

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: I 185/2016

In the matter between:

JOHANNES KAMBWELA

PLAINTIFF

and

MARIA MWEYA MBADHI

DEFENDANT

Neutral citation: *Kambwela v Mbadhi* (I 185/2016) [2018] NAHCNLD 16 (12 February 2018)

Coram: CHEDA J

Heard: 27, 28 November 2017

Delivered: 12 February 2017

Flynote: Every person is entitled to legal protection against an infringement of his/her dignity which is presumed. Where a plaintiff fails to make a full disclosure of the basis of his/her claim and/or misleads the court on matter of fact, the court will not be in a position to make a proper determination. A claim for defamation will not succeed.

Summary: Plaintiff, a businessman, employed the defendant and was engaged in various uncalled for immoral activities with defendant taking her to his various outlets and coming back at night, showering her with presents and other financial rewards

that were outside work environment. Plaintiff alleged that defendant had been spreading rumours that he was HIV positive. This resulted in him taking her for an HIV test and she was tested. However he did not submit himself for the test before the same doctor but advised defendant that he was going to be tested somewhere else in a laboratory. However, his results remain unknown. Defendant's HIV results were read to the workers. Plaintiff claimed N\$35 000 from defendant for spreading this rumour.

Defendant also counter-claimed the same amount from plaintiff for defamation based on the allegations that plaintiff had been making sexual advances towards her and that she underwent an HIV test and he forced her to read her HIV results to her fellow employees.

The evidence for both parties was not convincing as they seem to have been concealing a lot of information regarding their true social interaction. The court could not determine, as who defamed who. Both claims were dismissed with no order to costs.

ORDER

1. Plaintiff's claim is dismissed.
2. Defendant's counterclaim is dismissed
3. Each party to bear its own costs.

JUDGMENT

CHEDA J:

[1] On the 08th of August 2016, plaintiff mounted legal action against defendant for defamation which was defended. Defendant in turn also filed a counter-claim for the same amount against plaintiff for defamation. Plaintiff is a businessman trading

under the name and style of Eland General Market situated at Ondukuta, village. Defendant is employed by plaintiff at Eland General Market. Plaintiff has various businesses in the country and travels a lot.

[2] In his particulars of claim plaintiff alleged that sometime in June 2016 defendant told her co-workers that plaintiff is HIV positive and was, therefore, spreading the disease to his various sexual partners. The said information was according to plaintiff wrongful and defamatory.

[3] Further that the said statement was made with an intention to defame and injure his reputation. This statement, therefore, was understood by those present, that plaintiff was a person of loose morals and he was intentionally spreading the dreaded disease.

Plaintiff's Case

[4] Plaintiff attested to an affidavit which was read into the record and is, therefore, an exhibit. In that statement he narrated the events in this matter. It was his evidence that sometime in June 2016 it was brought to his attention that there was a misunderstanding between defendant and one Teresia Alweendo who are both his employees.

[5] He called for a staff meeting where he attempted to resolve the meeting amicably, but, without success. He then called Teresia aside to find out the root cause of the misunderstanding. It is at that point that he was advised by Teresia that defendant was spreading rumours referred to (supra). Upon hearing this he confronted defendant in the presence of Teresia and she confirmed that indeed she had said so but in a different context. He denied had been making sexual advances towards her and that he forced her to read out her HIV results to her co-workers.

[6] He further averred that because of defendant's actions he suffered in his dignity and as such he is of the opinion that defamatory damages in the sum of N\$35 000 was fair in the circumstances.

[7] Under cross-examination he categorically denied:

- a) having made any sexual advances towards defendant;
- b) having bought defendant lunch or gifts;
- c) forcing defendant to undergo blood test to ascertain her HIV status;
- d) forcing her to read her HIV test results to his members of staff and/or any other members of the public; and
- e) that he did not defame or injure her dignitas.

Teresia Alweendo

[8] In support of his claim he called on Teresia Alweendo to give evidence. She stated that she, together with defendant are employees of plaintiff and/or were friends. She too deposed to an affidavit which was produced in court and was also read into the record thereby becoming an exhibit. It was her evidence part of which I quote verbatim hereinunder that:

'During April 2016 to June 2016, Defendant in my presence repeatedly circulated false rumours to Plaintiff's staff members and member of the public to the effect that Plaintiff was HIV positive and that he was knowingly spreading this terrible disease to his sexual partners.

These malicious rumours caused a conflict between myself and defendant to such an extent that during June 2016, plaintiff called a meeting between all of the staff members to try and resolve the conflict that these malicious and false rumours had caused. (sic)

The meeting was held and was not successful. After the meeting I was called aside by Plaintiff and he asked me why there was a conflict between myself and Defendant. I informed him of the rumours that Defendant had been circulating among the staff members and members of the public.

Plaintiff duly called Defendant to ascertain the truthfulness of the allegations made by myself. Plaintiff, in the presence of myself, duly confronted Defendant regarding the allegations and Defendant confirmed having circulated these false, malicious and defamatory rumours and/or allegations.'

[9] This witness also stated that plaintiff took her together with defendant and one Panduleni to a Medical Doctor where he submitted himself for an HIV test. After

doing so, defendant also volunteered to have herself tested for HIV. She further stated that the HIV results came out after 3 days and she does not mention the rapid results test alleged carried out on the defendant.

[10] She further averred that the results that were read to the employees were those of plaintiff and not defendant and that to date she does not know defendant's HIV status.

[11] Teresia vehemently denied seeing plaintiff making sexual advances towards defendant or witnessed plaintiff buying defendant lunch or giving her presents. Further, she did not see plaintiff forcing defendant to submit herself to an HIV test or being forced to read her own results to the public. That was the gist of her evidence. Plaintiff then closed his case.

Defendant's Case

[12] Defendant opened her case by giving evidence herself. She also deposed to an affidavit which was read into the record and was admitted as an exhibit. In that statement she stated that she was indeed employed by plaintiff and has been so employed for more than 6 years.

[13] She insisted that plaintiff did not participate in the rapid HIV test like her, but, opted to go for a test whose results take longer to come out and in fact took 3 days and is carried out in a laboratory, and those results were never disclosed to her by plaintiff to date. In other words her evidence is at variance, with that of plaintiff and herein who denied that she underwent a rapid results test.

[14] It was further her averment that on many occasions plaintiff made sexual advances towards her, but, she turned him down. She also stated that plaintiff had transferred her from one branch of his business to the other ostensibly in order to have easy access to her. She further stated that after her transfer, plaintiff used to take her along during his visits to his various business outlets and they would come back very late at night. Sometime in June plaintiff again offered to buy her lunch in the presence of Teresia, she declined the offer and this enraged him. She further

told the court that shortly after this encounter plaintiff forced her to undergo an HIV test at Outapi which she did. It was a rapid results test and her results were negative.

[15] It was also her evidence that plaintiff did not undergo a rapid results HIV test but instead stated that he was going to undergo one at a laboratory and the results took 3 days to come out. She further stated that plaintiff did not disclose his results to date and that the results that were read and disclosed to the workers were hers.

[16] Under cross-examination she revealed that from the time she was employed plaintiff had been making sexual advances towards her even when she was heavily pregnant by her boyfriend. Plaintiff was not deterred by her medical condition as he continued to ask for sexual favours, but, she rejected all his overtures.

[17] It was also her testimony that plaintiff used to give her money ranging between N\$200 – N\$400 and also bought her lunch. Further that her boyfriend got to know about her unusual interaction with plaintiff and he asked her to leave the job, but, she refused as she loved the job. She denied alleging that she circulated rumours about plaintiff's HIV status, but, she stated that all she said was in response to Teresia's suggestion and/or question why she had not accepted plaintiff's love proposals and a lunch present.

[18] In response to Teresia question and/or recommendation she said that she remarked about the prevalence of passion killing in Namibia but she did not refer to plaintiff being HIV positive or that she uttered words to the effect that she did not want to die of Aids and/or HIV as plaintiff had multiple sexual partners.

[19] Defendant also counter-claimed an amount of N\$35 000 for defamation as she alleged that plaintiff demanded to sleep with her, forced her to undergo an HIV test and for demanding and/or forcing her to read her HIV results to her co-workers. That is the basis of her evidence.

The Law

[20] Both parties are claiming defamatory damages from each other. Every person has a right to a good name and this is recognised in our law as it is enshrined

in the Namibian constitution as a personal right. This is the respect and status which members of society enjoy and are guaranteed of. Any action that effectively reduces that status is actionable as it is defamatory.

[21] Therefore, defamation is the intentional infringement of another person's right to his good name. This is the law, this principle was ably laid down in *Tap wine Trading CC v Cape Classic Wine (Western Cape) CC* [1998] 4 SA 86 (c) and *Langa v Hlope* 2009 (4) SA 382 (SCA) at 3981 where the following essential elements were coined and these are a necessity in order for a party who chooses to sue for defamation to succeed:

- a) injuria i.e. the act (publication of words or conduct and/or behaviour);
- b) an injury to personality;
- c) wrongfulness, which is the infringement to one's dignitas; and
- d) the intent (*aminus injuriandi*)

[22] Plaintiff and defendant's allegations against each other are the basis of their claims. In order for the court to properly determine their claims, it is paramount to delve into the alleged facts of their cases.

Plaintiff evidence

[23] What comes out of his evidence is that Teresia told him of certain rumours being circulated by defendant. The said rumours were in connection with his HIV status. As a result of these rumours he confronted defendant in an attempt to quell them. He, together with Teresia, defendant and one Panduleni went to a Doctor in order to have an HIV test carried out on himself, ostensibly to prove that contrary to what defendant was saying about him, he was infact and in truth HIV negative.

[24] While he was at the Doctor's surgery, defendant also suggested that she be tested and he paid for her test. He said that his results were negative and they were later read out by defendant to other members of staff.

[25] In order for a party to succeed, he must present facts which the court must find on a balance of probabilities to be true. There are a couple factors which do not

seem to tally with reality. Plaintiff is a businessman and a responsible man in his community. Defendant who is an employee begins to peddle such damaging rumours to Teresia who is another employee. He decides to confront her and further submits himself for an HIV test. He does not end there, but, goes on to have the same person who is alleging that he is HIV positive to undergo an HIV test at his expense.

[26] The question is, (a) why he would do that if there was no intimate relationship with defendant. HIV is not transmitted in an employer-employee relationship in the absence of the exchange of body fluids, of which sexual intercourse is one of the vehicles of transmission, sexual intercourse which however, has not been admitted by both parties. (b) Why would both of them submit themselves to such a rigorous and demeaning procedure if they had not carnally known each other, (c) why did he disclose his results to the public, which results are disputed by defendant as being his and not hers. (d) What obligation did he have towards his employees, bearing in mind his social status.

[27] Above all his HIV results have not been made public to date. In such a cloudy environment it would have been of assistance if he had disclosed then to the court in confidence.

[28] In addition to these issues which have not been cleared, it is not clear why Teresia would run to tell plaintiff their woman-to-woman discussion. Why was Teresia so worried about a simple gossip from defendant, if at all, to an extent of causing such a commotion at work.

[29] In my mind the truth has not been disclosed by plaintiff and his witness. The circumstances surrounding this case are far from being convincing. The facts as plaintiff would like to the court to believe are mind boggling.

[30] As pointed out above, Teresia is an employee as well, if she misleads it is understood as she has to protect her job, this is expected. It is not clear in what context plaintiff's alleged spread of the HIV virus was being discussed. On one breadth it appears to have been after Teresia or someone had suggested to defendant that she should fall in love with plaintiff, to which she responded by saying

in Oshiwambo 'Hasho handisi ngawo' or 'Hasho hesi nga' which means 'that is not how I die' but death from what is not clear. Teresia, however understood it to mean that plaintiff was promiscuous and was therefore spreading the virus as he had multiple sexual partners.

[31] It is this response which upset her and which resulted in their relationship becoming sour and subsequent intervention by plaintiff. She also accompanied plaintiff for his HIV test, but, again he was not tested together with defendant. This again is illogical, as each person's status is based on their own's individual test. The results cannot be by association.

[32] If this is what took place according to Teresia, it does not make any sense and is hard to believe. Both plaintiff and his witness did not give credible evidence as they seem to have concealed a lot from the court.

Defendant's evidence

[33] Defendant's evidence also has numerous holes which have not been plugged. She totally denies having said anything relating to plaintiff's HIV status or his promiscuity. She further denied having a love affair with him, but, admitted that they have been out to plaintiff's business together and going back late and also being bought lunch and other goodies. She told the court that plaintiff has been making sexual advances towards her from the time she was employed by him, which is over 6 years ago, but she always turned him down.

[34] It was also her evidence that plaintiff had transferred her from one of his premises to the other in order for him to easily access her. While she together with plaintiff were engaged in these secret activities, her boyfriend picked up the scent and disapproved of her conduct. Despite the complaints by her boyfriend, she did not find it necessary to leave this job which apparently was distressing her boyfriend and was a threat to her otherwise healthy relationship.

[35] These nocturnal travels brought some monetary rewards which ranged between N\$200 – N\$400. These rewards were not official as they were not appearing in the business books as an expense. The said rewards were also being

concealed from her boyfriend. These benefits which arrived and flowed her way, she termed them overtime, they however had some distinct and unusual features in that:

- a) it was paid at night upon their return;
- b) there was no official record;
- c) no one in the company knew about them except plaintiff and defendant alone;
- d) there was no rate stated as they were paid *ad libitum*;
- e) no one in the company knew about it; and
- f) She decided not to disclose this fact to her boyfriend who had impregnated her.

[36] It was further her evidence that plaintiff continued to ask for sexual favours from her even when she was heavily pregnant as he said that there was nothing wrong with him sleeping with a pregnant woman. This does not sound like a true version of what took place. Defendant seems to have left out a lot or deliberately sought to mislead the court. Most of what she told the court was being disclosed for the first time under cross-examination.

[37] What was going in this company will never be known by the court as all these activities were being carried out under a veil of secrecy. Again, the circumstances surrounding this matter are far from convincing. The following questions cannot escape my hand:

- a) why was she accompanying plaintiff in all these nocturnal visits to his businesses?;
- b) why did she undergo an HIV test when the results would have had nothing to do with plaintiff?;
- c) why was she concealing her payments and lunch gifts from her boyfriend and her co-workers if she did not like what plaintiff was doing to her?; and
- d) why did she continue to receive lunch and money from him?

[38] In my mind, this is not the behaviour of a woman who was being bothered by plaintiff's persistent and consistent unwarranted conduct. According to her, he was relentlessly pursuing her. In my view plaintiff pursued defendant like an old tin tied to a bumper of a motor vehicle which reckless on until the vehicle hits a kerb. Despite this hot, annoying and immoral pursuit, she did not discourage him. If anything her

conduct was urging him on and it seems she was enjoying the illicit attention with all this melodrama.

[39] Defamation has an effect of an infringement of a person's right to his good name. The question which to be interrogated is whether, in the opinion of a reasonable man with normal intelligence and development, the reputation of the person concerned has been injured. This has always been our guiding principle as it was ably stated in *Tsedu v Lekota* 2009 (4) SA 372 (SCA) 378-379. If the answer is in the affirmative then the words or behaviour are defamatory, see *Mthembi-Muhanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) 342-343 and also *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) 192-193. Once plaintiff proves that publication is defamatory and it refers to him, it is then stands as *prima facie* proof of wrongfulness. A presumption of wrongfulness arises which then places the burden of rebuttal on defendant.

[40] Both parties denied liability for each other's claims. It should be borne in mind that liability for defamation postulates an objective and subjective element of fault, once the publication is made these elements will be presumed. It is a requirement that plaintiff must allege that the defendant acted unlawfully and that there was *animus iniuriandi*. See *Naylor and Another v Jansen; Jansen v Naylor & others* 2006 (3) SA 546 at 551 para 7 where Scott JA stated:

'Proof that the words were uttered gives rise to two presumptions: first that the publication was unlawful and, second, that the statement was made with the intention to defame.'

[41] Thereafter the defendant can either admit or deny it and vice versa. However a bare denial will not suffice and defendant is required to plead facts that will justify his denial of unlawfulness or *animus iniuriandi*, see *National Media Ltd & others v Bogoshi* 1998 (4) SA 1196 (SCA).

[42] I, find plaintiff's conduct quite strange to an extent that the court is obliged to look closely at what was going on. Plaintiff is aware that defendant has argued that the results that were read were hers and not his. Further, that his results were never disclosed to anybody.

[43] In light of these insinuations I would have expected plaintiff to produce his HIV results before the court. In their absence, I find it difficult to believe his assertions that he submitted himself and underwent an HIV test and that his results were produced and read to his workers by defendant. The silence on his part, leaves one with a sour mouth. I smell a rat and in fact a rotten one, for that matter.

[44] In my view it was important for him to at least produce them as he was concerned with the damage to his dignity which had been occasioned by defendant. Where the truth has not been, the court is deprived of facts which would enable it to make a fair and just determination.

[45] I find that both plaintiff and defendant are persons of coarse morals and both their law suits have no legal basis as the facts on the ground clearly show that there were unholy activities that were going on between them. These courts make determination on the basis of proven facts which unfortunately are lacking in both claims. These courts are not soothsayers and this court has no crystal ball, if it has one, it is broken and therefore is of no use in this case.

[46] In as much as they could have told the truth in some aspects namely that they are in the same organisation, as them being in the same acquisitions, they have been economic with the truth in facts which are necessary for the determination of their matter. Unfortunately the court cannot cherry-pic the truth from this melee. The latin maxim *falsus in uno falsus in omnibus* is applicable in this scenario, I find that both parties have failed in establishing liability against each other.

[47] In the result the following is the order of court:

1. Plaintiff's claim is dismissed.
2. Defendant's counterclaim is dismissed
3. Each party to bear its own costs.

M Cheda
Judge

APPEARANCES

PLAINTIFF:

J Greyling
Of Greyling & Associates, Oshakati

DEFENDANT:

BB Boois
Of BB Boois Attorneys, Ongwediva