

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-2022/00131

In the matter between:

MIRJAM KANANDUNGE AMUSHILA

PLAINTIFF

and

REBEKA CORNELIUS

DEFENDANT

Neutral Citation: *Amushila v Cornelius* (HC-NLD-CIV-ACT-DEL-2022/00131
[2022] NAHCNLD 88 (12 September 2022))

CORAM: MUNSU AJ

Heard: 18 July 2022

Delivered: 12 September 2022

Flynote: Action - Law of Delict - Defamation - Damages.

Summary: The plaintiff sued the defendant for statements made by the defendant which were alleged to be defamatory to the plaintiff. It was alleged that the defendant defamed the plaintiff by making statements concerning her, that she was a thief, fraudster and or a criminal. The plaintiff claimed compensation in the amount of N\$150 000. The defendant did not defend the matter. The plaintiff applied for default judgment.

Held: The plaintiff must establish on a balance of probabilities that the defendant had published a defamatory statement concerning her.

Held that: Defamation will only arise if the defamatory statement or behaviour has been published or disclosed to a third person. This means that the words or conduct must be made known or disclosed to at least one person other than the plaintiff herself.

Held further that: The defendant made statements concerning the plaintiff in the presence of two witnesses. Requirement of publication established.

Held: In assessing whether the statements were defamatory, an objective approach is employed.

Held that: As a businesswoman and founder of a school, the plaintiff held a prominent position in society.

Held further that: The statement that the plaintiff is a fraudster and a thief reduced and negatively affected her status and thereby caused injury to her reputation.

Held: There is no set formula to be followed by the court in determining an appropriate award. Relying on *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), it is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation. The damaged reputation cannot be more or less restored by the amount of the award.

Held that: With reliance on the matter of *Mbura v Katjiri* (I 4382/2013) [2017] NAHCMD 103 (31 March 2017), factors that may affect the assessment of damages for defamation include, the character, status and regard of the plaintiff; the nature and extent of the publication; justification of publication; whether there has been a retraction or apology; whether the defamation was oral or in permanent form. In addition, the court is entitled to take into account comparable awards in other defamation cases and the declining value of money.

Held further that: There was no wider circulation of the defamatory statements in this matter and as a result, publication was limited and once-off. There was also no evidence as to the effect of the statements on the plaintiff's business or school. The court found no aggravating circumstances in the matter.

Held: The amount claimed is way excessive and not justified by the circumstances of the matter.

In the result, the court awarded damages in the amount of N\$15 000.

ORDER

1. The defendant is ordered to pay the plaintiff damages of N\$15 000.
2. Interest at the rate of 20% from the date of judgment to the date of final payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded finalised.

JUDGMENT

MUNSU AJ:

Introduction

'A person's reputation matters. Members of society put high premium on a person's good name and reputation. People therefore go to great lengths to protect their reputations. It is not a trivial matter when one's reputation is harmed.¹

[1] The plaintiff instituted action against the defendant in which she claims payment in the amount of N\$150 000 for damages she allegedly suffered to her reputation as a result of defamatory statements made by the defendant.

¹ *Nangolo v Jacob* (HC-NLD-CIV-ACT-DEL-2020/00103) [2021] NAHCNLD 40 (26 April 2021).

[2] The plaintiff is Ms. Mirjam Amushila, an adult female person and businesswoman who resides at Ongwediva, Oshana Region, Republic of Namibia.

[3] The defendant is Ms. Rebeka Cornelius, an adult female person, residing at Uupindi location, Oshakati, Oshana Region, Republic of Namibia.

[4] The plaintiff is represented by Mr. Aingura.

Background

[5] The plaintiff is the owner of a school called Ebenezer English Private School situated at Eendombe, Ongandjera where the defendant was employed. Prior to the defendant's employment at the said school, she was employed by the plaintiff as a nanny.

[6] The plaintiff alleges in her particulars of claim that on 22 April 2022 and at or near Ebenezer English Private School, the defendant stated to Sargent Ananias and Constable Nakakuwa concerning the plaintiff that:

6.1 The plaintiff applied for a savings insurance policy with Sanlam in the defendant's name without the defendant's knowledge and/or consent.

6.2 The plaintiff forged the defendant's signature in applying for the aforesaid savings policy.

6.3 The plaintiff stole the defendant's identity document in applying for the aforesaid policy.

[7] The plaintiff alleges that the said statements made by the defendant are wrongful, defamatory and were made with the intention to defame her and to injure her reputation. She further alleges that the statements were understood by the addressee and were intended by the defendant to mean that the plaintiff is dishonest in the following respects:

7.1 That she is a fraudster, forger, thief and/or a criminal.

7.2 That she is not a law-abiding citizen.

7.3 That she is without moral fibre.

[8] The defendant was personally served with the combined summons; however, she did not defend the matter.

The evidence

[9] In support of her claim, the plaintiff testified in person and called two witnesses.

[10] The plaintiff testified that prior to the date of the incident; she had pressed criminal charges against the defendant with the Okahao Police Station. On 22 April 2022, two police officers, namely Constable Nakakuwa and Sargent Ananias, who are the witnesses referred to hereinabove arrived at Ebenezer English Private School to arrest the defendant in connection with the criminal matter. In the process of arresting her, the defendant hurled the defamatory statements referred to in paragraph 6.1 to 6.3 above in the presence of the two witnesses and that the pupils of the school were at the time by the classroom windows observing what was happening at the time.

[11] Furthermore, the plaintiff testified that the statements were made with the intention of defaming and/or to injure her reputation. She felt bad and hurt by the statements as according to her those that heard the statements would think of her as a thief and a criminal, more so because the defendant was her previous domestic worker and later employed at her school.

[12] It was the plaintiff's testimony that she is the founder of the school, and that if the parents heard of the defendant's statements, her reputation and that of the school would be placed in question. The plaintiff further testified that the statements were false and maintained throughout her testimony that at no point did she steal the defendant's identity document nor did she forge the defendant's signature for purposes of taking out any policy. She therefore wants to clear her name.

[13] As a result of the defendant's defamatory statements, the plaintiff testified that she is depressed and has no peace of mind. She testified that the amount of N\$150 000 is appropriate to compensate the damage caused to her reputation.

[14] The two police officers corroborated the plaintiff's testimony regarding the statements made by the defendant and that same were uttered in their presence. They both confirmed that they understood the statements to mean that the plaintiff is a thief, fraudster, not a law-abiding citizen or that she is a criminal.

The law

[15] The Supreme Court in *Trustco Group International Ltd and Others v Shikongo*², succinctly set out the law of defamation in para [24] as follows:

'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*)...'

[16] At common law, the elements of the delict of defamation are:

- (a) the wrongful
- (b) intentional
- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff.³

[17] The plaintiff must establish on a balance of probabilities that the defendant had published a defamatory statement concerning the plaintiff. Defamation will only arise if the defamatory statement or behaviour has been published or disclosed to a third person. In general this requirement is satisfied if the words or conduct are made known or disclosed to at least one person other than the plaintiff herself.⁴

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

³ *Nangolo v Jacob* (supra); see also *Teek v Walters* (HC-MD-CIV-ACT-DEL-2016/02863) [2018] NAHCMD 376 (23 November 2018) para 44; *Hengari v Namibia Wildlife Resorts and Others* (HC-MD-CIV-ACT-DEL-2020/01069) [2022] NAHCMD 381 (29 July 2022).

⁴ See Neethling J *et al* 2003 *Law of Delict*, 4th Ed. P338.

Determination

[18] Two witnesses testified that the statements were made in their presence. The statements concern the plaintiff. Thus, the requirement of publication has been established. The evidence proves that the defendant was responsible for the publication. A rebuttable presumption arises that the publication was wrongful and made with the intention to injure the plaintiff. As mentioned earlier, there is no other version before court than that of the plaintiff.

[19] In assessing whether the statements were defamatory, one looks at whether, in the opinion of a reasonable person with normal intelligence and development, the reputation of the person concerned has been injured, thus an objective approach. Any words or conduct that have the effect of reducing or negatively affect a person's status in minds of right-thinking members of society, are regarded as defamatory.⁵

[20] The plaintiff is a businesswoman and founder of the school at which the defamatory statements were made. Accordingly, the plaintiff holds a prominent position in society. There is a moral or legal obligation on her to ensure the safety or well-being of the pupils at her school. This duty has a corresponding element of trust from the public. It is my considered view that the statements that the plaintiff is a fraudster and a thief reduced and negatively affected her status, as was narrated by the witnesses, thereby causing injury to her reputation. I find that the defendant's statements had the effect of tarnishing the plaintiff's good name and reputation in society.

Quantum

[21] There is no set formula that the court is compelled to follow in determining an appropriate award. The true and lasting solace for the person wrongly injured is the vindication by the court of his or her reputation in the community.⁶ The damaged reputation cannot be more restored by a higher award and less restored by a lower

⁵ *Nyambe v Mushabati* (HC-MD-CIV-ACT-DEL-2021/04399) [2022] NAHCMD 389 (4 August 2022).

⁶ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). See *Geingos v Hishoono* (HC-MD-CIV-ACT-OTH-2021/00538 [2021] NAHCMD 48 (11 February 2022).

one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank.⁷

[22] In *Mbura v Katjiri*⁸ the court remarked on the arduous task associated with the assessment of an appropriate quantum. Citing from the work of the learned author Jonathan Burchell⁹ the following appears in para 69 of the judgment:

‘A number of general factors may affect the assessment of damages for defamation; the character, status and regard of the plaintiff; the nature and extent of the publication; the nature of the imputation; the probable consequences of the defamation; partial justification (e.g. publication of truth which is not for the public benefit); . . .; whether there has been a retraction or apology; and whether the defamation was oral or in permanent form. In addition to these and other relevant factors, the court is entitled to take into account of comparable awards in other defamation cases and the declining value of money.’

[23] The statements were made in the presence of two witnesses. As a consequence, the plaintiff testified that she felt bad and hurt; that she is depressed and has no peace of mind as the statements portrayed her as a person of bad character and a criminal. The defendant did not tender any apology.

[24] However, I find that there was no wider circulation of the defamatory statements in this matter. Therefore the publication was limited and once-off. There was no evidence as to the effect of the statements on the plaintiff’s business or school. Accordingly, I find no aggravating circumstances in this matter.

[25] In *Nangolo v Jacob*¹⁰ the plaintiff who was a businessman was accused of poisoning people and distributing poisons to third parties to kill members of his own community. The court took into account that the plaintiff’s family no longer wished to be associated with him and had distanced themselves from him. The court further took into account that, as a result of the statements, the plaintiff became an unwanted person in his community. However, the court found that there was no

⁷ Ibid

⁸ *Mbura v Katjiri* (I 4382/2013) [2017] NAHCMD 103 (31 March 2017).

⁹ Burchell J 1993 *Principles of Delict* Juta & Co. Ltd p. 188-189.

¹⁰ *Op cit.*

evidence that the statements had travelled far and wide, although there seemed to have been some exposure which resulted in the plaintiff's business slowing down. In the result the court awarded damages of N\$15 000.

[26] In the instant matter, the plaintiff claims N\$150 000 in damages. Considering my findings above, I am of the view that the amount is rather excessive and not justified by the circumstances. I am of the considered view that an amount of N\$15 000 is condign.

Costs

[27] The general rule applicable to costs is well-established. It is that the successful party is awarded his or her costs. There is no reason why the defendant should not be ordered to pay the costs in this matter.

Order

[28] In the result, it is ordered as follows:

1. The defendant is ordered to pay the plaintiff damages of N\$15 000.
2. Interest at the rate of 20% from the date of judgment to the date of final payment.
3. Costs of suit.
4. The matter is removed from the roll and regarded finalised.

D. C. MUNSU
ACTING JUDGE

APPEARANCES:

PLAINTIFF

S. AINGURA
Of Aingura Attorneys, Oshakati

DEFENDANT

No appearance.