



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3251/2014

In the matter between:

MICHAEL HEITA

PLAINTIFF

and

HENDRIK KAMUJA NEHEMIA

1ST DEFENDANT

OSCAR KAKUNGA

2ND DEFENDANT

ROBERT KAPEMBE

3RD DEFENDANT

Neutral citation: *Heita v Nehemia* (I 3251/2014) [2017] NAHCMD 119
(20 April 2017)

Coram: OOSTHUIZEN J

Heard: 8-9 June 2016 and 1-3 November 2016

Delivered: 20 April 2017

Flynote: Defamation – bare denials – first defendant and his witnesses unreliable.

Summary: Plaintiff instituted a defamatory action against the defendants. First defendant defended the action. First defendant denied the uttering of the statement complained of. Two contradictory versions. Version of plaintiff accepted. Statement by first defendant found to be defamatory.

ORDER

Having heard **MR VILJOEN**, counsel for the plaintiff and **MR HENDRIK KAMUJA NEHEMIA (1ST DEFENDANT)** in person –

IT IS ORDERED THAT:

1. Plaintiff succeeds in his defamation claim against the defendant.
2. Plaintiff is awarded damages in the amount of N\$60 000.00 for injury to his dignity and reputation.
3. Interest on the amount of N\$60 000.00 at the rate of 20% per annum a tempore morae from date of judgment to date of final payment.
4. Cost of suit.

JUDGMENT

OOSTHUIZEN J:

Pleadings and the Law

[1] The plaintiff instituted action for defamation against the defendants on 11 September 2014, which action was defended by the 1st defendant only.

[2] It is trite law that the plaintiff must set out the words alleged to have been used by the defendant and must prove them. Actual words or similar words (“more or less”) shall suffice. Plaintiff must prove the use of the actual words or words bearing a substantial similar meaning.¹

[3] First defendant pleaded a bare denial.

[4] The Pre-Trial Order listed the following disputed issues:

4.1 Whether the first and third defendants indeed made statements of an concerning plaintiff;

4.2 Whether second defendant forwarded the letter dated 8 November 2012 and marked annexure “A”;

4.3 Whether the statement made by the first, second and third defendant were understood by the addressees to mean that the plaintiff is dishonest, a thief, a criminal and that the plaintiff does not respect the office of the MUN;

4.4 Whether the plaintiff was injured in his dignity, feelings, self esteem, self respect and reputation;

4.5 Whether the plaintiff is entitled to compensation from the first and second and third defendant in the amount as stated;

4.6 The liability of the defendants.²

¹ *International Tobacco Co of SA Ltd v Wolheim* 1953 (2) SA 603 (A) 613-614.

² Notices bundle B, pp 26, 27 and 30.

[5] The burden of proof in a civil case has been stated as follows:

'[I]n general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt . . . for, in finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'³

[6] To succeed in a defamation action a plaintiff must establish that the defendant published a defamatory statement concerning him or her. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional.⁴ The plaintiff need not allege nor prove the falsity of the defamatory statement and need not allege anything more than his or her standing in a particular society where it is alleged that his or her reputation was damaged in the eyes of the community at large.⁵ 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.⁶

[7] In casu the two versions are in diametrical opposition. The plaintiff can only succeed with its claim of defamation if it satisfied the court on a preponderance of probabilities that its version is true and accurate and therefore acceptable. Needless to say, the aforementioned will as of necessity imply that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. The court should measure the plaintiff's version against the general probabilities.⁷

Evidence and Findings

³ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A - D: Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz MegaBuilt v Kurz* 2008 (2) NR 775 (SC) at 790B-C.

⁴ See *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

⁵ Daniels, H, 2007, *Becks Theory and Principles of Pleading in Civil Action*, (7th ED) Durban: LexisNexis, p 280.

⁶ *Trusco Group International v Shikongo* 2010 (2) NR 377 at 387B-D.

⁷ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E - G, cited with approval in *Van der Berg v Motor Vehicle Accident Fund* 2009 (2) NR 551 (HC) at 564 and 565, paragraph [54].

[8] The plaintiff is an adult community relation coordinator at Dundee Precious Metal in Tsumeb, Republic of Namibia and was employed there for the last 15 years.

[9] On or about 16 July 2012 at Tsumeb the 1st and 3rd defendant allegedly stated at a meeting of the Mine Workers Union of Namibia of and concerning the plaintiff that he was seen together with 'Immanuel I Asino and Corrie' unlawfully entering the office of the Union Representative at Tsumeb to steal and change the branch election/ballots.

[10] At the time the plaintiff was the second most senior member of the Mine Workers Union of Namibia.

[11] The plaintiff was involved in the Mine Workers Union of Namibia since 1988, in the capacity as an Education Coordinator. He became a Branch Education Coordinator in 1996 until 1997 and a Northern Regional Education Coordinator in 1998 until 2005. In 2005 the plaintiff became a Northern Regional Chairperson until 2010. He further became a full time Shop Steward in 2007 until 2010, and in 2010 he was elected as Vice President of the Mine Workers Union of Namibia.⁸

[12] The statement by the 1st Defendant was republished by the 2nd defendant in his letter of 8 November 2012 addressed to all members and branches of MUN.

[13] First Defendant's statement was wrongful and defamatory and was made with the intention to defame and to injure the reputation of the plaintiff.

[14] The statement were understood by the addressees at the meeting and was intended to mean that the plaintiff was dishonest, immoral and deceitful.

[15] The version of the plaintiff and his witnesses is accepted as correct, truthful, reliable and more probable than defendant's. The plaintiff made a good impression.

⁸ Pleadings bundle page 97.

[16] The words published at the aforesaid meeting was intended to defame the plaintiff and was clearly of and concerning the plaintiff, as well as wrongful.

[17] First defendant and his witness was perceived to be untruthful and argumentative and has contradicted each other on material aspects. First defendant boldly denied that plaintiff was discussed during the meeting of 16 July 2012, although his witness statement and evidence of his witness, Mr Nangombe, contradicted him. I find it superfluous to list all the contradictions and evasions. It suffices to conclude that first defendant blissfully refused to accept accountability for his unsubstantiated uttering which adversely affected the dignity and reputation of the plaintiff.

[18] First defendant's belated attempt to bolster his denial of uttering the defamatory words, by submitting that if the meeting was conducted in the official language, he could not have published those words or statement because he is unable to speak or understand the official language, is rejected. Neither the witness statement of the first defendant, nor his plea supported him. Although the court accorded the first defendant the benefit and courtesy of interpretation from the second session onwards when he became unrepresented, first defendant's feigned incomprehension of the English language is rejected as untruthful.

Quantum⁹

[19] As stated by Damaseb JP in *Ndeitunga v Kavaongelwa*¹⁰, the court has a wide discretion when it comes to quantum, to be exercised judicially guided by comparable awards in previous cases. The highest award approved by the Supreme Court is that in

⁹ *Ndeitunga v Kavaongelwa* (I 3967/2009) [2016] NAHCMD 99 (11 April 2016).

¹⁰ *Ibid* 10.

*Trusco Group International Ltd and Others v Shikongo*¹¹ where an award of N\$175 000 by the High Court for defamation was reduced to N\$ 100 000 on appeal. The plaintiff's claim is N\$ 100 000.00.

[20] However, Damaseb JP further stated that in the matter of *Trusco Group International Ltd and Others v Shikongo*¹², O'Regan AJA pointed out the difficulty in quantifying harm to reputation in monetary terms. The learned Judge argued that reputation cannot be restored to what it was by a higher award and less restored by a lower one. Rather, it is the judicial finding in favour of the integrity of the plaintiff that vindicates his or her reputation and not necessarily the amount that he or she receives as damages.¹³

[21] The nature of the defamatory statement was serious. The extent of the publication of the defamatory statement was aggravated by the repetition thereof which reached the national membership of the MUN. No apology was ever made. The effect of the statement on plaintiff was that his career in MUN was effectively destroyed.¹⁴

[22] The court finds in favour of the plaintiff and the following order is made:

1. Plaintiff succeeds in his defamation claim against the defendant.
2. Plaintiff is awarded damages in the amount of N\$60 000.00 for injury to his dignity and reputation.
3. Interest on the amount of N\$60 000.00 at the rate of 20% per annum a tempore morae from date of judgment to date of final payment.
4. Cost of suit.

¹¹ 2010 (2) NR 377 (SC).

¹² Ibid 12.

¹³ At 403C-E. See further cases of *Nuule v Kambwela* (I 629-2009) [2014] NAHCMD 219 (21 July 2014) and *University of Namibia v Kaaronda* (I 1838/2010) [2012] NAHCMD 221 (23 July 2014).

¹⁴ *Mbura v Katjiri* (I4382/2013) [2014] NAHCMD 265 (30 July 2014).

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF: Mr Viljoen
From Viljoen & Associates, Windhoek

FIRST DEFENDANT: Mr Nehemia
Litigant in person