO SHIVUTE

1ST PLAINTIFF

MAGANO IITA

2ND PLAINTIFF

and

ELIA MOSES

1ST DEFENDANT

AUNE AMATHILA

2ND DEFENDANT

MPINGANA MAGANO NDJAULA

3RD DEFENDANT

Neutral citation: *Shivute v Moses* (HC-NLD-CIV-ACT-OTH-2018/00219) [2018]
NAHCNLD 140 (11 December 2018)

Coram: CHEDA J

Heard: 03 December 2018

Delivered: 11 December 2018

Flynote: Practice – In a defamation suit – plaintiff seeks relief for impairment of his/her personal dignity and sense of self-worth – plaintiff must set out the words alleged to have been used by defendant and must prove his/her claim on a balance of possibilities. Particulars of claim must be clear.

Summary: Plaintiffs issued summons against defendants whom they alleged had stated in public that they were directly responsible for and forthwith involved in the untimely death of Mrs Liina Nekwaya. They alleged that this was said during the burial of the said Nekwaya. As such, their reputations were injured and their esteems were lowered in that village.

ORDER

The application for default judgment is dismissed with costs.

JUDGMENT

CHEDA J:

[1] This is a matter where plaintiff sued defendants for defamation. First plaintiff is a lady employed as a nurse by the Ministry of Health and Social Services and resides at Okahao area while second defendant is employed as a Police Officer by the Ministry of Safety and Security and also resides at Okahao in Namibia.

[2] First defendant is a pensioner who resides at Okahao while second defendant is a lady teacher and also resides at Okahao. Third defendant is a lady Police Officer employed by the Ministry of Safety and Security and is also a resident of Okahao.

[3] According to the particulars of claim, sometime in January 2018 at Olwaandjana Village, Okahao, all the parties attended a funeral ceremony for the late Mrs Liina Nekwaya. It is alleged that defendants alleged that first and second plaintiffs were responsible for the untimely death of the late Liina Nekwaya. In fact the particulars of claim is couched as follows:

'During or about January 2018, and at Olwaandjana Village, and during the commencement of the mourning ceremony held for the late Mrs Liina Nekwaya you stated to the villagers and residents of Olwaandjana, the neighbours, and all respective family members gathered

in mourning of the late Mrs Liina Nekwaya that the first and second plaintiffs were directly responsible for and forthwith involved in her untimely death.

Thereafter making the aforesaid statements during the aforesaid period, you continued making statements of and concerning the plaintiffs throughout the entire burial period of the deceased, and thereafter. As a result of these statements made of and concerning the plaintiffs, they have since suffered being shunned in their communities.

The statements made by the defendants are wrongful and defamatory of the first and second plaintiffs. The statements were made with the intention to defame the plaintiffs and to injure their reputations.

These statements were intended by the defendants to mean that the plaintiffs have no respect of the right to life of other people, are involved in murderous activities in direct violation of the fundamental principles and the right to protection of human life provided for in the laws of the Republic of Namibia, that they have no regard for human life whatsoever, that they engage in devious activities incompatible with acceptable human conduct and that they are not fit and proper people to live amongst the community in Namibia.'

[4] On the 4th September 2018 plaintiffs issued summons for defamatory damages in the sum of N\$120 000 and other ancillary relief against the defendants. The defendants did not enter an appearance to defend the said action. Plaintiff then applied for default judgment on the 31st October 2018. The court ordered that plaintiffs should file heads of argument in order to justify their claims against defendants.

[5] Mr Kasita for plaintiffs duly filed the Heads of Argument which the court has indeed perused. Defamation is the intentional infringement of another person's right to his/her good name. This definition together with its essential elements were clearly laid down in *Tap Wine Trading CC v Cape Classic Wine (Western Cape) CC* [1998] 4 SA 86 (C) quoted with approval in *Kambwela v Mbadhi* (I 185/2016) [2018] NAHCNLD 16 (12/2/2018) being that there should be:

- a) injuria (the act) (publication of words or conduct /or behaviour);
- b) an injury to personality;

- c) wrongfulness, which is the infringement to ones' *dignitas*; and
- d) the intent (*animus injuriandi*)

[6] It is trite law that *actio injuriarum* grants the relief for impairment of the person, dignity and the sense of self-worth of the plaintiff which impairment is committed wrongfully and unlawfully. It is, therefore, a requirement that the plaintiff must allege and prove impairment of the relevant personality relied upon.

[7] In order to succeed, plaintiff must set out the words alleged to have been used by the defendant and must prove them on a balance of probabilities. In simple terms plaintiff must prove the words actually used or bearing a substantially similar meaning, see *International Tobacco Co Ltd v Wollheim & others* 1953 (2) SA 603 (A) 613-614 and *De Villiers v Schutte* 2001 (3) SA 834 (C) 837 – 839 (headnote).

[8] Plaintiff must allege and prove publication of the defamatory statement to a third party and not to plaintiff or plaintiff's spouse. It is however, not necessary to state the names of all the persons in whose presence the defamatory statement was made, but, as a general rule only those persons whose identities have been pleaded may be called as witness to prove publication, see *International Tobacco Co (SA Ltd (supra))*.

[9] In *casu*, plaintiffs refer to mourners only. This in my view is not enough as they should have mentioned at least some of the people, who if need be, would be called to give evidence. In addition plaintiffs should have published the exact words or words which can be understood to be defamatory. It is not enough to say that they told mourners and that plaintiffs were directly responsible for the deceased's death. The question is, how is it said that they were directly responsible for her death. The exact words should be stated verbatim or words that are as near as reasonably possible to the exact words or better still that are substantially similar. It is from the published words that the court can determine whether the said words were defamatory per se or are reasonably capable of being ordinarily understood to be defamatory to those in whose presence publication was made, see *Dendy v University of Witwatersrand, Johannesburg* 2005 (5) SA 357 (W).

[10] The particulars of claim in their present state do not establish a cause of action. I am mindful of the fact that defendants did not defend this action. However, this court is a court of justice and as the final arbiter, cannot and should not rubber stamp proceedings which do not comply with the standing legal principles. Plaintiffs in their pleadings stated "... first and second plaintiffs were directly responsible and forthwith involved in her untimely death." This statement is vague as it does not say why it is said plaintiffs were involved. For that reason I find that plaintiffs have failed to establish a cause of action against defendants. They have failed to prove their claim on a balance of probabilities and as such this claim must fail.

In the result the following is the order of the court;

1. The application for default judgment is dismissed with costs.

M Cheda
Judge

APPEARANCES

For the Plaintiff:

P Kasita
of AngulaCo Inc., Ongwediva