

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-CIV-ACT-DEL-2022/04726

In the matter between:

**HERMANUS SCHOLTZ**

**PLAINTIFF**

and

**GERALDO CLINT SMITH**

**DEFENDANT**

**Neutral citation:** *Scholtz v Smith* (HC-MD-CIV-ACT-DEL-2022/04726) [2024]  
NAHCMD 147 (3 April 2024)

**Coram:** DE JAGER AJ

**Heard:** 29 January 2024 and 1 February 2024

**Delivered:** 3 April 2024

**Flynote:** Delict – *Iniuria* may cause patrimonial and non-patrimonial loss – *Actio legis Aquiliae* to recover patrimonial loss suffered through another's wrongful and negligent act – *Actio iniuriarum* to obtain satisfaction for non-patrimonial loss for intentional violation of personality right – Delictual liability elements – Wrongful conduct (or omission) for which person is at fault (intentionally or negligently) and that causes another harm – Defamation

elements – An act (publication), injury to personality (defamatory nature), wrongfulness (impairment of the personality right to a good name) and intent (*animus iniuriandi*).

Defamation – Publication to one person could suffice for liability – Extent of publication would influence quantum.

Defamation – Defamatory nature of statements – Court decides effect and meaning – Defamatory *per se* – Objectively consider contextual natural and ordinary meaning conveyed to ordinary reasonable reader and how such reader would understand it.

Defamation – Proof of publication of defamatory statements of a person to another results in presumptions of unlawfulness and *animus iniuriandi* (intent to defame and knowledge of wrongfulness) against defendant – Onus on defendant to disprove it – Bare denial of unlawfulness insufficient.

Defamation – Defence of truth and public interest – Defendant must allege and prove statements were true and publication was to public's benefit – Proof of truth of every word unnecessary – Proof of truth in every material part sufficient.

Defamation – Defence of fair comment – Defendant must allege and prove statements were comments (opinion) and not statements of fact and reasonable reader would understand them as such, comments were fair (that they do not exceed certain limits), facts commented on were true or substantially true (fair comments made on true facts), and comments relate to matter of public interest (the facts must be in the public's interest).

Defamation – Defence of privilege – Available if statements published in discharge of duty or exercise of right to person who had duty or right to receive it – Defendant must allege and prove statements were made on privileged occasion and were relevant, pertinent, or germane to the occasion's purpose – With reasonable person standard in mind, court objectively considers all circumstances under which statements were made.

Delict – Causation – Factual and legal.

Delict – Patrimonial loss – Principles of proof of damages apply – Damages flow directly from defendant's conduct.

Delict – Non-patrimonial loss quantification – Particulars not required – Court has wide discretion – Exercised judicially – Guided by comparable awards in previous cases – Estimated according to what is equitable and good on merits of case having regard to all its circumstances and wide variety of factors.

**Summary:** The plaintiff and the defendant were employed by AB-InBev, which dismissed the defendant, and from which the plaintiff resigned after he accepted an employment offer from Coca-Cola. Coca-Cola revoked the plaintiff's employment offer after the defendant made defamatory statements about the plaintiff to Coca-Cola. Thereafter the plaintiff was unemployed for two months. The plaintiff's newfound employment at Ohorongo Cement was for less remuneration than what he would have earned at Coca-Cola. The defendant furthermore sent Ohorongo Cement two defamatory emails about the plaintiff. The defendant admits the statements to Coca-Cola and Ohorongo Cement but denies they amount to publication and are defamatory. He also denies an intention to defame the plaintiff. The defendant alleges the contents of the statements were confidential, private and privileged, substantially true and in the public interest, fair and reasonable comment, and to the best of his knowledge, factually correct. The plaintiff's claim A is for N\$360 903 for loss of income caused by the defendant's conduct which led to Coca-Cola revoking the employment offer. His claims B and C are for N\$200 000 for defamation caused by the defendant's emails to Ohorongo Cement.

*Held that an iniuria*, which is the intentional, wrongful infringement of a person's personality right, may cause a person patrimonial and non-patrimonial loss. For recovery of patrimonial loss suffered through another's wrongful and negligent act, the *actio legis Aquiliae* must be used, and for non-patrimonial loss for the intentional violation of a personality right, the *actio iniuriarum* must be used.

*Held that* the elements for delictual liability are conduct (or omission) that is wrongful for which a person is at fault (intentionally or negligently) and that

causes another harm. The elements of defamation are an act (publication), injury to personality (defamatory nature), wrongfulness (impairment of the personality right to a good name) and intent (*animus iniuriandi*).

*Held that* it is undisputed the emails are about the plaintiff, the defendant sent the emails to Ohorongo Cement, and the defendant communicated with Coca-Cola and sent it an email with more or less the same contents as the emails which he sent to Ohorongo Cement.

*Held that* the effect and meaning of the statements are defamatory *per se*, alternatively, when the statements in the context of the respective emails as a whole are considered objectively as to what their natural and ordinary meaning would convey to the ordinary reasonable reader and how such a reader would understand them in that context, they would be understood to mean, and they would impute of the plaintiff, that the plaintiff is dishonest, he is without integrity, he is under investigation for fraudulent activities, he abuses his position of authority by victimising others, he is corrupt, he is without morals, he would expose his employer to labour unrest, he is mentally unstable, and he is a thief.

*Held that* publication to one person could suffice as publication for the purpose of a defamation suit, while the extent of the publication would influence the quantum of the damages.

*Held that* whereas the plaintiff proved the publication of defamatory statements about him to other persons, the presumptions of unlawfulness and *animus iniuriandi* (intent to defame and knowledge of wrongfulness) arises against the defendant, and the defendant bore the onus of disproving it, while a bare denial of unlawfulness is insufficient. The defendant's say-so that he did not intend to defame the plaintiff is insufficient to dispel that onus. Based on the undisputed evidence of the plaintiff and the evidence of the defendant, the court finds the defendant intended to defame the plaintiff.

*Held that* for the defence of truth and public interest, the defendant must allege and prove the statements were true and their publication was to the public's

benefit, while it is not necessary to prove the truth of every word used, and it is enough to be substantially true in every material part.

*Held that* for the defence of fair comment, the defendant must allege and prove the statements were comments (opinion) and not statements of fact and that they would have been understood as such by a reasonable reader, the comments were fair (that they do not exceed certain limits), the facts commented on were true or substantially true (fair comments made on true facts), and the comments relate to a matter of public interest (the facts must be in the public's interest).

*Held that* the defendant misconstrues and conflates the defence of truth and public interest and that of fair comment and both those defences fail. The only fact proved by the defendant is that he lodged a labour complaint with the Labour Commissioner against AB-InBev wherein the plaintiff's name was mentioned and implicated. The truth or substantial truth of the remainder of the statements was not proved. The statements were not comments (opinion) on the proved fact, and if considered in light of the proved fact, they were not fair comments thereon.

*Held that* the defence of privilege would be available if the statements were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statements, and the defendant had to allege and prove the statements were made on a privileged occasion and were relevant, pertinent, or germane to the purpose of the occasion. With the standard of the reasonable person in mind, the court objectively considers all the circumstances under which the statements were made, including their contents, the occasion at which they were made, and the parties' relationship. The court finds the statements were made to badmouth the plaintiff, not to convey information, the defendant had no relationship with Coca-Cola and there was no duty on the defendant towards Coca-Cola to inform it of the plaintiff's character, the statements were not made at an occasion, the occasions were self-created by the defendant, the statements were not relevant to something under discussion at an occasion and the defendant's conduct exceeded the boundaries of reasonableness. The defence of privilege fails.

*Held that* the defendant's conduct cannot be thought away without Coca-Cola's revocation of the employment offer disappearing simultaneously, the defendant's conduct caused Coca-Cola to revoke the employment offer, and the plaintiff's harm is a direct result of the defendant's conduct for which the defendant should be liable together with the intentional defamation of the plaintiff to Ohorongo Cement.

*Held that* particulars about the quantification of the plaintiff's non-patrimonial loss are not required, while the principles of proof of damages apply to the plaintiff's patrimonial loss.

*Held that* the amounts of N\$151 329 and N\$209 574 are damages flowing directly from the defendant's conduct and the defendant is liable to the plaintiff for both those amounts.

*Held that* for the quantum of the plaintiff's non-patrimonial loss, the court has a wide discretion to be exercised judicially guided by comparable awards in previous cases, and it is estimated according to what is equitable and good on the merits of the case having regard to all its circumstances and a wide variety of factors. The court finds that the appropriate cumulative award for claims B and C is N\$15 000.

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### **ORDER**

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1. The court grants judgment for the plaintiff against the defendant for payment of:

(a) N\$360 903.

(b) N\$15 000.

(c) Interest on the amounts of N\$360 903 and N\$15 000 at the rate of 20% per annum from the date of judgment to the date of final payment.

- (d) The plaintiff's costs of suit.
2. The matter is finalised and removed from the roll.

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## JUDGMENT

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DE JAGER AJ:

### Introduction

[1] The plaintiff and the defendant are two natural persons who were employed by the same company (AB-InBev), which dismissed the defendant, and from which the plaintiff resigned to pursue a higher position with another employer (Coca-Cola). The parties are before the court for a delictual suit with three constituent claims. The first claim is for loss of income following the defendant's conduct of making defamatory statements about the plaintiff to Coca-Cola, which resulted in the summary termination of the plaintiff's employment with Coca-Cola, whereafter the plaintiff was unemployed for two months and the package with his newfound employer (Ohorongo Cement) was less than with Coca-Cola. The second and third claims are for defamation following defamatory statements made by the defendant about the plaintiff to his newfound employer (Ohorongo Cement).

[2] For claim A, the plaintiff seeks damages for patrimonial losses of N\$360 903. The plaintiff alleges the communications to Coca-Cola are defamatory, unfounded and/or untruthful of and concerning the plaintiff to the effect that AB-InBev is investigating him for fraudulent activities and that he is implicated in pending labour matters before the Labour Commissioner.

[3] For claims B and C, the plaintiff seeks damages for non-patrimonial losses of N\$200 000. The plaintiff alleges the defendant sent two defamatory emails about the plaintiff to Ohorongo Cement which are wrongful and

defamatory of the plaintiff. Alternatively, they are false and defamatory of the plaintiff as the readers understood them to mean and they impute to the plaintiff that he is dishonest, he is without integrity, he is under investigation for fraudulent activities, he abuses his position of authority by victimising others, he is corrupt, he is without morals, he would expose his employer to labour unrest, he is mentally unstable, and he is a thief. The plaintiff also alleges the statements are without factual basis and made with the intention to defame him and injure his reputation.

[4] The defendant admits he made the statements to Coca-Cola and Ohorongu Cement, but denies they amount to publication and are defamatory. He also denies an intention to defame the plaintiff. He alleges the contents of the statements were confidential, private and privileged, substantially true and in the public interest, fair and reasonable comment, and to the best of his knowledge, factually correct.

#### The evidence

[5] The evidence presented, together with the undisputed facts, are as follows.

[6] The defendant has known the plaintiff since 2005, and they were co-workers at AB-InBev Namibia (Pty) Ltd (AB-InBev). The defendant worked at AB-InBev from 1 May 2014 until 2021, when he was dismissed, while the plaintiff worked there from 2 May 2014 until 2021, when he resigned. For some period, the plaintiff was the defendant's superior. In 2017, the defendant moved to the packaging department of AB-InBev and was no longer under the plaintiff's direct supervision.

[7] According to the defendant, the plaintiff victimised him on various occasions, was arrogant towards him and made sexual insults at him. The defendant says, because of the continuous victimisation, he consulted a clinical psychologist. He refers to a referral document dated 10 March 2021 and a report dated 4 January 2021. He says he had to go for a psychiatric evaluation.



[8] The defendant testified the plaintiff charged him with offences for which he received warnings, and which caused his dismissal. While under the plaintiff's supervision, the defendant was disciplined for insubordination, for which he was issued a six-month written warning. Under cross-examination, the defendant says he went through two disciplinary hearings and that he was dismissed after the second one in June 2021. The defendant believes he was unfairly dismissed. He lodged a labour complaint with the Labour Commissioner against AB-InBev as it is vicariously liable for the plaintiff's actions, so he says. The defendant refers to a letter from the Labour Commissioner dated 30 November 2021 and a form LC47 dated 19 October 2021. He says the labour cases are still underway.

[9] In June 2021, the plaintiff applied for a position at Coca-Cola Namibia Bottling Company (Pty) Ltd (Coca-Cola), for which he was interviewed in July 2021 and underwent a psychometric test. On 2 August 2021, Coca-Cola offered the plaintiff an employment contract with an annual income of N\$959 574 (N\$75 664,50 per month), which the plaintiff accepted on 10 August 2021. The written employment offer, annexed to the particulars of claim, forms part of exhibit A. The plaintiff resigned from AB-InBev to take up employment with Coca-Cola. The plaintiff completed the paperwork on 1 September 2021. He had to commence his new job on 20 September 2021.

[10] On 6 September 2021, the plaintiff received a letter from Coca-Cola's legal practitioner that he was dishonest during the recruitment process because he failed to disclose he had pending labour matters at the Labour Commissioner's office, calling for an answer from the plaintiff. The plaintiff approached AB-InBev, who wrote to Coca-Cola's legal practitioner to clarify the pending matters. The plaintiff completed his notice period with AB-InBev, and when he reported for duty at Coca-Cola on 20 September 2021, he was informed to go back the next day due to pending issues with his 'employment which the employer' had to sort out. The plaintiff says he went through an induction, and he was already an employee of Coca-Cola. When the plaintiff reported the next day, he was informed that his services were no longer required as the employment offer was revoked.

[11] The plaintiff says the revocation of his employment with Coca-Cola was enabled, facilitated and necessitated by wrongful and unlawful conduct by the defendant, who communicated defamatory, injurious statements and falsehoods about him to Coca-Cola, and the defendant's conduct resulted in him being summarily dismissed.

[12] Under cross-examination, the plaintiff says, his conclusion that the defendant was the cause of the employment offer being revoked, is based on the letter which he received from Coca-Cola's legal practitioner and a discussion he had with 'him' (the legal practitioner) wherein he was informed that emails were received which pointed out that the plaintiff was untruthful and the plaintiff was told that the reason why the employment offer was revoked was that he had labour issues. The plaintiff further says he was told where there is smoke, there is a fire, and the information was given to them under the 'Whistleblower Act' and they were not allowed to share it with him. The preceding hearsay evidence was elicited under cross-examination and is thus admissible.

[13] The plaintiff explains his name is mentioned in a labour matter, but he only learned about it after he received the letter from Coca-Cola's legal practitioner and took it to AB-InBev's human resource department. He says the case is not against him; it is against AB-InBev. According to the plaintiff, he was never called for a labour hearing. AB-InBev's response letter dated 9 September 2021 confirms that, at the time of the interview, the plaintiff had not been informed nor briefed on any labour disputes against AB-InBev wherein the plaintiff was mentioned or implicated.

[14] Frankie Ngurimuje testified for the plaintiff that he had a telephonic discussion with the defendant about a call the defendant made to Coca-Cola when the plaintiff was to commence employment with Coca-Cola. He could not recall the exact date as it was a random discussion, and he could also not recall everything they spoke about due to the time that had passed. He could, however, recall it was during the time when the defendant was dismissed from AB-InBev and at the same time when the plaintiff was to start working at Coca-

Cola. Under cross-examination, he says it was when the plaintiff announced he was going to Coca-Cola. He says the defendant informed him he called Coca-Cola and complained about the plaintiff, and he also sent Coca-Cola an email to make sure they would not 'take him'. He says the defendant told him he was determined to not let go and he was going to make sure the plaintiff was not going to be employed anywhere. When asked under cross-examination what he means by that statement, he says it usually means he would do anything possible for the plaintiff not to work at any company. He says he worked with both the plaintiff and the defendant, and he is not siding with either of them. The defendant could not recall he informed Frankie Ngurimuje that he would not let it go. The evidence of Frankie Ngurimuje is undisputed by the defendant.

[15] The defendant does not dispute that he contacted Coca-Cola or that he sent it an email. Under cross-examination, the defendant says he informed Coca-Cola what type of person the plaintiff is. He is not to be trusted, he is running away, he knows what happened at AB-InBev, and he is trying to escape that. He says the contents of the email he sent to Coca-Cola are more or less the same as the ones he sent to Ohorongo Cement (dealt with below). When asked whether the information disclosed to Coca-Cola was meant for it to decide whether or not to employ the plaintiff, he said yes.

[16] The defendant, however, says the communications to Coca-Cola are confidential, private, privileged and not published. He also says they are 'subsequently the truth', fair and reasonable comments, and factually correct to the best of his knowledge. According to the defendant, it is clear Coca-Cola took his communications seriously and did a background check on the plaintiff. He says from the letter of Coca-Cola's legal practitioner, it is clear Coca-Cola did research on the plaintiff and discovered he was dishonest as, during the recruitment process, he did not inform them of the two labour disputes where his name is mentioned. He believes that if the comments were false, Coca-Cola would have employed the plaintiff, and he says he cannot be held responsible because the plaintiff was dishonest with Coca-Cola during the recruitment process. The defendant's position is that the plaintiff has no proof that he caused the him damages.

[17] According to the plaintiff, as a result of the defendant's conduct, he was unemployed for two months with no income, and for that, he made a loss of N\$151 329, which he was supposed to earn at Coca-Cola for that two-month period, and he made a further loss of N\$209 574 for future earnings lost, totalling N\$360 903. When the plaintiff was asked under cross-examination how the amounts are calculated, he referred to the annual amount of N\$959 574 in the Coca-Cola employment offer, divided by 12 and multiplied by two for the two months' unemployment. Under cross-examination, he further explained he had to find another job, and the opportunity he got at Ohorongo Cement (Pty) Ltd (Ohorongo Cement) was much lower and he is still losing money.

[18] Ohorongo Cement employed the plaintiff in November 2021.

[19] The plaintiff says that on 19 December 2021, the defendant communicated falsehoods and defamatory remarks about him to the human resource department of Ohorongo Cement via email, stating that:

'to whom this may concern

it was brought to my attention that hermanus scholtz has been recruited by your company but i would like to bring under your attention that at abinbev Hermanus is currently under investigation for a lot of fraudulent activities which include intimidation ,victimization etc., and is currently fled from abinbev because i have a case against him at labor in which i have evidence that he gave my wife covid at work and tried to cover it up. There have been multiple lawsuits launched against abinbev because of Hermanus scholtz. He has since ruined my reputation and has had me dismissed unfairly. Evidence against him is substantial and he knows this that's why he's 'running away because apart from myself, he victimized everyone that opposes him including the packaging manager Aubrey Meyer who has also resigned due to hermanus victimizing him, cashni duplisiss, leanzo cloete etc to name a few this list is long and there are multiple cases at labor due to him.

You don't have to take my word for it ,phone abinbev and confirm what I'm saying ask to speak to bernd pfander who is also the brewing plant manager(head hunted from NAM breweries) and being victimized by hermanus. You can phone the labor commission and confirm what I'm saying .. ask yourself why does he want to go away from abinbev if holds the position he does?(energy and fluids manager) because he organized his sister a job as hr and then she brought in the whole family they were 7

family members working there at one point, please phone me regarding this email if you have any questions. the two cases i have pending at labor is in feb2021 (unfair dismissal) (covid case where he infected my wife and tried to cover it up). also you can phone labor and confirm what im saying (my arbitrators are Misses Ndaafa and Mr Nicholas Mouers). I'm reporting this within the law of the whistle blowing protection act of 2017 and i trust that my reporting will be dealt with the confidentiality It deserves. if you allow this man into your company you are opening the doors for corruption and victimization.

My Lawyer is Mr Kobus Van vuuren if you have any queries. Orongo Cement has the right to know who they are employing.His contact was declined by coke recently after numerous people reported him so you can phone coke and confirm and he made a case against them because he is petty and phsyco .. Please be warned.

Sincerely and humbly

Geraldo Smith'

[20] According to the plaintiff, the falsehoods communicated to Ohorongo Cement in the preceding email were, without basis in law, injurious, and defamatory to his feelings, dignity, and reputation, to the tune of N\$200 000.

[21] The plaintiff says the defendant again sent an email to Ohorongo Cement's human resource department on 12 March 2022, wherein he once again made the following defamatory statements about him:

'i would like to bring under your attention that you have appointed a narcissist at your Company by the Name Of Hermanus scholtz ,he was previously employed by abinbev where he victimized many employees to the point where most of them actually resigned and went to make labor cases against the Brewer because of him, he single handedly corrupted the whole water supply of the brewery and because he was victimizing employees and was found out after numerous reports he resigned after having applied for a position at Coke, where his contract was ultimately revoked after there were numerous complaints made against him at coke, verify everything I'm sayin by phoning coke, phone ab-inbev his previous employer and ask why he left, at one point in time he managed to recruit through his sister that he helped appoint at the brewery more than 6 family members. He is not by any means to be trusted, he will create a toxic environment in your company which will force others to leave, I'm warning you guys for the second time, you don't have to take my word for it just phone his previous employer and ask about the water treatment plant which until this day is

not running properly because of him, then he still had the audacity to apply for the utilities manager at coke. he is a very smart individual but the liability of your company is at stake as well as the well being of your employers as he is a slave driving narcissist.

Currently i have a labor case pending in which hermanus scholtz is the main culprit because my wife contracted covid from him at work and then he accused me of providing false information to the company when i wrote an email to the boss which included him I where i exposed what was going on at the brewery. as a result he will be summoned to labor courts in okahandja and along with his family members that all worked there during the time this incident took place(because he set me up and had his family sign my notice of investigation papers). further more i would like to point out that all except for one family member of his left the brewery recently when i started to expose what was going on there, his wife ,sister, brother, cousin, and the brothers baby mother all left the brewery, only one of his cousins remain at abinbev , willem olivier. you can verify everything I'm saying by phoning the brewery abinbev and ask what happened to ,yulande scholtz, lochalan scholtz, a lady named coma who is the brothers baby moma ,waldo sholtz .. and then you will hopefully hear the truth. it was literally a family business and his family was running it, there were even stories of things disappearing on site like 55 inch led tvs etc., he also managed to send his wife on training with the engineering budget whilst her position in the company didn't have the authorization for training, all the while telling the artisans that there is no money for training.

He also with his wife removed alcohol beverages from site during the lockdown which stipulated no moving or selling of alcohol compromising the liquor license of the brewery ,but then at the same time he chaired a hearing in which he fired an employee for doing exactly the same thing he did .. removing stock from site during a government sanctioned lockdown.

i have evidence of this incident and there were eye account witnesses.

I'm reporting all of this under the whistle blowing act of 2007 and i trust that there will be confidentiality regarding this matter.

ohorongo cement has the right just like coke had and every other company to know whom they employ.

Sincerely'

[22] The plaintiff says the falsehoods communicated to Ohorongo Cement in the preceding email were once again injurious towards his dignity and defamatory in the amount of N\$200 000.

[23] Lorrain Lyzette Jossop testified for the plaintiff that while she was employed at Ohorongo Cement's human resource department, she received the emails of 19 December 2021 and 12 March 2022 on her and the company's email addresses. She was the only person who received the 16 December 2021 email, while the 12 March 2022 email was received by her as well as the marketing manager. She says Ohorongo Cement did not take any steps against the plaintiff. She says she took the email seriously, and that is why she reported it to her superior. She mentioned that it is on the plaintiff's personal file at Ohorongo Cement. She forwarded the emails to the plaintiff.

[24] When Ohorongo Cement interviewed the plaintiff, he informed them of what happened with the Coca-Cola employment offer.

[25] The defendant admits that he wrote the two emails to Ohorongo Cement, but he says it was prepared as a privileged communication and sent with the following conditions:

- (a) It would be confidential, private and privileged.
- (b) Substantially true and in the public interest.
- (c) Fair and reasonable comment.
- (d) To the best of his knowledge factually correct.

[26] The defendant says he was not acting maliciously, unlawfully or wrongfully towards the plaintiff, and he did not intend to, nor did he, injure the good name of the plaintiff 'directly'. He says his correspondence was 'aimed at' Ohorongo Cement with the truth. According to him, a reasonable member of society would not deem his correspondence to be aimed at defaming the plaintiff's character. He says the correspondence was of a private nature. It was not published on the Internet or in newspapers. Hence, there was no publication, so he says. According to him, the emails were not ill-intended or meant to defame the plaintiff. He says the statements are materially true and correct and in the best interest of the public and Ohorongo Cement. Thus, he

says, the statements are reasonable and 'germane' to the conduct of the plaintiff towards him. The emails are only addressed to and received by a single employee of Ohorongo Cement and were not sent to any other person. The communications are, therefore, privileged. He says, from the observed facts, his conduct is reasonable, and the statements are therefore not defamatory, nor are they actuated by malice or improper motive. He says there is no intention to defame the plaintiff, and there is no hidden meaning or motive. He says his intention was to speak the truth and communicate it to Ohorongo Cement.

[27] When asked under cross-examination why he sent the emails to Ohorongo Cement, he explains it was done in the same context as when he lost his job. He says he had to look for another job, and the plaintiff is one of his references. He says if he applies for a job, his references will be telephoned, and if he is unsuccessful, and he never hears from the employer again, he cannot say if the plaintiff was telephoned and if he perhaps said something. He says the point is that people do reference checks.

[28] The plaintiff says the cumulative damages he suffered at the defendant's hands and conduct amount to N\$760 903. He says the defendant's conduct resulted in him losing out on two months' income, potential future earnings, and injury to his feelings and dignity.

[29] For the quantum of damages claimed for the defamation claim, the plaintiff relies on amounts which the court awarded in other defamation cases. The plaintiff says his feelings were hurt. He says he was made out to be a narcissist and the worst person in the world, petty and a psycho and that he was going through psychometric challenges in life.

#### The argument and the law applied to the evidence

[30] Considering the evidence and the parties' arguments, the court now deals with the relevant law and applies it to the facts.

[31] *Iniuria* is the intentional, wrongful infringement of a person's personality right (*corpus* – one's physical-mental integrity, *dignitas* – one's dignity, or *fama* –



one's reputation).<sup>1</sup> An *iniuria* may cause a person patrimonial and non-patrimonial loss. For patrimonial loss a person must use the *actio legis Aquiliae* and for non-patrimonial loss the *actio iniuriarum*.<sup>2</sup>

[32] With the *actio legis Aquiliae*, a person can recover patrimonial loss suffered through another's wrongful and negligent act. With the *actio iniuriarum*, a person can claim compensation (non-patrimonial loss) for the intentional violation of a personality right (*corpus, dignitas* or *fama*). In relation to defamation, the two actions have special characteristics, as discussed below.

[33] The essential elements for delictual liability are conduct (or omission) by a defendant which is wrongful for which such defendant is at fault (intentionally or negligently) that caused a plaintiff harm.<sup>3</sup> Defamation is the wrongful and intentional publication of a defamatory statement of and concerning a plaintiff to a party other than the plaintiff.<sup>4</sup> The elements of defamation are embodied in that definition, namely an act (publication), injury to personality (defamatory nature), wrongfulness (impairment of the personality right to a good name) and intent (*animus iniuriandi*). Once a plaintiff proves the publication of a defamatory statement, certain presumptions arise against a defendant. Those presumptions are dealt with below.

[34] The plaintiff must first allege and prove the publication of defamatory statements about him to another person. The defendant relies on *Trustco Group International Ltd and Others v Shikongo*<sup>5</sup> that the plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff.

[35] The plaintiff relies on two emails sent to Ohorongo Cement by the defendant and communications by the defendant to Coca-Cola, the contents of which are similar to the emails sent to Ohorongo Cement. It is undisputed:

(a) the emails are of and concerning the plaintiff.

<sup>1</sup> Neethling, Potgieter, Visser *Neethling's Law of Personality* at 55.

<sup>2</sup> Neethling, Potgieter, Visser *Neethling's Law of Personality* at 72 to 76.

<sup>3</sup> *Shikongo and Another v Minister of Health and Social Services and Another* 2021 (2) NR 577 (HC) para 136.

<sup>4</sup> *Nghiwete v Nekundi* 2009 (2) NR 759 (HC) para 5.

<sup>5</sup> *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) para 34.

(b) the defendant sent the emails to Ohorongo Cement.

(c) the defendant communicated with Coca-Cola and sent it an email with more or less the same contents as the emails which he sent to Ohorongo Cement.

[36] The words used are thus undisputed but their effect and meaning, to be decided by the court,<sup>6</sup> are disputed.

[37] The plaintiff did not specify certain defamatory parts of the emails, so the question is whether the emails read as a whole are defamatory.

[38] In the alternative to the emails being defamatory *per se*, the plaintiff attached particular meanings to them. The plaintiff is, however, not debarred from relying on the emails' ordinary meaning if they are defamatory *per se*.<sup>7</sup>

[39] Whether the emails are defamatory, the plaintiff relies on *Free Press of Namibia (Pty) Ltd and Others v Nyandoro*,<sup>8</sup> where the following was stated with reference to *Tsedu and Others v Lekota and Another*:<sup>9</sup>

'[13] In deciding whether the statements I have outlined are defamatory, the first step is to establish what they impute to the respondents. The question to be asked in that enquiry is how they would be understood in their context by an ordinary reader. Observations that have been made by our courts as to the assumptions that ought to be made when answering that question are conveniently replicated in the following extract from a judgment of an English court:

The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges

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<sup>6</sup> *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC) para 22.

<sup>7</sup> *New Age Press Ltd v O'Keefe* 1947 (1) SA 311 (W) at 317.

<sup>8</sup> *Free Press of Namibia (Pty) Ltd and Others v Nyandoro* 2018 (2) NR 305 (SC) para 41.

<sup>9</sup> *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) at 337C-F.

should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'

[40] On whether statements are defamatory, the court in *Unoovene v Nangolo*<sup>10</sup> stated that:

'[7] It is trite that the question whether the defendant's statement is defamatory falls to be determined objectively: the court will construe the statement, draw its own inference about the meaning and effect thereof and then assess whether it tends to lower the plaintiff 'in the estimation of right-thinking members of society generally' (per Greenberg JA in *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 at 1018) (*Afshani v I Vaatz* 2006 (1) NR 35 (HC) at 45C).'

[41] The defendant relies on *Nangolo v Jacob*<sup>11</sup> and submits that no evidence was presented of what a reasonable person would have understood from the statements. The defendant's reliance on *Nangolo v Jacob* for the submission that evidence was required of what a reasonable person would have understood from the statements, is misplaced. It is a question of law whether the statements are reasonably capable of conveying to the reasonable reader a meaning that defames the plaintiff.<sup>12</sup> If the statements have a defamatory meaning in their ordinary sense, a cause of action is disclosed,<sup>13</sup> and evidence of how a witness understood the statements is inadmissible if reliance is placed on the ordinary meaning.<sup>14</sup> In *Geingos (Born Kalondo) v Hishoono*,<sup>15</sup> with reference to *South African Associated Newspapers Ltd and Another v Yutar*,<sup>16</sup> the court stated:

'The test for defamation is whether, in the eyes of a reasonable person with ordinary intelligence, the words used impairs a person's good name, reputation or esteem in the community. Reasonable readers take into consideration, not only what the words used expressly state but also the implication of the words used.'

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<sup>10</sup> *Unoovene v Nangolo* 2008 (2) NR 497 (HC) para 7.

<sup>11</sup> *Nangolo v Jacob* (HC-NLD-CIV-ACT-DEL-2020/00103) [2021] NAHCNLD 40 (26 April 2021) para 16.

<sup>12</sup> *Mohamed v Jassiem* 1996 (1) SA 673 (A) at 703-704.

<sup>13</sup> *New Age Press Ltd v O'Keefe* 1947 (1) SA 311 (W) at 317.

<sup>14</sup> *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) at 566.

<sup>15</sup> *Geingos (Born Kalondo) v Hishoono* 2022 (2) NR 512 (HC) para 55.

<sup>16</sup> *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) at 451.

[42] The following statements contained in the context of the respective emails as a whole are, without a doubt, defamatory *per se*.

(a) The plaintiff is under investigation for a lot of fraudulent activities, including intimidation and victimisation.

(b) Multiple lawsuits were launched against AB-InBev because of the plaintiff.

(c) There are multiple labour cases because of the plaintiff.

(d) The plaintiff victimises others to the point that most of them resign and make labour cases against AB-InBev because of the plaintiff.

(e) Ohorongo Cement opens the doors of corruption and victimisation if it allows the plaintiff into its company.

(f) The plaintiff's employment offer was declined after numerous people reported him, and the plaintiff made a case against that employer.

(g) The plaintiff is petty and psycho.

(h) Ohorongo Cement appointed a narcissist.

(i) The plaintiff single-handedly corrupted the water supply of the brewery.

(j) The plaintiff is not to be trusted by any means.

(k) The plaintiff will create a toxic environment in a company which will force others to leave.

(l) The liability of Ohorongo Cement is at stake because of the plaintiff.

(m) The plaintiff is a slave-driving narcissist.

(n) The plaintiff removed alcoholic beverages from AB-InBev's site during the lockdown, which stipulated no moving or selling of alcohol compromising the liquor license of AB-InBev.

[43] Furthermore, when those statements in the context of the respective emails as a whole are considered objectively as to what their natural and ordinary meaning would convey to the ordinary reasonable reader and how such a reader would understand them in that context, the court finds they would be understood to mean, and they would impute of the plaintiff, that the plaintiff is dishonest, he is without integrity, he is under investigation for fraudulent activities, he abuses his position of authority by victimising others, he is corrupt, he is without morals, he would expose his employer to labour unrest, he is mentally unstable, and he is a thief.

[44] Regarding publication, the defendant relies on *Nangolo v Jacob*<sup>17</sup> and submits that because the emails were not shared with the community at large, the defendant did not publish the statements and the email correspondence does not constitute publication. The court did not, in *Nangolo v Jacob*, find that, in order to amount to publication, the publication must be to the community at large. In that matter, the court dealt with publications made to various community members, but in paragraph 13, it stated that ‘with regard to defamation, it is the act of communicating a false statement to a third person’. Publication to one person could suffice as publication for the purpose of a defamation suit. The extent of the publication would influence the quantum of the damages.

[45] The court finds that the defendant published defamatory statements of and concerning the plaintiff to persons other than the plaintiff. For claims B and C, the statements were published to two representatives of Ohorongu Cement. For claim A, and based on the defendant’s evidence, statements of more or less the same nature as the emails sent to Ohorongu Cement were published to at least one representative of Coca-Cola.

[46] Whereas the plaintiff proved the publication of defamatory statements about him to another person, the presumptions of unlawfulness and *animus iniuriandi* (intent to defame and knowledge of wrongfulness) arise against the defendant, and the defendant bears the onus of disproving it. The presumptions

<sup>17</sup> *Nangolo v Jacob* (HC-NLD-CIV-ACT-DEL-2020/00103) [2021] NAHCNLD 40 (26 April 2021) para 13.

are that the statements are unlawful and intentionally made with knowledge of their defamatory meaning and their unlawfulness.<sup>18</sup> A bare denial of unlawfulness is insufficient, as the onus is on the defendant.<sup>19</sup>

[47] The defendant says he did not intend to defame the plaintiff. His say-so is, however, insufficient to dispel that onus. When asked whether the information disclosed to Coca-Cola was meant for them to decide whether or not to employ the plaintiff, he said yes. Frankie Ngurimuje says the defendant informed him he called Coca-Cola and complained about the plaintiff, and he also sent Coca-Cola an email to make sure they would not 'take him'. He says the defendant told him he was determined to not let go and he was going to make sure that the plaintiff was not going to be employed anywhere. The defendant could not recall that he informed Frankie Ngurimuje that he would not let it go. The testimony of Frankie Ngurimuje was not disputed. The court finds the defendant intended to defame the plaintiff.

[48] Falsity need not be alleged or proved by the plaintiff, as the defamatory nature of a statement does not depend on it.<sup>20</sup> A defendant may, however, justify a statement by alleging and proving its truthfulness and that its publication was in the public interest. The truth of a statement may affect the quantum of damages.

[49] Whereas the defence of truth and public interest is relied on, the defendant must allege and prove the statements were true and their publication was to the public's benefit.<sup>21</sup> It is not necessary to prove the truth of every word used. It is enough to be substantially true in every material part.<sup>22</sup> Truth on its own is not a defence. It must also be in the public interest. It is not for the public's benefit to publish partly true matters.<sup>23</sup>

[50] The defendant also relies on the defence of fair comment. For that defence, he must allege and prove the statements were comments (opinion)

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<sup>18</sup> *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC) paras 24 and 31.

<sup>19</sup> *Brett v Schultz* 1982 (3) SA 286 (SE) at 292.

<sup>20</sup> *Sutter v Brown* 1926 AD 155 at 172.

<sup>21</sup> *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 769-780.

<sup>22</sup> *Olivier v Kostin* (HC-MD-CIV-ACT-DEL-2019/03603) [2022] NAHCMD 180 (8 April 2022) para 82.

<sup>23</sup> *Iynan v Natal Witness Printing & Publishing Co (Pty) Ltd* 1991 (4) SA 677 (N) at 687.

and not statements of fact and that they would have been understood as such by a reasonable reader, the comments were fair (that they do not exceed certain limits), the facts commented on were true or substantially true (fair comments made on true facts), and the comments relate to a matter of public interest (the facts must be in the public's interest).<sup>24</sup>

[51] The defendant, however, misconstrues and conflates the defences of truth and public interest on the one hand and fair comment on the other hand. Those two defences are not the same, nor are they complementary, and, in certain circumstances, they should be pleaded in the alternative if a party wants to rely on both. The defendant relies on *Olivier v Kostin*<sup>25</sup> and says the 'trite law as to the defence of truth and fair comment' was reiterated therein. There is no defence such as 'truth and fair comment'. The court, in *Olivier v Kostin*, dealt with the defence of 'truth and public benefit'. 'Truth' and 'public benefit' go together as the defence of 'truth and public benefit/interest'. As explained above, for 'truth and public interest', the defence lies in the truth of the statements made and that they are in the public's interest, while for 'fair comment', the defence lies in the statements made were 'comments (opinion)' and not statements of fact and that readers would understand them as comments (opinion) and not facts.

[52] Considering the defence of truth and public interest, the 'truth' or 'substantial truth' of the defamatory statements that the defendant proved was that he lodged a labour complaint with the Labour Commissioner against AB-InBev wherein the plaintiff's name was mentioned and implicated. If the defamatory statements made by the defendant to Coca-Cola and Ohorongo Cement were limited to that fact which the defendant proved, the next question for the defence of truth and public interest would have been whether that statement was in the interest of Coca-Cola and Ohorongo Cement. However, the defamatory statements were not limited to that fact, and the defendant failed to prove the truth or substantial truth of the other defamatory statements. The court finds that the defendant did not prove that the plaintiff victimised him to the

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<sup>24</sup> *Johnson v Beckett* 1992 (1) SA 762 (A) at 778-779. JC Van der Walt, JR Midgley *Principles of Delict* 3 ed at 148 – 149.

<sup>25</sup> *Olivier v Kostin* (HC-MD-CIV-ACT-DEL-2019/03603) [2022] NAHCMD 180 (8 April 2022) para 82.

extent that he had to seek professional help. The court further finds that the defence of truth and public interest fails.

[53] Considering the defence of fair comment, the true, or substantially true, fact which the defendant proved whereupon fair comments could have been made was that he lodged a labour complaint with the Labour Commissioner against AB-InBev wherein the plaintiff's name was mentioned and implicated. The defendant failed to prove that the defamatory statements were comments (opinion) on that proved fact and not statements of fact and that they would have been understood as such by a reasonable reader. In fact, the defendant clearly misunderstood the defence of fair comment in its entirety. The defendant also failed to prove the defamatory statements were fair comments (that they do not exceed certain limits) on that fact proved. If the defamatory statements are considered in light of that proven fact, it cannot be said that the statements were fair comments thereon. The question of whether the comments relate to a matter of public interest does, therefore, not arise. Fair comment protection is forfeited if a defendant acts with malice or improper motive, and the onus of malice or improper motive is on the plaintiff.<sup>26</sup> If the defence of fair comment was established and the court considered the issue of the defendant's malice or improper motive, the court would, based on Frankie Ngurimuje's testimony, which was not objected to, find that the defendant was malicious and acted with an improper motive in making the defamatory statements to Coca-Cola and Ohorongo Cement, thereby forfeiting the defence of fair comment. The court finds that the defence of fair comment fails.

[54] The fact that the defendant wanted the statements to be kept confidential and private is not a defence. Privilege is, however, available as a defence if the statements were published in the discharge of a duty or exercise of a right to a person who had a duty or right to receive the statements. The onus is on the defendant. He must allege and prove the statements were made on a privileged occasion and were relevant, pertinent, or germane to the purpose of the

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<sup>26</sup> *Crawford v Albu* 1917 AD 102.



occasion. Once a defendant alleges and proves that it is for a plaintiff to rebut it by, for example, alleging and proving a defendant's improper motive or malice.<sup>27</sup>

[55] The defendant relies on *Afshani and Another v Vaatz*<sup>28</sup> that the essence of the defence of privilege:

‘. . . lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end.’

[56] He further relies on *Borgin v De Villiers*<sup>29</sup> wherein it was stated:

‘The particular category of privilege which, in the light of the above finding, would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it (see *De Waal v Ziervogel* 1938 AD 112 at 121 - 3). The test is an objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances.’

[57] It was further stated in *Borgin v De Villiers* that:

‘The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one.’

[58] The defendant's counsel submits the defendant testified he felt it was his duty to inform the potential employer of the plaintiff's character and share his experience of victimisation he suffered while working with the plaintiff. He further says in *Afshani and Another v Vaatz*<sup>30</sup> it was said the defendant must show on a balance of probabilities that the statements were reasonably germane and

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<sup>27</sup> *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC). JC Van der Walt, JR Midgley *Principles of Delict* 3 ed at 150.

<sup>28</sup> *Supra* para 32.

<sup>29</sup> *Borgin v De Villiers and Another* 1980 (3) SA 556 (A) at 577D-F.

<sup>30</sup> *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC) para 34.

relevant to the privileged occasion. He says he showed on a balance of probability that the statement was not only 'truthful and fair public comment' but the emails were sent with the intention that it be regarded as confidential and privileged.

[59] With the standard of the reasonable person in mind, the court objectively considers all the circumstances under which the statements were made, including their contents, the occasion at which they were made, and the parties' relationship. The statements' contents are not fact-driven nor neutrally descriptive to convey information. They are emotive and dramatic to badmouth the plaintiff. The defendant says he felt it was his duty to inform 'the potential employer' of the plaintiff's character. If someone 'feels' he has a duty to do something, it does not mean he indeed has a duty to do it. In fact, it means he does not have a duty to do it, but he felt he had a duty. The defendant refers to a duty to inform the employer about the plaintiff's character. The statements were not made at an occasion which the defendant had with the employers, and, in the moment, he felt a need to speak up, nor were the statements relevant to something under discussion at a particular occasion. The defendant, who had no relationship with the employers, intentionally approached them to inform them about the plaintiff's character. In other words, the defendant created the occasions. For Coca-Cola, he sent an email as well to make sure they would not 'take him'. For Ohorongo Cement, one email was not enough. When he did not hear from Ohorongo Cement, he sent a second email. Insofar as public policy may require a member of the public to warn an employer about an employee's character, if the general criterion of reasonableness is considered, the defendant's conduct exceeded its boundaries. The court finds that the defence of privilege fails.

[60] With reference to *Olivier v Kostin*,<sup>31</sup> the defendant submits the plaintiff failed to prove the defendant published the statements with an improper motive or malice or that he abused or exceeded the ambit of qualified privilege. The defendant says the plaintiff should have raised the issue of improper motive or malice in a replication. The defendant failed to properly plead the defence of

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<sup>31</sup> *Olivier v Kostin* (HC-MD-CIV-ACT-DEL-2019/03603) [2022] NAHCMD 180 (8 April 2022) para 88.

qualified privilege. Hence, it could not be expected from the plaintiff to have dealt with the issue of improper motive or malice in a replication. The sum of the defendant's plea on the defence of 'privilege' is the defendant 'further pleads that the contents [were] confidential, private and privileged'. The defendant had to allege and prove the statements were made on a privileged occasion and were relevant, pertinent or germane to the purpose of the occasion. He did not do so. If the defence of privilege was established and the court considered the issue of the defendant's malice or improper motive, the court would, based on Frankie Ngurimuje's testimony, which was not objected to, find that the defendant was malicious and acted with an improper motive in making the defamatory statements to Coca-Cola and Ohorongo Cement, thereby defeating the defence of privilege. In conclusion, the court reiterates its finding that the defence of privilege fails.

[61] The defendant also relies on the Whistleblower Protection Act 10 of 2017. The plaintiff submits that the defendant's conduct is not protected thereunder as it does not comply with ss 30(1)(c), 31 and 35(3), which outline the requirements and manner wherein information must be reported and to whom it must be reported. The Whistleblower Protection Act 10 of 2017 has, to date, not been brought into force, hence that defence is not considered.

[62] The defendant says the plaintiff failed to show how the defendant was the cause of his damages. He says the plaintiff failed to prove a causal link between the revocation of the employment offer and the defendant or his damages. The defendant relies on *African Dynasty Investment CC v Xavier Gomes*<sup>32</sup> and submits if the defendant made a defamatory statement to Coca-Cola and it revoked the employment offer due to the statements, then a sufficient causal link would exist whereby damages could be proven. The defendant further submits the evidence shows the defendant made a truthful 'comment' which is 'fair and in the interest of the public', and after investigation, Coca-Cola realised the statements were true. He says no evidence was led to indicate that, but for the defendant's comments, the offer was revoked, and there is thus no factual causation, nor legal causation and no causal link

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<sup>32</sup> *African Dynasty Investment CC v Xavier Gomes* (I 2009/2015) [2017] NAHCMD 280 (6 October 2017) para 9 and 10.

between the defendant's conduct and the damage suffered. The court reiterates the defendant's defences of truth and public interest and fair comment failed.

[63] The court, in *African Dynasty Investment CC v Xavier Gomes*, stated:

'[9] It has been stated that the main tool for determining factual causation is the 'but-for' test or the theory of *conditio sine qua non*. (*Minister of Police v Skosana* 1977 (1) SA 31 (A)) In the course of time the 'but-for' test has been criticized as not being perfect. But in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the Supreme Court of Appeal was of the view that any hurdles in the way of the application of the 'but-for' test should not be exaggerated unduly because a plaintiff does not have to establish factual causation with absolute certainty. The plaintiff only has to prove that the conduct complained of probably caused the harm or loss and that this entails a 'sensible retrospective analysis of what would probably have occurred based upon the evidence and what can be expected to occur in the ordinary course of human affairs'(Van Duivenboden (SCA), para 25).

[10] Nevertheless, the factual link between a defendant's conduct and the harm or loss is not enough to establish liability. This concerns the second problem mentioned in paragraph 8 above, i.e. legal causation. A person may be held liable for only the consequences that are closely linked to his or her conduct – either directly or sufficiently closely. Where the consequences are not linked closely to the defendant's conduct or where the link is not strong enough, then there is no legal causation, that is, the consequences alleged by the plaintiff are too remote, as the defendant in the instant case contends. (See Max Loubser (ed.), *The Law of Delict in South Africa*, Cape Town, OUP, 2nd edn (2012), para 5.2.)'

[64] The court does not agree with the defendant's submission that causation was not proved. After the plaintiff's interview was successful, Coca-Cola gave him a written offer of employment, which the plaintiff accepted. The plaintiff resigned from AB-InBev, and he was scheduled to start employment with Coca-Cola on 20 September 2021. On 6 September 2021, the plaintiff received a letter from Coca-Cola's legal practitioner that it came to its attention that there are two existing labour disputes referred to the Labour Commissioner citing AB-InBev as respondent, in which allegations are made against the plaintiff's conduct as EF & M Manager. The letter says the allegations are of great

concern to Coca-Cola as it seems the plaintiff failed to provide relevant information during the recruitment, selection and interview process, his conduct as manager at AB-InBev is associated with, or caused, allegations of labour disputes and, if correct, it may result in concerns pertaining to trust in the plaintiff. AB-InBev responded with a letter dated 9 September 2021 that, at the time of the interview, the plaintiff was not informed of any labour disputes against AB-InBev in which he was mentioned or implicated. When the plaintiff reported for duty on 20 September 2021, he was informed to go back the next day due to pending issues with his 'employment which the employer' had to sort out and when he returned the next day, he was informed that his services were no longer required as the employment offer was revoked. Frankie Ngurimuje says the defendant informed him he called Coca-Cola and complained about the plaintiff, and he also sent Coca-Cola an email to make sure they would not 'take him'. The defendant did not dispute that evidence.

[65] On the evidence before the court, the defendant's conduct cannot be thought away without Coca-Cola's revocation of the employment offer disappearing simultaneously. The court finds that the defendant's conduct caused Coca-Cola to revoke the employment offer.

[66] The revocation of the employment offer resulted in the plaintiff being unemployed for two months, and the package with Ohorongo Cement, who subsequently employed the plaintiff, was less than Coca-Cola's. The court finds that harm is a direct result of the defendant's conduct, for which the defendant should be liable, together with the intentional defamation of the plaintiff to Ohorongo Cement.

#### The quantum of damages

[67] According to the defendant, the plaintiff failed to provide factual evidence of how his damages were quantified. However, it is not necessary for the plaintiff to give particulars about the quantification of general damages or about his reputation, standing in the community, character, or the extent of the

publication.<sup>33</sup> As for the actual patrimonial loss, the principles of proof of damages apply.<sup>34</sup>

[68] The court first deals with the patrimonial loss.

[69] The defendant relies on *Fish Orange Mining Consortium (Pty) Ltd v Goaseb and Others*<sup>35</sup> for his submission that the plaintiff must prove his damages. He submits the plaintiff failed to provide any evidence relating to claim A.

[70] According to Coca-Cola's written employment offer to the plaintiff dated 30 July 2021, which the plaintiff accepted, the plaintiff's monthly remuneration with Coca-Cola would have been N\$75 664,50. If N\$75 664,50 is multiplied by two for the two months that the plaintiff was unemployed, the result is N\$151 329.

[71] According to Coca-Cola's written employment offer, the plaintiff's annual remuneration with Coca-Cola would have been N\$959 574. According to Ohorongo Cement's written employment offer to the plaintiff dated 11 November 2021, whereunder the plaintiff was employed at Ohorongo Cement, the plaintiff's annual remuneration with Ohorongo Cement is N\$750 000. The difference between those two amounts is N\$209 574.

[72] The employment offers form part of exhibit A and they are undisputed. The amounts of N\$151 329 and N\$209 574, which make up the cumulative claim amount of N\$760 903, together with the amount of N\$200 000 for claim B and another amount of N\$200 000 for claim C, were not challenged under cross-examination save for the question of how it is calculated, the answer of which is obvious as illustrated above. The amounts of N\$151 329 and N\$209 574 are damages flowing directly from the defendant's conduct. The court finds the defendant is liable to the plaintiff for both those amounts, totalling N\$360 903.

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<sup>33</sup> *Summonds v White* 1980 (1) SA 755 (C) at 758.

<sup>34</sup> *Coxton Ltd v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A).

<sup>35</sup> *Fish Orange Mining Consortium (Pty) Ltd v Goaseb and Others* 2018 (3) NR 632 (HC) para 31.

[73] The court now considers the quantum of damages for the defamation (the non-patrimonial loss).

[74] How one quantifies harm to reputation, the plaintiff refers to *Trusto Group International and Others v Shikongo*<sup>36</sup> where the following was stated with reference to *Dikoko v Mokhatla*<sup>37</sup>:

'There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower 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.'

[75] However, awards of damages remain important. With reference to the same authority, the Supreme Court, in *Trusto Group International and Others v Shikongo*, stated:<sup>38</sup>

'In our society money, like cattle, can have significant symbolic value. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money-oriented as it is. Many miscreants would be quite happy to make the most fulsome apology (whether sincere or not) on the basis that doing so costs them nothing – it is just words. Moreover it is well established that damage to one's reputation may not be fully cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation.'

[76] The plaintiff relies on *Ndeitunga v Kavaongelwa*<sup>39</sup> wherein it was stated that, when it comes to the quantum of damages, the court has a wide discretion to be exercised judicially guided by comparable awards in previous cases, and the plaintiff refers to awards made in several previous cases. Some of those cases deal with juristic entities and or involve media statements which are not

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<sup>36</sup> *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) para 19.

<sup>37</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 110.

<sup>38</sup> *Supra* para 91.

<sup>39</sup> *Ndeitunga v Kavaongelwa* 2016 (3) NR 622 (HC) para 106.

applicable to the matter at hand, including *Du Toit v Amupadhi*,<sup>40</sup> which was overturned on appeal.<sup>41</sup> Those cases will not be considered. The plaintiff further refers to *Amunyela v Shaanika*<sup>42</sup> (dealing with statements made by a magistrate in a court in the presence of only a few persons wherein N\$35 000 was awarded), *Unoovene v Nangolo*<sup>43</sup> (dealing with statements made at two separate political gatherings wherein N\$60 000 was awarded), *Nghiwete v Nekundi*<sup>44</sup> (dealing with statements made at a press conference wherein N\$250 000 was awarded), *Geingos (Born Kalondo) v Hishoono*<sup>45</sup> (involving the then first lady wherein N\$250 000 was awarded) and *Nyambe v Mushabati*<sup>46</sup> (involving a legal practitioner where a statement was made under oath at a police station which was also given to the Law Society when lodging a complaint against the legal practitioner wherein N\$70 000 was awarded on each of the two claims in that matter).

[77] The plaintiff submits, having considered comparable awards, an award of N\$100 000 would be appropriate for each of claims B and C (for each email to Ohorong Cement), totalling N\$200 000.

[78] For claims B and C, the defendant says the plaintiff failed to prove his financial harm, which, as stated above, is not required of him.

[79] PJ Visser, JM Potgieter *Visser and Potgieter's Law of Damages* 2 ed at 110 states the following in respect of defamation:

'Injury to personality caused by defamation has some special characteristics. In reality, the element of loss should be the fact that the plaintiff's good reputation in the community has in fact been impaired. However, it would appear that the question whether the plaintiff's reputation has actually suffered is not really taken into consideration. It is determined objectively whether, in the eyes of a reasonable person, the good name of the plaintiff has been infringed. Non-patrimonial loss in this instance

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<sup>40</sup> *Du Toit v Amupadhi* (HC-MD-CIV-ACT-DEL-2016/02822) [2019] NAHCMD 216 (1 July 2019).

<sup>41</sup> *Amupadhi and Another v Du Toit* 2021 (3) NR 626 (SC).

<sup>42</sup> *Amunyela v Shaanika* 2007 (1) NR 146 (HC).

<sup>43</sup> *Unoovene v Nangolo* 2008 (2) NR 497 (HC).

<sup>44</sup> *Nghiwete v Nekundi* 2009 (2) NR 759 (HC).

<sup>45</sup> *Geingos (Born Kalondo) v Hishoono* 2022 (2) NR 512 (HC).

<sup>46</sup> *Nyambe v Mushabati* (HC-MD-CIV-ACT-DEL-2021/04399) [2022] NAHCMD 389 (4 August 2022).



is not merely objectivated;<sup>47</sup> it is in fact based on a hypothesis or fiction.<sup>48</sup> It must, of course, be accepted that words or conduct with a defamatory tendency will often actually cause injury to the plaintiff's reputation and that he will usually also suffer affective loss, in other words, experience feelings of hurt and injustice. One may see the ratio of allowing a claim for satisfaction based on defamation as the plaintiff's actual or presumed feelings of hurt and outrage which must be neutralized through an award of satisfaction.'

[80] In a footnote, it is stated:<sup>49</sup>

' . . . . It is required only that the publication of words or conduct concerning the plaintiff must have the tendency to defame him, not that actual defamation has occurred. This implies that the law is concerned with the probability of loss of a good reputation. Eg, it may not even be asked of a witness how he actually understood the alleged defamatory conduct (except in the case of an innuendo - . . . . '

[81] The amount of satisfaction for the plaintiff's loss of his good name and reputation is estimated according to what is equitable and good on the merits of the case,<sup>50</sup> but in doing so the court must have regard to all the circumstances of the case and consider a wide variety of factors in the assessment process. PJ Visser, JM Potgieter *Visser and Potgieter's Law of Damages* 2 ed at 450, with reference to various authorities, in footnote 120, states:

'In estimating the amount of damages to be awarded the Court must have regard to all the circumstances of the case. It must, *inter alia*, have regard to the character and status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done. . . . In the *Smith*, case (*supra*) at 876-81 the assessment of the amount of satisfaction is discussed extensively under the following heads: nature of the defamation; nature and extent of the publication; the plaintiff's status and esteem; the probable consequences of the defamation; the conduct of the defendants; comparable award and the falling value of money, and insult.

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<sup>47</sup> In other words, it is determined without reference to the feelings of the plaintiff.

<sup>48</sup> Because of the use of the criterion of the reasonable person.

<sup>49</sup> Footnote 139 at 110.

<sup>50</sup> *Smith v Die Republikein (Edms) Bpk* 1989 (3) SA 872 (SWA) at 875.

[82] In *Mbura v Katjiri*,<sup>51</sup> the court quoted as follows from Jonathan Burchell *Principles of Delict* 1993 at 188 to 189, dealing with the general factors the court may take into account in making a determination of an appropriate award:

‘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 comparable awards in other defamation cases and the declining value of money.’

[83] The plaintiff held and continues to hold a managerial position which requires authority and the enforcement of authority. The plaintiff was the defendant’s superior. Put differently; the defendant was the plaintiff’s subordinate. The defendant was unsatisfied with the manner the plaintiff treated him and he acted thereon in an inappropriate manner. The defendant was receiving psychological treatment to manage stress and mental health and to think constructively and positively. The nature of the publication to Ohorongo Cement was serious, but the publication was limited to two individuals, and it did not have direct adverse consequences for the plaintiff. The emails are, however, on the plaintiff’s personnel file, which makes the publication somewhat permanent. The defendant did not apologise to the plaintiff or try to make good what he said about the plaintiff. The plaintiff’s feelings were hurt. He felt he was made out to be the worst person in the world. Having considered awards made in previous matters and all the facts and circumstances of the present case, the court finds that the appropriate cumulative award for claims B and C is N\$15,000.

### Conclusion

[84] It follows that the plaintiff’s claims succeed, and the following order is made:

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<sup>51</sup> *Mbura v Katjiri* (I 4382/2013) [2017] NAHCMD 103 (31 March 2017) para 69.

1. The court grants judgment for the plaintiff against the defendant for payment of:

(a) N\$360 903.

(b) N\$15 000.

(c) Interest on the amounts of N\$360 903 and N\$15 000 at the rate of 20% per annum from the date of judgment to the date of final payment.

(d) The plaintiff's costs of suit.

2. The matter is finalised and removed from the roll.

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B DE JAGER  
Acting Judge

#### APPEARANCES

PLAINTIFF: C Mayumbelo  
Of Chris Mayumbelo & Co.,  
Windhoek

DEFENDANT: P Coetzee  
Of PD Theron & Associates,  
Windhoek

