

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-ACT-DEL-2022/00046

In the matter between:

HELEN EKANDJO

PLAINTIFF

and

DAVID DAVID

DEFENDANT

Neutral Citation: *Ekandjo v David* (HC-NLD-CIV-ACT-DEL-2022/00046)
[2023] NAHCNLD 05 (06 February 2023).

CORAM: **MUNSU AJ**

Heard: **21 September 2022**

Delivered: **06 February 2023**

Flynote: Dafamation – Claim for damages – Defamatory statement issued during court appearance accusing the plaintiff of dishonest and corruption. Such statement defamatory – No circulation of defamatory statement – Award for damages reduced.

Summary: The plaintiff sued the defendant for an alleged defamatory statement made during a court appearance of the defendant before the plaintiff. The defendant accused the plaintiff of being dishonest and corrupt.

Held, that the allegations attributed to the plaintiff are defamatory. Such accusations convey the innuendo that the plaintiff lacks integrity and conducts herself in a manner contrary to the judicial oath.

Held that, the defendant's statement is not only defamatory to the plaintiff but also has the effect of eroding the public's confidence in the administration of justice.

Held that, no evidence was presented to support the allegations made by the defendant and that the plaintiff made out a case of defamation against the defendant.

Held that, there was no circulation of the defamatory statement in this matter as the publication was once-off and therefore limited.

ORDER

1. The Defendant is ordered to pay an amount of N\$ 20 000 to the Plaintiff as damages.
 2. The Defendant is to pay interest on the aforesaid amount at the rate of 20% from the date of judgment to the date of final payment.
 3. The Defendant is ordered to pay the costs of the action.
 4. The Defendant is ordered to issue an apology in writing to the Plaintiff within ten (10) days of this order.
 5. In the event the Defendant fails and/or refuses to issue an unconditional apology to the Plaintiff, the amount of damages and the amount on which interest is payable as per paragraph 1 and 2 above shall increase to N\$ 30 000.
 6. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MUNSU AJ:

Introduction

[1] This is an action for defamation where the plaintiff, a magistrate sues the defendant, an accused person in a criminal matter, for a defamatory statement presented during the defendant's court appearance before the plaintiff. The plaintiff claims payment in the sum of N\$ 70 000 for damages she allegedly suffered to her reputation as a result of the defamatory statement made by the defendant.

[2] The defendant failed to enter an appearance to defend. On 19 May 2022, the matter appeared before this court in order for the plaintiff to lead evidence in respect of the application for default judgment.

[3] On the said date, the defendant who at the time was held in police custody on criminal charges, was brought to court by the court orderlies. The defendant was unaware of the reason he was brought to court. It turned out that the court orderlies noticed the defendant's name on the court roll and found it necessary to bring him to court as is always done in criminal matters.

[4] The defendant informed the court that he had been served with documents pertaining to the matter but that he was unsure of what the matter was all about. Following the court's explanation of the exact nature of the case, the defendant indicated that he would defend the plaintiff's claim and that he would apply for legal aid.

[5] The matter was duly removed from the roll to enable the defendant to file his notice to defend and the application for legal aid.

[6] The defendant failed to enter an appearance to defend and file his application for legal aid. The plaintiff once again enrolled the matter to enable her to lead evidence. On 21 September 2022, the plaintiff led her evidence.

The parties

[7] The plaintiff is Ms Helen Ekandjo, a major female. She resides in Oshakati and is employed as a magistrate, stationed at the Oshakati Magistrates' Court.

[8] The defendant is Mr David David, a major male and resident of Uupindi Location, Oshakati and "incarcerated at Oshakati Police Holding Cells, Oshakati, Namibia".

[9] The plaintiff was represented by Mr Jan Greyling (Jnr).

Pleadings

[10] In the particulars of claim, the plaintiff alleges that on 19 October 2021 and at or near B-Court at Oshakati Magistrates' Court, the defendant in writing, in the form of a recusal application, submitted to the plaintiff who was presiding, a document concerning the plaintiff and also stated verbally that:

10.1The plaintiff is not working with the truth.

10.2The plaintiff is full of corruption and playing tricks in his case.

10.3The plaintiff was paid by the family of the complainant, in the defendant's criminal case, to ensure that the complainant was not arrested.

10.4The plaintiff is corrupt.

10.5The plaintiff is a friend to the mother of the complainant.

[11] It is alleged that the above statement was made in the presence of the following people:

11.1 Samingu Kasaona (the public prosecutor).

11.2 Gerson Shihepo (the interpreter).

11.3 Teophelus Nambandja (court orderly).

11.4 Selma Haimbodi (court orderly).

11.5 Lahia Pieter (court orderly).

[12] It is further alleged that the statement is wrongful and was made with the intention to defame and injure the plaintiff's reputation.

[13] Furthermore, the plaintiff alleges that the statement was understood by her and those present to mean that the plaintiff is dishonest in one of the following ways:

13.1 That the plaintiff has loose morals or is without any moral fiber.

13.2 The plaintiff does not uphold the Namibian Constitution.

13.3 The plaintiff engages in criminal conduct.

13.4 The plaintiff would willfully prejudice the rights of an accused person for payment.

[14] As a result of the defamatory statement, the plaintiff alleges that her reputation has been damaged and claims an amount of N\$ 70 000. In addition, the plaintiff seeks an order directing the defendant to issue a public apology in one edition of a national newspaper, absolving her of the allegations.

[15] The defendant has full knowledge of the present proceedings and decided not to oppose and to either deny or justify the allegations.

The evidence

[16] In support of her claim, the plaintiff testified in person. She confirmed the allegations in the particulars of claim.

[17] The plaintiff testified that she is employed as a magistrate, stationed at Oshakati Magistrates' Court. She has been a magistrate for more than 20 years, most of which she has been based at the Oshakati Magistrates' Court. She got to know the defendant when he appeared before her.

[18] The plaintiff testified that prior to the day of the incident, the defendant had previously appeared before her for a bail application. She testified that she dismissed the defendant's application for bail as she found that there was a likelihood of interference with investigations.

[19] The witness testified that on 19 October 2021 she was presiding over criminal matters in B-Court. The defendant's case was called and before the public prosecutor could address the court, the defendant raised his hand. The plaintiff informed him to wait for the public prosecutor to address the court. Once the prosecutor was done, the plaintiff afforded the defendant an opportunity to address the court. The defendant stated that he wanted the plaintiff to recuse herself from the case because he heard that she is a friend to the complainant.

[20] The plaintiff testified that there were two complainants in the case and she did not know which one the defendant was referring to. She testified that the defendant then handed to the public prosecutor a document addressed to the plaintiff. After the public prosecutor had perused the document, he addressed the court regarding the document and handed same to the plaintiff in order to form part of the record. The statement was marked as exhibit A.

[21] According to the plaintiff, the statement was handwritten, wherein the defendant made allegations that he did not want the plaintiff to hear her case because she is dishonest and full of corruption; that she is a friend to the complainant and that she had been paid by the complainant's family. The witness testified that the statement was made in the presence of five other court officials.

[22] In addition, the plaintiff testified that the statement was defamatory as the allegations were not true. She testified that she did not know the complainants in the matter.

[23] Furthermore, the plaintiff testified that the statement conveys the insinuation that the plaintiff is dishonest; that she has loose morals; that she engages in criminal conduct and does not uphold the law.

[24] According to the plaintiff's testimony, the statement did not warrant the defendant's committal for contempt of court, because doing so, would only have restored the dignity of the court and the administration of justice but not her personal dignity.

[25] The plaintiff testified that an award of N\$ 70 000 as damages and a public apology to be issued in one edition of one of the national newspapers would restore her reputation and the public's confidence in the administration of justice.

The law

[26] 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.¹

[27] In *Nangolo v Jacobs*² this court held as follows:

'At common law, the elements of the delict of defamation are therefore:

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

¹ *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

² *Nangolo v Jacobs* (HC-NLD-CIV-ACT-DEL-2020/00103) [2021] NAHCNLD 40 (26 April 2021).

[28] Once the elements of publication and defamatory statement are established, a rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*).³ In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion.⁴

Analysis of the evidence and law

[29] It is clear from the above authorities that the plaintiff must establish on a balance of probabilities that the defendant had published a defamatory statement concerning the plaintiff. To this end, the plaintiff testified that the defamatory statement was made during court proceedings and in the presence of other court officials. The statement concerns the plaintiff. Thus, the plaintiff has established the requirement of publication.

[30] Once publication of a defamatory statement concerning the plaintiff has been proven, the two presumptions arise: that the publication was unlawful and the defendant acted with *animus injuriandi*.⁵ The onus is now on the defendant to show that the publication was justified or reasonable. Since the defendant did not oppose this action, the presumptions remain intact.

[31] The allegations attributed to the plaintiff are defamatory. She is accused of being dishonest, corrupt and getting paid by litigants. The statement conveys the innuendo that the plaintiff lacks integrity and conducts herself in a manner contrary to the oath of judicial officers. The alleged conduct is not only inconsistent with the office held by the plaintiff but also implies criminal conduct on her part. This indeed tend to lower her in the estimation of people.

³ *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC); *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC). *Platt v Apols* (HC-MD-CIV-ACT-DEL-2019/01211) [2021] NAHCMD 143 (26 March 2021).

⁴ *Nahole v Shiindi* (I 220/2014) [2014] NAHCNLD 53 (03 October 2014).

⁵ See *Nahole v Shiindi* supra footnote 4.

[32] No iota of evidence was presented to support the allegations. I am therefore satisfied that the plaintiff has made out a case of defamation against the defendant and that there was no lawful defence available to the defendant in respect of the allegations against the plaintiff.

Quantum

[33] In the *Nahole* matter,⁶ this court observed that:

[11]...Courts are astute not to depart too much from previous awards in similar circumstances. The Supreme Court had already warned in *Trustco Group International Ltd and Others v Shikongo*⁷ that the courts are careful in granting monetary awards in defamation cases because of the difficulty involved in placing a monetary value on damage that has been caused to a person's reputation. In that case, O'Regan AJA noted that damage caused to one's reputation is not necessarily fully restored by a higher award of damages or less restored by a lower one. It is, the learned judge said, the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation. The court further observed (at 403) that even though monetary awards do not cure one's reputation 'they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation'.

[34] In *Mbura v Katjiri*⁸ this court opined as follows:

'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'.

[35] Thus, the nature of the words used; the circumstances in which the infringement took place; the behaviour of the defendant; the plaintiff's

⁶ Ibid.

⁷ *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) 402-404.

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

standing in society; the extent and consequences of the publication; the extent of the plaintiff's humiliation or distress and whether or not there has been an apology made by the defendant etc are relevant factors.⁹

[36] In determining the quantum, Mr Greyling urged the court to take into account the following factors:

36.1 That the plaintiff is a sitting Magistrate with over 20 years' experience with most of it being served at the Oshakati Magistrates' Court.

36.2 That the statement was in writing.

36.3 That the statement was also uttered and/or handed in to Plaintiff in the presence of other officers of the court whilst the court was in session.

36.4 The statement was attached to the record, which is a public document open to any member of the public.

36.5 When the defendant appeared before this court, he failed and/or refused to offer any apology and has to date not tendered any apology for the statement.

36.6 It is clear that the plaintiff, as a magistrate, is of high standing in society, more specifically taking into consideration the period of time she has been employed as a magistrate.

36.7 The statement has been attached to a public document and can therefore be circulated widely to any member of the public.

36.8 The statement is permanent as same was done in writing.

36.9 No justification was made for the defamatory statement, nor did the defendant provide any iota of evidence to prove the allegations as made in the statement.

36.10 The defendant, despite having ample opportunity to apologise, has remained steadfast in his refusal to remedy the defamation of the plaintiff.

36.11 The defendant's defamatory attack on the plaintiff, was an attack on a sitting magistrate in open court, hence this court must clearly mark its displeasure at the defendant's conduct by making it clear to

⁹ *Kashulu v Nakale* (I 132/2015) [2018] NAHCNLD 44 (14 May 2018); *Platt v Apols* supra footnote 3.

the defendant and members of the public that an attack on a judicial officer will not be tolerated without clear proof of such allegations.

[37] When determining damages awards in defamation cases, the courts usually take into consideration previous awards.

[38] In *Nuule v Kambwela*,¹⁰ statements relating to the plaintiff's infidelity had repeatedly been made to various persons on various occasions for about two years. In that case the court awarded N\$40 000.

[39] In the *Apols* matter¹¹ a medical doctor was defamed in a statement posted on Facebook. It was alleged that the plaintiff insults his clients; that he orders the security guard to push out his clients out of his practice; insulting an old woman; that he is arrogant and disrespectful towards his patients. The publication of the defendant's Facebook post was widespread on social media. The Facebook post continued to circulate with additional comments and innuendo. The plaintiff testified that after the Facebook post was published, he noticed a drop in the number of patients who visited his practice. The court awarded damages of N\$ 20 000 and ordered the defendant to publish an apology.

[40] In the *Shiindi* matter¹² defamatory statements accusing the plaintiff of being a witch were published in the media, namely "Namibian Sun", "New Era", and "The Namibian". The court awarded damages of N\$ 30 000.

[41] In *Nangolo v Jacob*¹³ 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

¹⁰ *Nuule v Kambwela* (Case 629/2009) [2014] NAHCMD 219 (21 July 2014).

¹¹ *Platt v Apols* supra footnote 3.

¹² *Nahole v Shiindi* supra footnote 4.

¹³ *Nangolo v Jacob* supra footnote 10.

plaintiff became an unwanted person in his community. However, the court found that there was no 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 end the court awarded damages of N\$15 000.

[42] The plaintiff in my case is a magistrate. It was submitted that the defendant had an opportunity to apologise but chose not to. He remained steadfast in his allegations even when he appeared before this court. The defendant's statement is not only defamatory to the plaintiff but also has the effect of eroding the public's confidence in the administration of justice.

[43] However, despite the statement having being attached to the court record and thereby becoming a public document, there was no circulation of the defamatory statement in this matter. The publication was once-off and therefore limited.

[44] There was no publication of the defamatory statement in any of the newspapers, and for that reason, I do not find it necessary to order the defendant to publish an apology in a newspaper. I am satisfied that the damages claimed are not justified by the circumstances of the case, especially considering previous awards.

Costs

[45] In light of the serious nature of the defamation committed by the defendant, the plaintiff seeks a costs order on an attorney own client scale. The plaintiff submitted the award of costs on a higher scale in favour of the plaintiff is justified by the defendant's conduct of attending to court, indicating his intention to oppose and thereafter not opposing the claim. I am of the view that costs on the normal scale will meet the interests of justice.

The order

[46] In the result, the following order is made:

1. The Defendant is ordered to pay an amount of N\$ 20 000 to the Plaintiff as damages.
2. The Defendant is to pay interest on the aforesaid amount at the rate of 20% from the date of judgment to the date of final payment.
3. The Defendant is ordered to pay the costs of the action.
4. The Defendant is ordered to issue an apology in writing to the Plaintiff within ten (10) days of this order.
5. In the event the Defendant fails and/or refuses to issue an unconditional apology to the Plaintiff, the amount of damages and the amount on which interest is payable as per paragraph 1 and 2 above shall increase to N\$ 30 000.
6. The matter is removed from the roll and is regarded as finalised.

D.C MUNSU
ACTING JUDGE

APPEARANCES:

PLAINTIFF

Jan Greyling (Jnr).

Of Greyling & Associates, Oshakati.

DEFENDANT

No appearance.