

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

CASE NO.: HC-NLD-CIV-ACT-DEL-2019/00155

In the matter between:

JOHANNES IITHETE

PLAINTIFF

and

TIMOTEUS MARKUS

DEFENDANT

Neutral citation: *Iithete v Markus* (HC-NLD-CIV-ACT-DEL-2019/00155) [2020]
NAHCNLD 99 (30 July 2020)

Coram: DIERGAARDT AJ

Heard: 13 - 14 July 2020

Delivered: 30 July 2020

Flynote: Defamation-elements of defamation need to be fully satisfied-close of plaintiff's case - Application for absolution from the instance - application for absolution was dismissed wit costs - The plaintiff needs to prove wrongfulness and unlawfulness - The plaintiff failed to prove intention to defame. Defamation is dismissed with costs.

Summary: Plaintiff instituted a defamatory action against the defendant. At the close of plaintiff's case the defendants applied for absolution. The Application for absolution was dismissed with costs.

The defendant proceeded to testify and he denied uttering any statement complained of. Two contradictory versions.

The court *held*; that the defendant lacked the intention to defame the plaintiff and thus cannot be held liable. The claim for defamation is accordingly dismissed with costs.

ORDER

AD Application for absolution from the instance

1. The application for absolution from the instance is dismissed;
2. Cost of suit is awarded to the Plaintiff.

AD Defamation claim

1. The claim for defamation is hereby dismissed;
2. Cost of suit is awarded to the Defendant.

JUDGMENT

DIERGAARDT AJ

Introduction

[1] The plaintiff instituted action for defamation against the defendant. The Plaintiff herein is represented by Mr Peter Greyling and the Defendant herein is represented by Ms Amupolo.

[2] The court is now tasked with the issue of whether or not the defendant did in fact make public utterances which can produce or can be perceived to be defamatory towards the plaintiff and whether the defendant had the intention to defame the plaintiff.

Plaintiff's case

[3] The Plaintiff testified that on or about 14 August 2018, he reported on duty as the shift commander at the Ongwediva roadblock. At approximately 19:30, himself and Constable Nampila Ignatius Ndeapo, attended to Omwandi, Ongwediva, with his private vehicle, to purchase food.

[4] While at one of the informal traders, he noticed a vehicle driving from Ondangwa, turning off to the right of the road. Himself and Constable Nampila, dressed in full uniform, drove in the direction of the vehicle and stopped the vehicle whilst it was still on the dirt road. Whilst remaining seated in the car, they observed that the vehicle was a Nissan NP 200 single cab bakkie. Inside the vehicle were two people, defendant, who was seated in the passenger seat and another unknown gentleman who was driving the vehicle.

[5] Whilst remaining seated in our car with defendant also seated in the car, they requested the driving license of the driver. The driver informed them that he does not have a driver's license and defendant informed them further that he had instructed the driver to drive the vehicle as he was tired, although defendant did possess a valid driver's license, he was not in possession of same.

[6] He then instructed the driver to accompany in their vehicle to the roadblock so that a traffic ticket could be issued to him. Defendant ordered the driver not to drive further and he further informed the plaintiff and Constable Nampila that he will not go to the roadblock until such time as he had called Inspector Mweyanale.

[7] The defendant informed him that we will not wait until he has called the Inspector as he was not reporting to the Inspector nor does the Inspector have any concern with the fact that the driver drove without a driver's license. After he had said that, Defendant agreed to attend to the roadblock and instructed the driver to accompany them, in their vehicle to the roadblock.

[8] Defendant and the driver duly accompanied them to the roadblock whilst driving their vehicle. The driver stopped the vehicle next to the office at the roadblock. At that time, Defendant contacted his wife and requested her to bring his license to the roadblock. Defendant and the driver remained seated in the vehicle and the plaintiff requested that they should provide him with the keys to the vehicle so as to ensure that they did not leave the roadblock. Defendant however ordered the driver not to hand over the keys.

[9] Whilst waiting for Defendant's wife to arrive, he instructed Constable Musu to issue a ticket to the driver, the fine of which was N\$ 1,000. Unfortunately he could not issue the ticket as the driver was not in possession of his ID, however Defendant's wife had been requested to provide the ID.

[10] After approximately 20-30 minutes, Defendant's wife arrived and provided Defendant's license and the driver's ID. The ticket was duly issued. After we had provided the ticket to the driver, Defendant became aggressive and enquired as to why we had issued a ticket. Defendant's wife instructed Defendant to remain silent and to leave the roadblock which Defendant duly did.

[11] In the main action the plaintiff alleges that on 15 August 2018 the defendant laid criminal charge of theft of N\$1,000. He was informed that he unlawfully searched the plaintiff's vehicle and money went missing. He was informed in the presence of subordinates. According to his knowledge the matter was investigated and the docket forwarded to the Prosecutor General's office. He was further aware that on 19 December 2018 the Prosecutor General declined to prosecute. He stated that at the time criminal proceedings were instituted, he was a police officer for 16 years and did not have a criminal complaint against him during his service. He was the shift commander for the duty station and had a reputation to uphold. The criminal proceedings were instituted at Ongwediva police station which was his duty station.

[12] The plaintiff contends that he was defamed and humiliated by the statement and conduct as made by the defendant. He believes that the defendant did not only inquire but acted with malice as he gave a witness statement narrating the events that occurred. He therefore claimed the amount of N\$50 000 to restore his dignity.

[13] The plaintiff called Mr Ignatius Ndeapo Nampila to testify on his behalf, he collaborated the evidence of the Plaintiff in so far as it related to himself.

Defendants' application for absolution from the instance

[14] After the close of plaintiff's case the defendant applied for an absolution from the instance. The application for absolution is founded on the following grounds:

- a) The defendant contend that he went to inquire at the station commander and did not know who stole his money.
- b) He among other things said that the statements allegedly deposed to are not defamatory and that no reasonable person will understand them to convey an intent to defame the plaintiff. The defendants therefore pray that their application for absolution from the instance be granted.
- c) The defendants contend that there is no evidence at the close of the plaintiff's case, upon which a court might find in favour of the plaintiff.

The legal principles relating to application for absolution from the instance

[15] The reasoning in an application for absolution from the instance is that at the close of plaintiff's case if the defendant feels that plaintiff has not made out a case upon which a court may find for the plaintiff, they may move for an application for absolution.

[16] The test which the court applies for such applications has been authoritatively stated in various judgments and adopted by this court and our Supreme Court. The leading case normally referred to in this regard is *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H: where Miller AJA propound the applicable test in the following terms:

'when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff'.

[17] The court considered the evidence adduced by the plaintiff, found that the plaintiff established a prima facie case.

[18] The court gave an order refusing the application for absolution and ordered that the defendant proceeds to lead his evidence.

Defendant's evidence

[19] The defendant read his statement into record and chose not to amplify his statement. He contended that at the time of the incident, he was a small business vendor selling vegetables from the back of his pickup vehicle.

[20] On the evening of 14 August 2017 whilst with his nephew, coming from Ondangwa, they then decided to take the backroad, whilst driving on the gravel road by the village Idiva, they were approached by two unknown men using a private vehicle, they were uniformed police officers.

[21] They had torches that they were using and because of the private vehicle, he was fearful that they were robbers pretending to be police officers. One requested that his nephew provide his license, which he could not do as he was not in possession of one. Whilst the one police officer was requesting the license, the other one told them to disembark the vehicle and he proceeded to search the vehicle whilst we stood outside in the dark.

[22] The male officers allegedly offered to release them upon payment of a certain amount seeing that the nephew was not in possession of a driver's license. They regarded this offer as a bribe and they refused to pay.

[23] According to the defendant they refused to pay the bribe as requested, they were told to go to the roadblock for his nephew to be issued with a ticket. They subsequently complied with the instruction of the plaintiff. When the ticket was issued and they went home, and found that in the glove compartment, which once occupied N\$ 1500 now only had an amount of N\$ 500.

[24] The next day the defendant approached the police station of Ongwediva and spoke to the station commander, Mrs Nashandi and narrated the incident to her. His

main worry was the fact that his money was stolen but he did not know by whom. He indicated that he believed it was well within his rights to report what had happened to him, from the bribery to his money going missing.

[25] He informed the station commander that he does not know the officers and he could not pin point who and at what point his money was stolen. The station commander then advised him to open a case so that the entire shift of the roadblock could be queried.

[26] He referred the court to the statements of Benjamin Hophni and the Station Commander Elizabeth Naqshbandi in the plaintiff's discovery bundle which statements both clearly indicates that he did not know the name of the person who stole his money, all members of the shift in question were questioned and he does not know how it came about that only the plaintiff and his colleague were charged.

[27] To his knowledge the plaintiff did not have an impeccable reputation. As he came to come to learn that the plaintiff has pending matters in Oshakati Magistrate's Court that are similar to this matter. Cases of corruption and bribery charges which occurred in a similar fashion as to how he tried to bribe him on the evening of 14 August 2017.

[28] Before the incident, he did not know the Plaintiff, He had no intention to injure him or anyone in their reputation and simply made a query to the Station Commander, which he was entitled to do, station commander advised him to open a case so the matter can be investigated, he had no control of what process was taken thereafter.

Applicable Law

[29] The burden of proof in a civil case has been stated in the case of *Heita v Nehemia* (I 3251/2014) [2017] NAHCMD 119 (20 April 2017) Oosthuizen J stated:

'In general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although in 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.'

[30] To succeed in a defamation action a plaintiff must establish that the defendant published a defamatory statement concerning him or her¹. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional.² 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.³ In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion.⁴

Evidence and Findings

[31] In *casu* the two versions are mutually destructive. 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 probability.

Facts in common cause

[32] That the plaintiff was a police officer for many years at the time of the incident. That the plaintiff was one of the two police officers who stopped the defendant on the 14 August 2018. That the plaintiff informed the unit command that his car was searched by two unknown police officers and his money, N\$1000 went missing. That the unit commander held a meeting with the police officer of Ongewediva station and informed them of the complaint by defendant. In this meeting the plaintiff volunteered the information, that indeed he and his colleague stopped a vehicle on that specific night. As a result of this meeting the plaintiff was identified.

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

² Daniels, H, 2007, *Becks Theory and Principles of Pleading in Civil Action*, (7th ED) Durban: LexisNexis, p 280.

³ *Trusco Group International v Shikongo* 2010 (2) NR 377 at 387B-D.

⁴ *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].

[33] There were various contradictions in the version of the plaintiff. During evidence in chief the plaintiff testified that all police officers that were on his shift were all called in at the same time by the Unit Commander and informed of the incident of the money that was removed from the defendant's vehicle whereas Mr Nampila Ndeapo testified that they were called in one by one.

[34] The plaintiff states in his affidavit at paragraph 12 that he was informed that the plaintiff laid a charge of theft and defamation of character, but he does not state against whom. At paragraph 16 of his affidavit he denies that the defendant merely made an inquiry at the Ongwediva police station regarding the missing N\$1000. He created the impression that the defendant laid a charge from the onset and did not inquire.

[35] This statement is totally contradictory to the statement of the station commander, Elizabeth Nashandi with reference to exhibit H, where she states that the defendant approached her on 15 August 2017 and narrated his version of events that occurred on 14 August 2017. He informed her that he was stopped by two officers and his money went missing after they searched his vehicle. She further stated that she did not know who the officers was and she advised him to open a case so that the matter can be investigated.

[36] It thus became clear that the defendant was truthful when he informed the court that he first inquired and after being advised by the station commander he only laid a charge for purpose of investigation. It also became evident that the station commander decided on her own accord to take the matter further and therefore she discussed the matter with the Unit Commander

[37] The Unit commander Benjamin Hofni confirms in his statement that the station commander indeed approached him .He states in his statement "exhibit I". He states that on 14 August he was approached by the station commander, Ms Elizabeth Nashandi who explained to him that the defendant complained to her that two police officers searched his vehicle and money went missing. She explained to him that the two police officers drove a private white Toyota Hilux pick up. He confirmed to the station commander that the plaintiff was the only one who drove a white Toyota Hilux bakkie and he was on the shift in question.

[38] He confirms that he called in all members of "Shift D" and explained the allegations that were conveyed to him. He further states that in this meeting the plaintiff identified with the incident. He further states in paragraph 9 that the plaintiff explained what happened to him and his colleague's that evening. This seems to be a voluntary explanation in the presence of other police officers in which the plaintiff admitted to have been the officer that stopped the defendant.

[39] I am of the view that at the time the defendant laid the charge he was not aware of the identity of the plaintiff and his colleagues, as he did not mention any names in his statement "exhibit B" He continuously referred to the two unknown police officers as unknown police officers that searched his vehicle.

[40] I take cognizance of the argument by the plaintiff that by making reference to the "two unknown police officers" the defendant actually referred to the plaintiff. I am of the view that the plaintiff in the first instance went to the unit commander for purposes of inquiring and only seeking his money back. He went as far as requesting the station commander to take him to the roadblock just to get his money back from the officers. The only reasonable inference that can be drawn is that the defendant merely wanted his money back.

[41] I accept the version of the defendant that he had no malicious intention when he laid a charge. It is only upon the advice of the station commander that he gave a statement for purpose of seeking investigation into the matter. It is common knowledge that prosecution normally follows investigation in the normal cause of events.

[42] The fact the subordinates and superiors became aware of the allegation was a result of the unit commander's meeting and the plaintiffs voluntary explanation in the presence of other officers. Publication was thus inevitable.

[43] The law makes provision for any member of the public to seek recourse in pursuance of their constitutional rights which includes laying a charge against another, without malicious intent. There is no evidence before this court that the defendant identified the plaintiff and insisted that he should be charged and prosecuted. In his statement he merely gives a background of what happened and he concludes by

seeking “investigation and prosecution”. The initiative to charge the plaintiff rested entirely on the Namibian police on information provided by the plaintiff himself.

[44] In *Unoovene v Nangolo* (Case No.: I 1082/08) [2008] NAHC 113 (10 October 2008), Van Niekerk J stated the applicable principles as follows:

‘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’.

[45] There is no evidence that suggest that the defendant called the plaintiff a thief or dishonest person. I am of the view that the statements allegedly deposed to are not defamatory and that no reasonable person will understand them to convey an intent to defame the plaintiff.

[46] The Court can therefore not find that defendant’s statement was wrongful and defamatory and was made with the intention to defame or to injure the reputation of the plaintiff.

[47] For the above-mentioned reasons the version of the defendant carries more weight than the plaintiff’s version and the version of the defendant is accepted as correct, truthful, reliable and more probable than plaintiffs.

Submissions

[48] The parties were ordered to file their respective heads of arguments on or before 24 July 2020, both are in default of the said court order. Both Parties filed condonation applications. The court had sight of the respective affidavits and the court is not satisfied with the explanations contained in their affidavits. The court is however satisfied that it has sufficient evidence before it from the trial to proceed without their respective heads.

Quantum

[49] However, Damaseb JP further stated that in the matter of *Trusco Group International Ltd and Others v Shikongo*⁵, 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.

[50] In *causa*, the court did not find that the integrity and or reputation of the plaintiff was affected thus no justification to restore it.

Costs

[51] The main principle of costs is that the party that succeeds should be awarded costs. There exists no other compelling reasons in this matter as to way this principle should not be upheld for both the claim for defamation and the application for absolution.

[52] I therefore make the following orders:

AD Application for absolution from the instance

1. The application for absolution from the instance is dismissed;
2. Cost of suit is awarded to the Plaintiff.

AD Defamation claim

1. The claim for defamation is hereby dismissed
2. Cost of suit is awarded to the Defendant.

A Diergaardt
Acting Judge

⁵ *Trusco Group International v Shikongo* 2010 (2) NR 377 at 387B-D.

