

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-2021/00201

In the matter between:

ROSALIA HAUKONGO

PLAINTIFF

and

PAULINA PANDELA

FIRST DEFENDANT

HILMA SHITEKULU

SECOND DEFENDANT

Neutral citation: *Haukongo v Pandela* (HC-NLD-CIV-ACT-DEL-2021/00201)
[2022] NAHCNLD 17 (7 March 2022)

Coram: ANGULA DJP

Heard: 31 January 2022

Delivered: 7 March 2022

Flynote: Law of delict – Defamation – The basic requirements restated – factors to be taken into account in awarding damages.

Summary: The plaintiff instituted a defamation action against the defendants claiming damages she allegedly suffered as result of certain defamatory statements made by the defendants – The parties in this matter are business persons trading in the sale of chicken and traditional food – According to the plaintiff, the statements

were allegedly intended to mean that the plaintiff is dishonesty in the following respects: she engages in sexual relations with men for money; she defrauds her customers and is a person of low morals – The basic requirements for defamation action restated and are: (a) the wrongful; (b) and intentional; (c) publication of; (d) a defamatory statements; and concerning the plaintiff – Once the plaintiff has proved that the defendants' publication of defamatory words, it is presumed in law that the statement was both wrongful and intentional.

In the present matter, the court struck the defendants' notice to defend the action due to non-compliance with its orders and as a result, the matter was unopposed. After hearing arguments on behalf of the plaintiff, the court *held* that the statements made by the defendants were defamatory and that they violate her right to dignity. It was further *held* that those statements adversely affected the plaintiff's business activities. The court concluded that the plaintiff was thus entitled to be compensated for damages suffered and upheld the claim with costs.

ORDER

1. The defendants to the pay plaintiff the sum of N\$50 000 as damages, jointly and severally the one paying the other to be absolved.
2. Interest on the aforesaid amount of N\$50 000 at the rate of 20 per cent per annum calculated from the date of judgment to the date of final payment.
3. The defendants are directed to publicly apologise to the plaintiff and retract the wrongful and defamatory statements in the same manner as the defendants' had initially published the statement.
4. The retraction and apology must be made at Oshakati Open Market in front of the general public and vendors within seven (7) days from the date of this order.
5. Costs of suit.

6. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] Serving before court is an action in which the plaintiff seeks payment for damages she suffered that arose from defamatory statements made by the defendants during the year 2020 and 2021. The plaintiff in essence seeks the following relief jointly and severally against the defendants:

- '1. Payment in the amount of N\$60 000.
2. Interest thereon at 20% calculated from the date of judgement (*sic*) to date of final payment.
3. An order directing the Defendants to publicly apologise to the Plaintiff and retract the wrongful and defamatory statements as aforesaid, in the same manner as the defendants have initially published in respect of and concerning the Plaintiff. The retraction and apology must be made at Oshakati Open Market in front of the general public and fellow vendors within 7 days of date of judgment.
4. Cost of suit on an attorney and own client scale.
5. Further and/or alternative relief.'

The parties

[2] The plaintiff is Rosalia Haukongo, an adult female businesswoman who resides at Oneshila, Oshakati.

[3] The first defendant is Paulina Pandela, an adult female vendor who resides at Omhumbu Location, Oshakati

[4] The second defendant is Hilma Shitekulu, an adult female who resides at Omhumbu Location, Oshakati.

[5] The plaintiff is represented by Mr Ndana. It appears from the record that the defendants initially defended the action, first in person but later they instructed a legal practitioner to represent them. He however later filed a notice of withdrawal of his representation. Thereafter their notice to defend was struck due to non-compliance with the orders of this court. Henceforth, the matter proceeded on an unopposed basis.

The background

[6] The plaintiff pleads in her particulars of claim that during 2020, and more recently in June 2021 at Oshakati Open Market the defendants made the following false, wrongful and derogatory remarks concerning her:

'Plaintiff is a loose woman who has been left by her husband because of bringing men to her marital home; that the Plaintiff is dishonest and does not sell complete boxes of chicken to customers, thereby defrauding her customers; and that the Plaintiff is engaged in sexual relations with men for money.'

[7] The plaintiff pleads further that these insults and statements would be hurled at her the moment one or more of her customers visit her stand, thereby interfering with the sale of her products.

[8] The plaintiff pleads further that in addition, the defendants physically assaulted her she thereafter laid a charge of assault with the police under case number CR 138/06/2021.

[9] The plaintiff also pleads that the unlawful assault perpetrated on her by the defendants caused damage to her reputation and dignity which are protected by

Article 8 of the Namibian Constitution. Furthermore, that the defendants' conduct interfered with her right to trade protected by the laws of Namibia.

Plaintiff's case

[10] The plaintiff testified in person. In addition she called one witness.

The plaintiff's evidence

[11] The plaintiff testified that she is a vendor at Oshakati Open Market where she sells traditional food. Her stall was situated next to that of the defendants. That is how she came in contact with the defendants. She testified that during 2020 the defendants publically insulted her and informed people present that the merchandise that the plaintiff sells is received by her from various men in exchange for sexual favours.

[12] She testified further that during 2021 the defendants personally informed her customers that the plaintiff removes chicken pieces from the boxes she sells. This statement was also uttered in public.

[13] It was the plaintiff's further evidence that as a result of these insults hurled at her and the false information spread to her customers, her business has plummeted and that she has been demoralised which has ultimately affected her personal life.

[14] She testified that she did not address the issue with the defendants but instead she approached the police with the intention to lay a charge. She was however informed by the police that the police do not deal with civil complaints and was thus advised to approach a lawyer.

[15] Following the advice, she consulted her current legal practitioner who addressed a letter of demand to the defendants requesting them to cease and desist from their conduct. It was the plaintiff's testimony that the defendants did not heed the demand but continued with their conduct.

[16] As regard the amount of N\$60 000 claimed, the plaintiff testified apart from the harm to her self-esteem and reputation that she also took into account the fact that her business performance has gone down as a result of the defendants' conduct. According to her, prior to the defendants' defamatory statements she would ordinarily earn about N\$120 000 per month. However following the defamatory statements, she currently earns about N\$15 000 per month. It was her evidence that the sales have dropped as a result of the defendants' conduct.

[17] It was further the plaintiff's testimony that when the defendants physically assaulted her they also tore her clothing; and that during the assault she lost the money. The plaintiff further testified that the defendants further insulted her saying that she 'must go get fuck in the vagina or mouth'. That concludes the plaintiff's evidence.

Nelson Mukonda

[18] Mr Mukonda testified in support of the plaintiff's claim. He testified that he and the plaintiff do business together whereby they sell chicken and traditional food; that the defendants also sell the same goods. It was his evidence that during 2020 the defendants used to shout at the plaintiff alleging that she was getting her products in exchange for sexual favours. According to Mr Mukonda during 2021, the defendants shouted in the presence of customers saying that the plaintiff was removing pieces of chicken from the boxes she was selling to the customers. Some of the customers confronted the plaintiff demanding to know whether what was alleged by the defendants was true.

[19] It was his further testimony that he has observed that the number of the plaintiff's customers who visit her stand have gone down since the statements by the defendants. According to him the customers no longer go to the plaintiff's stand.

The law

[20] In order for a plaintiff to succeed with an action for defamation, he or she must establish that the defendant published the impugned defamatory statement

concerning the plaintiff. Once that has been proved, a rebuttable presumption then arises that the publication of the statement was both wrongful and intentional.¹

[21] As regards the effect of defamatory words uttered toward the plaintiff, Masuku J in *Mbura v Katjiri*² aptly and succinctly summed up the effect as follows:

‘For most human beings, words are at the center of their existence. In this regard, the word, whether written or spoken, carries with it tremendous power, influence and effect on other people’s feelings, actions and sometimes even reactions. Positively used, the word, whether spoken or written, can bring joy, laughter and serve to build the recipient’s self-worth and esteem. On the other hand, when used negatively, it can hurt, cause anguish and serve to affect the esteem of the recipient, causing him or her to endure sleepless nights as the deleterious impact of the words digs in and spews out bile in the recipient’s heart.’

Law to the facts

[22] In the present matter there is no doubt in my mind that the statements made by the defendants about and concerning the plaintiff were plainly defamatory of the plaintiff’s character and good name. The statements were made in public thus the requirement of publication has been met.

[23] The derogatory statements were directed at the personal character of the plaintiff. It is clear to me that the statements were made with the intention to hurt and denigrate the plaintiff’s self-esteem and reputation. I am of the further considered view that the statements intended to portray that the plaintiff is a person of low integrity or has no moral fiber in that she grants sexual favours in exchange of merchandises; that she cheats her customers; and therefore she is not a person to be trusted.

[24] In my judgment the statements were gratuitous and crude and were made to humiliate the plaintiff, so much so that the defendants found it necessary to drag in the plaintiff’s parents by insinuating that it was her parents who taught her the matters she was falsely accused of. On the record, there is no evidence that the defendants were provoked by the plaintiff.

¹ *Trustco Group International Ltd and others v Shikongo* 2010 (2) NR 377 (SC) para 24.

² *Mbura v Katjiri* (I 4382-2013) [2017] NAHCMD 103 (31 March 2017) para 1.

[25] In her testimony, the plaintiff attributed the plummet of her business performance to the defamation she suffered at the hands of the defendants. She indicated that prior to the conduct of the defendants she made about N\$120 000 a month whereas after their continued conduct her sales are now in the region of N\$15 000 a month. This is a very drastic decrease in sales by any standard. I would have expected concrete evidence to substantiate and prove how the alleged losses have been calculated and arrived at. The plaintiff failed to produce such evidence.

[26] Be that as it may, in my view failure to produce evidence how the losses have been calculated does not negate the plaintiff's claim for *injuria*. As earlier indicated this court is satisfied that the plaintiff has made out a case that she suffered injury to her dignity, self-esteem and reputation at the hands of the defendants.

[27] I observed the plaintiff when she testified and it was evident from her demeanour that she displayed lack of self-esteem and self-confidence. I am satisfied that the anguish described by the court in the *Mbura* case has been experienced by the plaintiff in the present matter. In this connection the plaintiff testified that her self-esteem has been negatively affected. She expressed a view that her reputation has been tarnished forever.

[28] I am of the considered view that a result of the defendants' conduct the plaintiff's name has been impaired and reputation dented in and around the community in which she carries out her business trade.

[29] What aggravates the defendants' conduct in this instance is the fact that they were not deterred after the plaintiff had opened a criminal case against them, they instead persisted in their conduct. What further demonstrates their callousness and vindictiveness towards the plaintiff is the fact that even after they had received the letter of demand from the plaintiff's legal practitioner to cease and desist from their malicious utterances, they persisted in their conduct.

[30] Taking all the factors into consideration, I am satisfied that the plaintiff has made out a case for the relief sought. Counsel for the plaintiff in his heads of argument urged upon the court to take into account the comparative analysis done

by Masuku J in *Mbura*³ in respect of appropriate quantum. I will do so. It is generally accepted that when coming to the assessment of appropriate damages to be awarded in a defamation action a court is always faced with a daunting task.

[31] In *Nuule v Kambwela*⁴ the court opined that the purpose of an award for damages is not to punish the wrongdoer, but rather to afford the victim personal satisfaction for an impairment of a personality right. That consideration applies in the present matter. I am of the view that an amount of N\$50 000 will assuage the injury she has suffered to her personal right.

Conclusion

[32] For all those reasons, findings and conclusions, I am of the considered view that the plaintiff has made out a case and is entitled to be compensated for the damages she suffered as a result of the 'defamatory statements directed at her by the defendants.

Costs

[33] The ordinary rule is that costs follow the results. However, the plaintiff prays for a punitive costs order, being that of attorney and own client. There is no evidence to justify such an order. As regards the defendants' aggravating conduct mentioned elsewhere in this judgment, this court takes into account that factor in the amount of damages to be awarded. For those reasons, costs is to be awarded on an ordinary scale.

Order

[34] The order that I make is the following:

1. The defendants to the pay plaintiff the sum of N\$50 000 as damages, jointly and severally the one paying the other to be absolved.

³ *Mbura v Katjiri* (I 4382/2013) [2017] NAHCMD 103 (31 March 2017).

⁴ *Nuule v Kambwela* (I 692/2009) [2014] NAHCMD 219 (21 May 2014).

2. Interest on the aforesaid amount of N\$50 000 at the rate of 20 per cent per annum calculated from the date of judgment to the date of final payment.
3. The defendants are directed to publicly apologise to the plaintiff and retract the wrongful and defamatory statements in the same manner as the defendants' had initially published the statement.
4. The retraction and apology must be made at Oshakati Open Market in front of the general public and vendors within seven (7) days from the date of this order.
5. Costs of suit.
6. The matter is removed from the roll and is regarded as finalised.

H Angula
Deputy-Judge President

APPEARANCES:

PLAINTIFF: D NDANA
Of Jacobs Amupolo Lawyers & Conveyancers, Ongwediva

DEFENDANTS: No appearance