

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,

CASE NO: HC-MD-CIV-ACT-



MAIN DIVISION, WINDHOEK

OTH-2021/00538

In the matter between:

MONICA GEINGOS (BORN KALONDO)

PLAINTIFF

and

ABEN LINOOVENE (BISHOP) HISHOONO

DEFENDANT

Neutral Citation: *Geingos v Hishoono* (HC-MD-CIV-ACT-OTH-2021/00538 [2021] NAHCMD 48 (11 February 2022))

CORAM: SIBEYA J

Heard: 07 – 08 February 2022

Delivered: 11 February 2022

Flynote: Delict – Defamation – Claim arising from a video clip recorded and distributed on social media where slanderous averments were made against the plaintiff – Averments made seemingly of a political nature wherein the collapse of Air Namibia was opined to be as a result of the plaintiff being in cahoots with other agents to ensure same for personal gain; that the President was married to plaintiff after she was supplied to him by plaintiff's alleged boyfriend with whom she bore a child and questions how that was possible, amongst others – Defendant adamant that the allegations stated in the video were mentioned in the public interest due to the continuity of the reported ongoing state corruption – Court found that allegations in the video were made recklessly without care of consequential harm to plaintiff and her family – Allegations found to be malicious, false and harmful to plaintiff in her reputation, dignity and esteem in the community together with that of her family –

Defendant failed to demonstrate that he made the allegations in the public interest – Court of the view that the plaintiff proved that she is entitled to damages for aggravated defamation based on both reputation and dignity. Caution issued that words have consequences.

Summary: The plaintiff instituted action and claimed an amount of N\$350 000 plus interest and costs on a punitive scale of attorney and own client with a further prayer for an order to declare statements made in the video clip, the subject of the claim, as false and further seek an order to direct the defendant to unconditionally retract the said statements and unreservedly apologize to the plaintiff within 5 (five) days of court order for the harm caused.

The defendant defended the claim primarily on the basis that the statements allegedly used by the defendant in the video clip were not made with intention to injure the plaintiff's reputation and dignity as they concerned a matter of public interest relating to ongoing state corruption. He stated that his intention was to further obtain clarity on the activities of the plaintiff as a public office holder.

When assessing defences in relation to defamation matters, the test is whether, in the mind of a reasonable person, the words used, objectively viewed, serve to undermine, or impair a person's good name or reputation in the community. Further discussed in this matter is the determination whether the defendant violated the dignity of the plaintiff and whether such constitutes defamation.

Held – That the violation one's dignity through defamatory statements may lead to damages being awarded based on such violation.

Held – That there is no distinction in moral blameworthiness between the creator of the rumour and conveyor of the rumour. Both factions must be discouraged and it must be known to everybody that whether you create the rumour or repeat it or simply say words capable of tarnishing one's reputation or dignity without a valid defence in law, it amounts to words spoken that carry the same liability.

Held – That the statements made by the defendant in the video recording are found to be defamatory to the plaintiff and her family.

Held – That a modicum of difficulty or doubt, that on the facts of this case, the defendant failed to demonstrate in evidence that indeed he made the allegations in the public interest. Surfing through the evidence of the defendant reveals no valid defence in law to the plaintiff's claim, and such defence therefore falls by the wayside.

Held – That it is aggravating that the defamatory statements were made by a leader in society. A teacher and a political mobilizer who undoubtedly is looked up to by some of the members of the community. Leaders and educated persons, the defendant alike, should assist to breathe life in our Constitution by protecting fundamental rights and freedoms enshrined therein, inclusive of the respect for human dignity.

Held further – That it is difficult to quantify harm to reputation and dignity in monetary terms. A higher award does not restore an injury to reputation and dignity. It is not necessarily the damages awarded that vindicates the injury caused to the reputation and dignity of the plaintiff, but the judicial finding in favour of the plaintiff.

Held – That the aggravated defamation in this matter is befitting with high compensation to be awarded to the plaintiff and the award reflects such aggravation.

ORDER

1. The plaintiff's claim for damages is granted in the amount of N\$250,000.
2. Interest on the aforesaid amount of N\$250,000 at the rate of 20% per annum calculated from the date of judgment to the date of final payment.

3. The statements made by the defendant as quoted in para 4 of the Particulars of Claim are hereby declared false and defamatory to the plaintiff.
 4. The defendant must unconditionally retract the statements quoted in para 4 of the particulars of claim and unreservedly apologize to the plaintiff within 5 (five) days of the date of the Court Order, for the harm and damage occasioned by his defamatory statements.
 5. Costs of suit.
 6. The matter is regarded finalised and removed from the roll.
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JUDGMENT

SIBEYA J:

Introduction

[1] Rhonda Jones, a Christian meditator, in her article titled Depression & Negative Thoughts said the following regarding the power of thoughts and words:

‘Watch your thoughts, they become words. Watch your words, they become actions. Watch your actions, they become habits. Watch your habits, they become character. Watch your character, for it become your destiny.’

[2] As recent as 08 February 2022, in the House of Commons of the United Kingdom, while rebuking the British Prime Minister Boris Johnson for words uttered, the speaker, Sir Lyndsay Hoyle set the record straight on the effect of words when he said that:

‘Our words have consequences and we should always be mindful of the fact.’

Background

[3] This court is seized with a defamation claim arising from a video clip recorded by the defendant and distributed on social media where slanderous allegations were made against the plaintiff.

[4] The plaintiff resultantly instituted action and claimed damages in the amount of N\$350 000, plus interest and costs on a punitive scale of attorney and own client. Plaintiff further prays for an order declaring statements made in the video clip as false and also seeks an order directing the defendant to unconditionally retract the said statements and unreservedly apologize to her within 5 (five) days of the court order for the harm caused. The claim is defended.

The parties and their representation

[5] The plaintiff is Mrs. Monica Geingos (born Kalondo), an adult female and First Lady of the Republic of Namibia by virtue of her marriage to Dr. Hage G. Geingob, the President of the Republic of Namibia. She resides in Windhoek, Republic of Namibia.

[6] The defendant is Mr. Abed Linoovene (Bishop) Hishoono, a Namibian adult male teacher at Elao Primary School in Ohangwena Region and a mobiliser of the Independent Patriots for Change (IPC), a political party in the Republic of Namibia.

[7] The plaintiff is represented by Mr. S. Namandje while the defendant is unrepresented and acts in person.

The pleadings

[8] The plaintiff alleged in the particulars of claim that between 12 – 16 February 2021, the defendant authored and featured in a video recording which he widely circulated where false suggestions and insinuations were made about the plaintiff to the effect that:

(a) She was clandestinely involved in the collapse of Air Namibia through her business interest with Westair Aviation where she has an interest or is a shareholder and was instrumental in its establishment;

(b) She corruptly influenced decisions regarding the liquidation of Air Namibia in order to protect her economic interest;

(c) She is a girlfriend to and bore a son with Hatuikulipi who is in police custody and that the said Hatuikulipi arranged and procured the plaintiff for marriage to the President of the Republic of Namibia.

[9] The particulars of claim quote the contents of the said video recording, which were made in Oshiwambo language and translated to English by a sworn translator, verbatim, as follows:

'Traffic by road. Mode of transport by road, rail, marine and air. As our mode of traffic by air in Namibia, we have Namibian airplanes and say a Namibian airline. A Namibian airline which fly visitors across, in and out of Namibia and thereby generating an income. In between there, when this President of Nashoono came to power, the very one who is under discussion here. There were voyages amongst the Namibian airline and some of these airlines belongs to the spouse of the President, it seems.

Know that the President was availed a wife by Hatuikulipi. Hatuikulipi is the one who supplied the President a spouse. The very one, the one and only Monica, who is a girlfriend to Hatuikulipi and they even parented a child together, a full-grown son, who is over the age of twenty years. And the very same Hatuikulipi who presented Monica is a friend to Geingob. How can you be connected by a woman as such, to join you, a President and a thief together? So the airplanes that were flying over there, belongs to Monica.

A company named WestAir was found. Some professionals came together and initiate (sic) their company, a voyage company, WestAir. For WestAir to thrive they first have (sic) destroy Air Namibia. The state owned airline Air Namibia must be unproductive so that westAir can get customers, the visitors must use WestAir Aviation flights, and to whom will the money go? It must go to them, the very ones. WestAir was established extraordinarily, so that Air Namibia can fall. Do you understand that? Watch out. The country is dented. Some does (sic) not know that Monica they, (sic) hold shares in WestAir.

WestAir is now the airline of choice, all the flights in Namibia are now considered for them. Visitors must come into the country, we need tourism, which brings in much needed revenue, to the country. When visitors come to watch our elephants and our country and so forth, for them to come here they have to fly in, which belongs to who? If it does not belong to Namibia, to whom does it belong? It belongs to WestAir. To whom does WestAir belong? It belongs to Monica. Whose wife is Monica? She is Geingob's wife. Given to him by who? By Hatuikulipi. Where is Hatuikulipi? He is in jail. Oh well! Welcome to Namibia. That is how things are. That is all I can inform you about, for today, so you know. That is where I end for now. Have a blessed weekend.'

[10] Plaintiff claims that the above-mentioned statements were intended by the defendant to mean and were understood by persons who acquired knowledge of same that the plaintiff is corrupt, greedy, conspired with others to corruptly and inappropriately collapse the airline Air Namibia and corruptly used her influence to disadvantage Namibian people.

[11] Plaintiff further claims that the said statements are false and defamatory. She alleges further that the defendant had no factual basis to make such allegations which were meant to injure plaintiff's reputation and dignity. Defendant used his position of power to legitimize and give credence to his false statements. The distribution of such statements by the defendant gravely injured the plaintiff's reputation and dignity and lowered her esteem in the eyes of the right-thinking members of the Namibian community and others elsewhere who acquired knowledge of such statements, so plaintiff claims.

[12] The defendant, in his plea, which was filed with the assistance of his erstwhile legal representatives, Henry Shimutwikeneni & Co Inc, denied the allegations that he recorded the video in question as stipulated by the plaintiff in the particulars of claim. The defendant proceeded to plead that, if it is found that he made and published the innuendos alleged, then he denies that they were intended to mean and that they were understood by persons to whom they were published to mean that there was an improper link between the plaintiff (a public official), and Westair Aviation. This is premised on the allegation that the plaintiff is the First Lady of the Republic of Namibia and a public official with influence on the decisions of the government or the

state of Namibia, as such, her office is inextricably linked to the Presidency, so the defendant pleaded.

[13] The defendant pleaded further that the plaintiff plays an operational role in Stimulus Investments Limited Namibia (Stimulus Investments) where she has an interest while Stimulus Investments, in turn, has an interest in Westair Aviation. He further pleaded that the President has been painted with corruption allegations such as the fishrot saga.

[14] The defendant pleaded in the further alternative that if the words that he is alleged to have used were understood as suggested, then, in the premises, the statements were not made with intention to injure the plaintiff's reputation and dignity because such statements concerned a matter of public interest relating to ongoing state corruption. His intention was to further obtain clarity on the activities of the plaintiff as a public office holder, so he pleaded.

Issues for determination

[15] In terms of the joint pre-trial report dated 06 July 2021, which was prepared by the parties at the time when the defendant still had the benefit of legal representation, the contents of which was made an order of court on 21 September 2021, this matter was referred to trial for the determination of the following relevant issues:

- (a) Whether or not the defendant featured in a video, widely circulated, where he made slanderous allegations against the plaintiff and he circulated same?
- (b) Whether or not the averments made by the defendant in the video were true?
- (c) Whether or not the allegations made by the defendant were intended to defame the plaintiff and harm her feelings and dignity?
- (d) Whether or not statements made constituted a statement of fact or fair comment regarding a matter of public interest?

[16] It is worth mentioning that the pre-trial report listed agreed facts between the parties which included:

- (a) The fact that the plaintiff is the First Lady of the Republic of Namibia by virtue of her marriage to the President.
- (b) The accolades of the plaintiff as set out herein above.
- (c) That the allegations made in the video were made towards the plaintiff.

[17] With the opportunity presenting itself to address the above-mentioned issues, it is now appropriate to consider the evidence led by the parties.

Plaintiff's case

[18] In a quest to prove her claim, the plaintiff took to the stand and testified as the sole witness for her case. She testified, *inter alia*, that: she is the First Lady by virtue of her marriage to the President, a lawyer by training and an accomplished business executive in private equity with over 20 years of experience in the financial sector. She testified that she is the founder and chairperson of One Economy Foundation, a foundation established to uplift people out of poverty and fight against existing economic inequality. She further stated that her work in various areas of the economy received recognition both domestically in Namibia and internationally. She was also appointed as the UNAIDS Special Advocate for Young Women and Adolescent Girls.

[19] Plaintiff testified further that amongst the accolades received, she was awarded the National Honours (most distinguished order of Namibia) by the former President, Hifikepunye Pohamba for her contribution to the socio-economic development of Namibia. She was also inducted into the Namibia Business Hall of fame. The media publications rated her as one of Africa's top 100 economic leaders.

[20] It was her testimony further that before becoming the First lady in 2015, she was a co-shareholder and Managing Director of Namibia's largest private equity fund for over a decade, during which period, she served on several Boards of public and private companies. She served as a member of the President's Economic Advisory

Council, the governing party's Think Tank and the National Council of the Namibia Chamber of Commerce and Industry.

[21] She further testified that the defendant, a teacher and a Regional Mobilizer for IPC in Ohangwena Region circulated a video on social media platforms where he made defamatory statements against her. A day before her wedding anniversary, 13 February 2021, she was alerted by another person to a video clip circulating on social media. After watching the video, she was shocked to see the defendant state with confidence, false and defamatory statements about her. She denied the allegations in the video as devoid of any truth. She said that the allegations were aimed to injure her good reputation and violate her dignity as well as that of her family, including her children, who were subjected to public stigmatization.

[22] It was plaintiff's further testimony that out of the persons named Hatukulipi in jail, she only knows Mr. James Hatukulipi (Mr. Hatukulipi) who was her school mate and a colleague at the university and in the finance field. She had no sexual relationship with Mr. Hatukulipi neither does she have a child fathered by Mr. Hatukulipi. As somebody she knew, she requested Mr. Hatukulipi who was in London to bring along the President's suit to Namibia which was already paid for, and he brought it. She stated further that no friendship exists between the President and Mr. Hatukulipi.

[23] She denied owning any airline or Westair and further denied knowledge of or being part of any plan to collapse Air Namibia. The allegations of collapsing Air Namibia were made when Air Namibia was an emotive public issue as by the time over 600 employees were due to lose employment.

[24] She testified that she was a Managing Director of Stimulus Investments which had an interest in an entity called Westair Maintenance but not Westair Aviation, which is a different entity. There was no competition between Westair Maintenance and Air Namibia. At times Westair Maintenance rendered services to Air Namibia. The interest of Stimulus Investments in Westair Maintenance came to an end on 17 February 2011, so she testified. She resigned from being an operational director at Stimulus Investments in 2015 and just remained as a director and shareholder.

[25] She testified further that as First Lady, she has no influence in operations of state-owned companies.

[26] She testified that, after she issued summons against the defendant, he persisted in his conduct by making a statement on his Facebook account that:

'Meet Abed Hishoono,

The first man ever to be sued by the first lady in Namibia, if not in the whole world.'

[27] She further testified that in another Facebook post, made after summons were issued, the defendant said:

'She must just come, maybe she wants me.'¹

[28] It was her evidence, that she was abused on social media platforms as a result of the allegations made by the defendant. In her view, the defamatory statements were aggravated by the fact that the defendant, in his plea, sought to injure her name even further by suggesting that, on account of her marriage to the President alone, means that she is corrupt. This was a politically motivated attack on her because of her marriage to the President, as the defendant distributed the video in attempt to score cheap political points at the expense of her reputation and dignity. She stated that the video was aimed at delegitimizing the president and dehumanizing her in the process.

[29] She testified further that, the defendant's father and her father are good friends and that she regarded the defendant's father as part of her family. It was this close relationship that made her contact the defendant's father and apologised to him for intending to institute these proceedings against the defendant.

[30] In cross-examination, the defendant put to the plaintiff that he apologised to her. The plaintiff responded that the apology was never presented to her and when it came to her attention, she rejected it as the defendant still persisted in his defamatory statements. The defendant further questioned the plaintiff that she had in

¹ Exhibit "B".

the past being subjected to several insults but instituted no action and the current claim was only instituted against him out of political motivation. The plaintiff responded that as First Lady she was indeed subjected to several insults and decided to have a thick skin and absorb such insults, but the defendant became an exception when he involved her children. She decided to protect her children. She further realised that when the President steps down, she will be 48 years old and may need to return to the private sector when her reputation has been tarnished. The video was above all extremely degrading, she stated.

Defendant's case

[31] The defendant was equally the sole witness for his case. He testified, *inter alia*, that in February 2021, after the news of the liquidation of Air Namibia, he wondered where the nation was headed to. He knew that the plaintiff was involved with Fly Westair, and he believed that since Fly Westair was competing with Air Namibia for customers, the demise of Air Namibia would benefit Fly WestAir. He recorded a video clip of himself, whereafter he posted the video clip on a WhatsApp Group. He later realised that the information posted on the video clip was not accurate, after which, he retracted the allegations and issued an apology to the Plaintiff (circulated widely on social media) in the same manner that he made the video, so he stated. He deleted the initial video and left social groups where people kept circulating the first video.

[32] The defendant further testified that the plaintiff has a child fathered by Mr. James Hatukulipi who is the President's friend. His source of this information was that this was news widely circulating. He proceeded to state that it was all over the newspapers that the President was named in the Fishrot documents. He referred to the said information as "national hearsay". He testified further that he regrets publishing the video without accurate information hence he issued the apology to the plaintiff and her family.

[33] In cross-examination by Mr. Namandje, the defendant conceded that he is a leader in his class at school and politically he is a leader during political campaigns.

When asked as to what caused him to record the video, the defendant stated that it was due to the collapse of Air Namibia. He confirmed when further questioned that he had no independent knowledge of the correctness of the allegations made in the video. Pressed further on the purpose of the video, it was put to the defendant that the allegation that Mr. Hatuikulipi supplied the plaintiff, as a wife, to the President is unrelated to the demise of Air Namibia, to which the defendant responded that, on that score, he only intended to inform his friends and the public that Mr. Hatuikulipi made available a wife to the President. This information according to the defendant emanated from social media which he was simply repeating. The defendant repeatedly stated that all what he said in the video was to repeat the rumours circulating in the country. He said he fell victim to rumour mongering. (My emphasis). He also stated that his intention in recording the video was to inform the people of the content of the video.

[34] When asked that in the video he suggests that the plaintiff was a girlfriend to Mr. Hatuikulipi and that the two had a child together, the defendant answered in the affirmative and further said that this allegation was based on the rumour which he heard, but could also not state where the rumour originated from.

[35] It was his testimony that he knew that people were angry about the liquidation of Air Namibia and as a politician he opted to act by recording the video and shared it with one group of persons on social media. He, however did not put a caveat to prevent the circulation of the video to unintended persons.

[36] When further questioned that by failing to verify the allegations made in the video, he was reckless, the defendant conceded that he had no concrete facts or information on which to base his allegations and had he been careful he would not have made the allegations. On the version of the plaintiff that the allegations injured her reputation and dignity, the defendant said that the video was not intended for the plaintiff's eyes to see.

Analysis of evidence

[37] Damaseb JP in *Dannecker v Leopard Tours Car and Camping Hire CC*² restated the trite legal principle that he who alleges must prove his allegation on a balance of probabilities in order to sustain the claim, as follows:

[44] It is trite that he who alleges must prove. A duty rests on a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that his or her claim or defence, as the case may be, should succeed. A three-legged approach was stated in *Pillay v Krishna* 1946 AD 946 at 951-2 as follows: The first rule is that the party who claims something from another in a court of law has the duty to satisfy the court that it is entitled to the relief sought. Secondly, where the party against whom the claim is made sets up a special defence, it is regarded in respect of that defence as being the claimant: for the special defence to be upheld the defendant must satisfy the court that it is entitled to succeed on it. As the learned authors Zeffert *et al South African law of Evidence* (2ed) at 57 argue, the first two rules have been read to mean that the plaintiff must first prove his or her claim unless it be admitted and then the defendant his plea since he is the plaintiff as far as that goes. The third rule is that he who asserts proves and not he who denies: a mere denial of facts which is absolute does not place the burden of proof on he who denies but rather on the one who alleges. As was observed by Davis AJA, each party may bear a burden of proof on several and distinct issues save that the burden on proving the claim supersedes the burden of proving the defence.'

[38] Against the backdrop of the above established principle, I venture into the analysis of the evidence presented. It should be stated at the outset that the plaintiff claims that the whole video is defamatory as a result of which she seeks damages arising from injury to her reputation and dignity. Ordinarily defamation laws are aimed at protecting a person's right to unimpaired reputation and good name. Reputation is the reflection which the individual has in the eyes of the society.³ In *casu*, the plaintiff extends her defamation claim to include damages for the violation of her dignity. The right for human dignity is entrenched in our Constitution which provides that:

'Article 8 Respect for Human Dignity

(1) The dignity of all persons shall be inviolable...'

² *Dannecker v Leopard Tours Car and Camping Hire CC* (I2909/2016) [2016] NAHCMD 381 (5 December 2016) at para 44-45.

³ See: Burchell, JM. *The Law of Defamation in South Africa*. Juta: Cape Town, 1985, p. 18, para 1.

[39] In motivating a claim for damages based on defamation for violation of dignity, Mr. Namandje referred the court to the following passage by Sachs J from the South African Constitutional Court matter of *Masetlha v President of South Africa and Another*⁴ where the following was said regarding respect for one's career and reputation:

[236] ... People live not by bread alone; indeed, in the case of career functionaries, reputation and bread are often inseparable.'

[40] I endorse the above remarks, as one's career and reputation, more often than not, bring bread to the table. Career, reputation and bread are so entangled, in my view, that it is difficult to separate them, just as the proverbial attempt to separate salt from water in which it is dissolved. Career and reputation not only define one's life but one lives by his or her career and reputation. Human dignity is one of the established pillars of our Constitution.

[41] Article 5 of our Constitution sets the tone for the protection of fundamental rights and freedoms, including the protection for human dignity, as follows:

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the Courts in the manner hereinafter prescribed.'

[42] The South African apex Court, the Constitutional Court, captured the value of dignity significantly in words that we historically and legally relate to, when Justice O'Regan in the matter of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister Minister of Home Affairs and Others*, said that:⁵

'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South

⁴ *Masetlha v President of South Africa and Another* 2008 (1) SA 566 (CC).

⁵ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation analysis.’

[43] The constitutional interpretation in my view finds further support from Articles 25 (3) and (4) of the Constitution.⁶ What immediately comes to mind at this stage is what has come to be known as exceptionalism of the Constitution. This is where courts have said that where a dispute can be resolved at common law without getting to the Constitution regard should not be had to the Constitution in resolving the dispute. Moseneke DCJ (as he then was) in his judicial memoir titled *All Rise*⁷ discussed exceptionalism of the Constitution. He states the following at p. 95 – 96:

‘The difficulty preoccupied the early cases of the Constitutional Court, which understood the hierarchy to mean that other courts had to avoid reaching a constitutional issue if the dispute could be resolved through the common law only. In this way the space to decide a dispute under the Constitution became exceptional and ordinarily a forensic plague to be avoided.

Perhaps the clearest statement on the exceptionalism of the Constitution was found in *S v Mhlungu*.⁸ Kentridge AJ explained: “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.⁹ Other early decisions of the

⁶ Article 25 ‘(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.’

⁷ Dikgang Moseneke, *All Rise*, A Judicial memoir published in 2020, Picador Africa, South Africa.

⁸ *S v Mhlungu* 1995 (3) SA 867 (CC).

⁹ *S v Mhlungu (supra)* at para 59.

Constitutional Court followed this unfortunate and contested route to sideline the supreme law.¹⁰

Despite its diversion over the true reach of its power to decide constitutional matters, the Constitutional Court made remarkable headway on substantive issues that otherwise came to it. These were cases where the court had original power or jurisdiction given to it directly by the Constitution or constitutional issues referred to it by the other courts.’

[44] The constitution is the law which all other laws, common law and statutory laws, must conform to.¹¹ The constitution is therefore the point of departure in a quest to protect the fundamental rights and freedoms. The Supreme law, in my view, serve as the foundation on which all laws are based. It further serves as the yardstick where the validity of common law or statutory law is measured. The constitution is therefore the *grundnorm*, the importance of which, as a society we cannot afford to side step, and focus on common law and statutory law only in attempt resolve disputes. It is the law which amongst all laws reflect the values of the Namibian people. On the subject of dignity under discussion, over and above the protection of human dignity provided for in Art 8, the preamble of the Constitution underscores the critical importance for protection of human dignity. It provides that:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; Whereas the rights include the rights of the individual to life, liberty and pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status ...

Whereas these rights have for so long been denied to the Namibian people by colonialism, racism and apartheid ...

Whereas we the people of Namibia – desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation...

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.’

[45] It follows from the above Constitutional provisions and interpretation that where one’s dignity is violated through defamatory statements, the protection

¹⁰ *S v Bequint* [1996] ZACC 21; 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC); *De Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (CC); *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC); and *S v Vermaans, S v Du Plessis* [1995] ZACC 5; 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC).

¹¹ Article 1(6) and Art 66 of the Constitution.

provided for in the Constitution cannot be sidestepped. The Constitution, in my view, is the starting point to enforce the guarantee provided for therein, including the guarantee that human dignity shall be inviolable. Damages sustained as a result of the violation of human dignity, including damages arising from defamation, may be awarded to the injured party. It must be understood that the Framers of the Constitution created a constitution designed to, *inter alia*, preserve self-rule, respect for and enforcement of human rights and freedoms. The Constitution, which is a document rich in content and revealing of the values and aspirations of the Namibian people, and literally, the identity of the Namibian people, should not be left to gather dust in book shelves but to be actively utilised by the Courts in order breathe life and meaning into it and operationalise its provisions. The guarantees for the protection of fundamental rights and freedoms provided for in the Constitution can be better appreciated and enjoyed by the Namibian people when the Constitution is considered by the courts in adjudicating disputes between the parties.

[46] This court in *Shikongo v Trustco Group International Ltd and Others (supra)* traced the history of the law of defamation and stated, *inter alia*, that violation of a person's dignity is defamatory. In discussing defamation, Muller J said the following:

[32] The law of defamation was established in the Roman law. It did not much change under the Roman-Dutch law. The law of defamation considers the protection of the personality rights of a person. Reference is usually made in respect of the well-known triad of the Roman law regarding *injuria*, namely *corpus*, *fama* and *dignitas*. *Fama* concerns the reputation of a person while the other rights that were also protected concerned the body of a person (*corpus*) and his dignity (*dignitas*). These were separate rights. *Fama* and *dignitas* were separately protected:

“While the Courts identify, recognise and protect *corpus* (body) and *fama* (good name) as separate, delimited aspects of personality, views on the meaning and significance of the term *dignitas* vary considerably.”

It is recognised that *dignitas* has a wide meaning which is a collective term for all personality rights with the exception of the right to a good name and the right to bodily integrity. According to the well-known author Melius de Villiers *dignitas* should be widely interpreted and encompasses all aspects of the legally protected personality, except *corpus* and *fama*.

On the other hand, defamation emphasises an objective element and the plaintiff's emotional reaction is of secondary importance.

[33] The infringement of a person's reputation (*fama*) must be objectively evaluated, while dignity has a subjective element. The essential difference is what others think of a person (reputation) and what he thinks of himself (dignity). Perhaps due to the English influence, dignity was sometimes described by the word 'character', while *fama* was sometimes described by the word 'honour'. In South African case law dignity and *fama* (reputation) have sometimes been used together and not separately with their own specific protections...'

[47] Reputation and dignity are two distinct concepts. Reputation, as stated before, constitutes the perception and good name of a person in the eyes of the community. Dignity which is inviolable, as per the Constitution, is a given. Everyone has it for inherently being human and cannot be taken away. The right to life, would mean less, without respect for human dignity. That is the magnitude of dignity. Respect for reputation and dignity of others is a requirement of law with consequences for defaulters.

[48] The training, work experience and accolades of the plaintiff set out herein above are not in dispute and are adorable by any standard. They are accolades which deserve to be celebrated. People must be encouraged to take pride and celebrate in the successes of fellow citizens and any attempts to tarnish the image of such persons must be rebuked in the strongest words.

[49] As a matter of fact, the defendant stated on record that he has recently come to know that the plaintiff is, in his own words, a good person who helps people in general and children in particular and that he would not want to trouble such a person. This cements the good reputation that the plaintiff has which deserves protection. I dare say, that even if the plaintiff did not possess all her wonderful accolades and that she was not a highly rated individual, her reputation would still demand protection.

[50] It is plaintiff's undisputed evidence that the content of the video recording injured her reputation, harmed her feelings and dignity. The allegations also affected

her family, including the children. The allegations of business assassination of Air Namibia also harmed her.

[51] She testified that the defendant made the allegations out of pure malice and for political reasons. It was her evidence that it appeared that the allegations were aimed at the President and tarnished her in the process. This, conclusion of the plaintiff finds corroboration in the dissection of the allegations contained in the video. In the first paragraph of the transcribed statement of the video, as per paragraph 4 of the particulars of claim, the statement mentions the President, that "...When the President ... came to power, the very one who is under discussion here." In the second paragraph, the statement reveals the sentence that: "Hatuikulipi is the one who supplied the President a spouse... How can you be connected by a woman as such, to join you, a President and a thief together?"

[52] The said statements support the conclusion that the defendant's statements made in the video were aimed at the President. The plaintiff, unfortunately, appears to have been casualty or collateral damage in the firing line directed to the President.

[53] The plaintiff further testified undisputedly that the allegations made by the defendant were aggravated by the further statements which he made after receiving summons when he publicly stated on social media that he was the first man ever to be sued by the First Lady of Namibia, if not in the whole world. Plaintiff further testified that a statement on the defendant's Facebook account that "she must come if she wants me" suggested that plaintiff wanted the defendant in a sexual manner and this was hurtful. She was further hurt by the allegations that she was supplied for marriage to the President, as if she was a commodity.

The law of defamation

[54] The Supreme Court in *Trustco Group International Ltd and Others v Shikongo*¹² set out the law of defamation in para [24] as follows:

¹² *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC).

'The law of defamation in Namibia is based on the *actio injuriarum* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). 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. The list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.'

[55] 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.¹³ Reasonable readers take into consideration, not only what the words used expressly state but also the implication of the words used.

Application of the law to the facts and analysis of the evidence

[56] When one assesses the said defence in this matter in particular where several admissions were made by the defendant, it is vital to bear mind the test applicable to defamation cases. It is whether or not, in the mind of a reasonable person, the words used tend to undermine, or impair a person's good name or reputation in the community and whether such words violate the person's dignity. This is an objective test.

[57] With the test in mind it is critical at this state to point out the following admissions made by the defendant in respect of the averments and evidence led by the plaintiff:

(a) That he is a teacher at Elao Primary School in Ohangwena Region and a Regional Mobizer for IPC in the Ohangwena Region;

(b) That in February 2021, he recorded himself in a video where he spoke in Oshiwambo language, the words whose sworn translation into the English language is stipulated in para 4 of the plaintiff's particulars of claim;

¹³ South African Associated Newspapers Ltd and Another v Yutar 1969 (2) SA 442 (A) 451.

(c) That after recording the video, he posted it on a WhatsApp Group, a social media platform, without a caveat preventing further circulation of the said video;

(d) That the allegations made in the video that Mr. Hatuikulipi supplied the plaintiff to the President for marriage; that plaintiff is a girlfriend to Mr. Hatuikulipi and that they bore a child together; that Mr. Hatuikulipi is a friend to the President; that the plaintiff owns an airline Westair; that the plaintiff and others connived to bring out the demise and liquidation of Air Namibia; that the plaintiff is a public official with influence in the decisions of the government, were based on alleged rumours that were circulating in the country which he called “national hearsay”, thus unverified;

(e) That the words used in the video were made recklessly and that had he been careful, he would not have mentioned the allegations in the video;

(f) That the words mentioned in the video could injure the reputation and dignity of the plaintiff;

(g) That he was sorry for the allegations made in the video and asked for forgiveness from the plaintiff for the injury caused to her.

[58] Notwithstanding the above admissions, the defendant appears to be adamant that the allegations stated in the video were mentioned in the public interest due to the continuity of the reported ongoing state corruption. Can this be said to be a valid defence in law to the plaintiff’s claim? I ask.

[59] I find that the words used by the defendant in the video recording are harmful to the good name and reputation of the plaintiff and violates the plaintiff’s dignity and that of her family. Therefore, the statements are defamatory in nature.

[60] The difficulty that the defendant finds himself in is that he did not care about the possible harm that his video would cause to the plaintiff. His evidence that he relied on rumours offers him no shelter. It has been argued that it is better to repeat a rumour than to create it. Contrariwise, other protagonists argue that the one who repeats a rumour is in a worse off position because he keeps unfounded allegations alive even beyond the life that the creator, in his mind, accorded to the rumour. This is a debate capable of lasting until eternity and one that I am not prepared to engage

in. Suffice to state that, in my view, there is no distinction on moral blameworthiness on the creator of the rumour and conveyor of such rumour. Both factions, if I may label them in that fashion, must be discouraged and it must be known to everybody that whether you create the rumour or repeat it or simply say words capable of tarnishing one's reputation or dignity without a valid defence in law, it amounts to words spoken and that carries the same liability.¹⁴ Caution to all and sundry: words have consequences.

[61] The statements made in the video are catchy to people who come to have sight of it. They refer to the President being supplied with a wife by the wife's boyfriend with whom she bore a child; they state that the First Lady corruptly assassinated Air Namibia, the then national airline of pride and a national treasure and depict the plaintiff as a greedy and selfish person with no Namibian people's interest at heart, yet she is the mother of the nation. These remarks are like a rainbow shining in the sky that a person can hardly just glance at it once and ignore. To the contrary, they command a relook twice or even more. That is how inviting the allegations are and where such allegations are unfounded, that is how severely tarnishing they become.

[62] Without beating about the bush, I hold without a modicum of difficulty or doubt, that in the premises and on the facts of this case, the defendant failed to demonstrate in evidence that indeed he made the allegations in the public interest. Surfing through the evidence of the defendant reveals no valid defence in law to the plaintiff's claim. The defence that the allegations were made in the public interest thus fall by the wayside.

[63] The plaintiff testified in a forthright manner, clearly expressed the injury sustained to her good name as well as her reputation and dignity, together with that of her family including children on account of the defendant's unfounded allegations. She has therefore established aggravated defamation.

[64] I find that the video recording was defamatory to the plaintiff and her family in the following respects: It stated that she owned or had an interest in Westair; That

¹⁴ *Tuhafeni Hangua v Trustco Newspaper and Another*, Case No. I 4081/2011, delivered on 26 November 2012, para [45]-[46].

she connivingly caused the demise of Air Namibia; It implied that she is corrupt, greedy, selfish and only cares for her own economic interest with zero consideration for the Namibian people; It stated that she was supplied to the President as a wife implying that she is a commodity incapable of exercising her own independent mind to decide who to marry; It stated that she was a girlfriend to Mr. Hatuikulipi and they bore a child together which allegations were proven to be false and malicious and would have suggested that she lied to her child about his paternity, which is a grave insult to the plaintiff.

Conclusion

[65] The video recording which was politically motivated, is, in the premises, defamatory and injured the plaintiff in her good reputation, violated her dignity together with that of her family, including the children. I find that the plaintiff proved that she sustained damages arising from the aggravated defamation caused to her good reputation and dignity should therefore be entitled to an increased award. The difficult question to be addressed at this stage is what the quantum for the damages sustained should be.

Quantum

[66] The plaintiff contends that considering the aggravated defamation that the defendant is found liable for, damages in the amount of N\$350,000 would be adequate. Plaintiff does not clearly and mathematically set out the calculation that led her to claim the total amount of \$350,000. As expected, it is a mammoth task, even for the injured, to quantify the damages arising from a defamation claim. The court is also not better placed.

[67] A comparative study of similar cases is a useful tool to determine the appropriate award for damages arising from defamation. Masuku J in *Mbura v Katjiri*¹⁵ engaged in a comparative analysis of some of the defamation cases in our jurisdiction in the following manner:

¹⁵ *Mbura v Katjiri* (I 4382-2013) [2017] NAHCMD 103 (31 March 2017).

*'(a) Amunyela v Shaanika*¹⁶

In this matter, the plaintiff, a litigant, was defamed by the defendant, a magistrate in open court. The defendant made various demeaning allegations about the plaintiff, *inter alia*, that he was poor, stupid and had having (*sic*) sexual relations with a named individual. The plaintiff was therefore suspected of having contracted a certain disease by the magistrate. The court, after assessing the evidence, came to the view that the words were uttered in the presence of only a few persons and that the defendant had abused her position as a judicial officer. An award of N\$35 000 was held by the court to be condign.

*(b) Unoovene v Nangolo*¹⁷

In this case, the defendant uttered statements at two separate political gatherings to the effect that the plaintiff's business was funded by stolen money and that if he were to be asked where the money came from, he would be unable to proffer an answer. The court, after taking the circumstances into account and previous awards, came to the conclusion that an award in the amount of N\$60 000 was appropriate.

*(c) Nghiwete v Nekundi*¹⁸

In this case, the plaintiff, a Permanent Secretary in the Ministry of Foreign Affairs attended a dinner on his Minister's behalf at the invitation of the German Ambassador. The defendant, a prominent member of the SWAPO Youth League, attacked the plaintiff, at a press conference, alleging that the plaintiff had brought the country into disrepute by associating himself with certain German diplomats and with members of Namibia's opposition parties, which was untrue. The latter did not take the time to verify the correctness and accuracy of the information he disseminated. The court, after considering the facts of the matter, awarded the plaintiff an amount of N\$ 250 000 and further mulcted the defendant with punitive costs.

*(d) Universal Church of the Kingdom of God (Incorporated Association Not for Gain) v Namzim Newspaper (Pty) Ltd t/a The Southern Times*¹⁹

In this case, the defendant, a newspaper, published an article entitled, 'State Bans Satanic Sect'. In another article, in the same newspaper, the readers were informed that the Zambian

¹⁶ *Amunyela v Shaanika* 2007 (1) NR 146 (HC).

¹⁷ *Unoovene v Nangolo* 2008 (2) NR 497 (HC).

¹⁸ *Nghiwete v Nekundi* 2009 (2) NR 759 (HC).

¹⁹ *Universal Church of the Kingdom of God (Incorporated Association Not for Gain) v Namzim Newspaper (Pty) Ltd t/a The Southern Times* 2009 (1) NR 65 (HC).

chapter of the same church had been banned. The court was of the view that a reasonable reader would conclude that the latter article in question had a bearing on the plaintiff specifically. The court thus awarded the plaintiff an amount of N\$60 000 in damages.

(e) *Trustco Group International Ltd and Others v Shikongo*²⁰

In this matter, the appellant Company, the proprietors of a newspaper, were sued for an article published by their newspaper, to the effect that the Mayor of Windhoek had been involved in an underhand land deal, which was described in the article as a 'Broederbond cartel'. The Supreme Court on appeal, awarded the plaintiff an amount of N\$100 000, overturning an award of N\$175 000 granted by this court. The Supreme Court was of the considered view that the award by this court was extremely high in view of all the circumstances attendant to the matter.

(f) *Nghimtina v Trustco Group International Ltd*²¹

In this matter, the plaintiff sued the defendant for an article published by its newspaper, captioned, 'Nghimtina Hijacks Rural Power Plan to Pamper In-Laws'. This court, after considering comparable awards and the circumstances of the case, awarded damages in the amount of N\$60 000.'

[68] It is well established that the comparison of cases is helpful in quantifying the damages in a defamation claim. I am of the view that the present matter is more serious than all the above cited matters including the matter of *Nghiwete v Nekundi* which received the highest award of N\$250,000 from all the above cases. The allegations, in *casu*, target the President but harmed not only the plaintiff but her children in the process. It can only be imagined how much harm the allegations caused to the plaintiff's children, particularly the concerned son who is said to be about twenty years old and who still has a long life ahead of him. For the reasons stated herein above, it is clear that the harm caused to the plaintiff is unimaginable and the allegations further undermine the good work that the plaintiff is engaged in for the benefit of the Namibian people, including children.

²⁰ *Trustco Group International Ltd and Others v Shikongo* (SA 8/2009) [2010] NASC 6 (7 July 2010).

²¹ *Nghimtina v Trustco Group International Ltd* (I 2976/2010) [2014] NAHCMD 11 (23 January 2014).

[69] Useful as it may be, the comparison of cases cannot be used as a sole and conclusive measure to determine the award, as there is no mathematical formula in quantifying damages for defamation.

[70] Sachs J in *Dikoko v Mokhatla*,²² related to the difficulty that courts face when quantifying damages in defamation cases and said the following:

‘There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person’s reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured, is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

There is something conceptually incongruous in attempting to establish a proportionate relationship between the 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.’

[71] The court in *Muller v SA Associated Newspapers Ltd and Others*²³ set out important factors to be considered in order to determine the quantum and said that:

‘.. 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.’

The character and status of the plaintiff

[72] The plaintiff, the First Lady, is a public figure who has accomplished successes in the business field. She is a woman of independent thinking who led several companies and institutions. She has been engaged in projects aimed at

²² *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para [109] - [110].

²³ *Muller v SA Associated Newspapers Ltd and Others* 1972 (2) SA 589 (C) at 595.

poverty alleviation in Namibia. Her efforts have not gone unnoticed domestically in Namibia and internationally. Her good reputation deserves protection from been trampled on. Her dignity and that of her family is inviolable.

The nature of the words used

[73] The defamatory statements made by the defendant were barbaric to say the least. The defendant attempted to justify his defamatory statements during pleadings which demonstrated further defamation with a conscious, clear as day, that the defamatory statements made, were politically motivated. His motive was therefore to score cheap political points at the detriment of the plaintiff and her family.

The effect of the words and extent of publication

[74] During the trial, with his back against wall, the defendant still attempted to insinuate that, the fact that he used the words “it seems” in the circulated video should diminish his culpability as it would appear to the reader that he had no backing information. I do not agree. The defendant only used the word “it seems” in one of the sentences out of many. He mentioned all other statements as facts and I harbour no doubt that the reasonable persons who watched the video understood the statements as emanating from a resourceful person, whereas in truth and in fact the defendant was just blowing hot air with no regard to the consequences of such statements. This is aggravating.

Apology

[75] The defendant did not produce the alleged apology posted on the social media platform for the court to consider its content and his sincerity. He testified that he posted the said apology in the same way as he posted the defamatory video due to the fact that he had no idea that he could approach the First Lady, given her position. I find this statement not to be true. If the defendant could not approach the plaintiff in person, he was served with summons which revealed the particulars of the legal representatives of the plaintiff but he failed to approach them. He was legally represented during the pre-trial stage yet he made no attempts to apologize directly

to the plaintiff or approach her legal representatives through his erstwhile legal representatives. His concession that the plaintiff's father and his father are close friends and that he went as far as speaking to his father about this matter after the plaintiff apologized to his father regarding her intention to institute summons against the defendant, waters down his explanation for failure to apologise to the plaintiff directly. Why the defendant did not initiate an apology towards the plaintiff through his father at a family level points to one direction, namely that he had no genuine intention to apologise for his actions and this aggravates the defamation.

[76] For what it is worth, the defendant deserves a little bit of mercy for his apology expressed during the court proceedings. The weight of the said apology is minimal to the extent that it does not invite the court to treat the defendant with kid gloves. Even if such invitation would be said to exist, it would be an invitation I would comfortably reject.

[77] It is further aggravating that the defamatory statements were made by a leader in society. A teacher and a political mobilizer who undoubtedly is looked up to by some of the members of the community. Leaders and educated persons, the defendant alike, should assist to breathe life in our Constitution by protecting fundamental rights enshrined therein, inclusive of the respect for human dignity.

[78] It is further aggravating that the defendant portrayed the plaintiff as a liar to his family including the children. She testified that the paternity of her children had never been an issue and has thus been apparent to her family and the children. To suggest that her son was fathered by Mr. Hatuikulipi is to controvert the paternity of her son which has been beyond dispute. This implies that the plaintiff lied to her son about the identity of his father. The defendant therefore painted the plaintiff as a liar, when he linked her son to Mr. Hatuikulipi, which allegation is very serious, demeaning and totally unfounded. It is simply false.

[79] It is also aggravating that the defendant was determined to live through his defamatory statements to the extent that even serving him with summons did not deter him from his unlawful conduct. He proceeded to brag on Facebook that: "Meet Abed Hishoono, the first man ever to be sued by the first lady in Namibia, if not in the

whole world” and further stated on social media, after receiving summons, that: “She must come, maybe she wants me.” These remarks, demonstrate persistence in the defamatory statements made and show no signs of compunction or attempt to withdraw the allegations made in the video when the defendant knew that the said allegations contained unfounded and false statements. This is aggravating.

[80] Courts, have a wide discretion when assessing the quantum to be awarded in defamation claims and such discretion must be exercised judicially as Damaseb JP found in *Ndeitunga v Kavaongelwa*.²⁴

[81] Courts are generally conservative in the award in defamation cases. One of the rationales behind this position is that people should not resort to instituting defamation claims as a means to make profit. Notwithstanding the discretion, it is still difficult to quantify harm to reputation and dignity in monetary terms. A higher award does not restore an injury to reputation and dignity. It is not necessarily the damages awarded that vindicate the injury caused to the reputation and dignity of the plaintiff, but the judicial finding in favour of the plaintiff.²⁵

[82] I find that the aggravated defamation in this matter is befitting of high compensation to be awarded to the plaintiff and the award shall accordingly reflect such aggravation.

Costs

[83] Ordinarily, costs are awarded to a successful party. The question in this matter is whether or not the court should award punitive costs on the scale of attorney and own client as prayed for by the plaintiff. It should be pointed out that the defendant had and has no good reason to defend this action. Courts have decided that where a party has subjected his opponent to unnecessary trouble and expense, to defend the matter, the court may, in the exercise of its discretion order punitive costs on the scale of attorney and client. (*Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC)).

²⁴ *Ndeitunga v Kavaongelwa* (I 3967/2009) [2016] NAHCMD 99 (11 April 2016).

²⁵ *Mbura v Katjiri* (I4382/2013) [2014] NAHCMD 265 (30 July 2014).

[84] The difficulty in this matter is that, from the genesis of the defence of the action up to the stage where the pre-trial order (literally throughout the process of filing pleadings), the defendant was represented by a legal practitioner. The defendant, in closing arguments, suggested that some of the averments set out in his plea did not originate from him, while others, he could not recall if he provided related instructions to his erstwhile legal practitioners. The defendant, being a lay person, later in the proceedings, sought to bring to the attention of the court the content of the apology which he allegedly tendered to the plaintiff, during closing arguments. His attempt was not allowed as the defence case within which the defendant could lead evidence was long closed, and no application to reopen the defence case served before court. The apology might or might not have had any bearing on the blameworthiness of the defendant.

[85] The defendant, belatedly tendered an apology to the plaintiff in his closing arguments. The plaintiff was present in court during the entire proceedings. The unfortunate part for the defendant is that by the time that he apologized and sought forgiveness from the plaintiff, plaintiff had already testified and there was no opportunity to hear her reaction to the said apology. Notwithstanding the belatedness, it cannot be said that the apology tendered is of no moment. It will however carry very little weight, but it is weighty enough to tilt the scales of justice in his favour in as far as punitive costs are concerned.

[86] In further view of the fact the defendant is a lay litigant, and considering the foregoing, I am, in the exercise of my discretion, not inclined to subject the defendant to further punishment in the form of punitive costs. I am of the view that the defendant has been punished enough with the liability and the quantum. He deserves a measure of mercy, even to a limited degree. I am therefore not persuaded that this is a case befitting of punitive costs. Consequently, costs will be awarded on the ordinary scale.

Order

[87] In view of the foregoing discussion and conclusions, and underscoring the theme of the judgment that “words have consequences” I make the following order in favour of the plaintiff against the defendant:

1. The plaintiff’s claim for damages is granted in the amount of N\$250,000.
2. Interest on the aforesaid amount of N\$250,000 at the rate of 20% per annum calculated from the date of judgment to the date of final payment.
3. The statements made by the defendant as quoted in para 4 of the Particulars of Claim are hereby declared false and defamatory to the plaintiff.
4. The defendant must unconditionally retract the statements quoted in para 4 of the particulars of claim and unreservedly apologize to the plaintiff within 5 (five) days of the date of the Court Order, for the harm and damage occasioned by his defamatory statements.
5. Costs of suit.
6. The matter is regarded finalised and removed from the roll.

O S SIBEYA
JUDGE

APPEARANCES:

PLAINTIFF: S Namandje
Sisa Namandje & Co
Windhoek

DEFENDANT: In person