

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 115/2016

In the matter between:

JOSUA SHEELONGO NATANGWE MWETUPUNGA

PLAINTIFF

and

MATHIAS KANDJABA

1ST DEFENDANT

GIDEON KONDJENI AKA KONDJA HUUSHI

2ND DEFENDANT

Neutral citation: *Mwetupunga v Kandjaba* (I 115/2016) [2016] NAHCNLD 104 (05 December 2016).

Coram: **CHEDA J**

Heard: **08.06; 18.07; 25.10; 01.11; 02.11.2016**

Delivered: **05 December 2016**

Flynote: **Delict** – Defamation - A statement issued at a beer party by defendants that a SWAPO member who was a businessman was a member of Rally for Democracy and Progress (RDP) is not defamatory. Rally for Democracy and Progress (RDP) is a lawful organisation and is represented in parliament. In order to succeed plaintiff must also prove that he suffered a loss either in business or reputation or lost friends as a result of the said defamatory statements.

Summary: Plaintiff who is a member of SWAPO and a businessman sued defendants for defamation, as they alleged that, he was a member of Rally for Democracy and Progress (RDP), a lawful political party. The words were uttered at a beer party. The opposition party was not an unlawful organisation. The said defamatory statements did not result in plaintiff losing business or friends. The claim was dismissed with costs.

ORDER

The claim is dismissed with costs.

JUDGMENT

CHEDA J:

[1] In this action matter, plaintiff sued defendants for defamation. Plaintiff is a businessman who conducts his business as Ketu Two Thousand Guest House and Bar CC at Okalongo, Namibia.

[2] First defendant is a Businessman who conducts a business under the name and Style of Ehangano Service Station at Okalongo. Second defendant who is also known as in his circles as "Kondja Huushi" is also a Businessman and conducts business under the name and style of People United Shop at Kasamane Border Post, Onandjaba, Okalongo.

[3] The allegations as presented by plaintiff in his particulars of claim are outlined hereinunder. On or about 15 February 2014 at Pastor Jesaya Hanghuwo's home at Okalongo, Omusati Region, first and second defendants uttered defamatory words

against him. On the day in question there was a beer drink ceremony commonly referred to as Omagongo Drinking Festival.

[4] In that festival, there was himself, first defendant, second defendant, Kadjeje, Pastor Jesaya Hanghuwo and Antonius Tomy Lungameni. It is his allegation that during that session first and second defendants spoke openly and in such a manner intended to inform and allow the persons who were present to hear them uttering words which are defamatory in nature.

[5] The alleged defamatory statement was: "I want to speak straight that we used to assemble or meet, myself, Kandjaba (first defendant) and this person and he disappeared from our group and was staying with Hakaye and they joined their "Radopa". At that stage first defendant is said to have stood up and said "it is not "Radopa", but, Rally for Democracy and Progress" he further stated "Tony, can you hear what I am saying, we must look at this person carefully" (or words to that effect), this was in reference to plaintiff. At that stage one Jefelina Kadjeje Ndeutala intervened in an attempt to stop both defendants from continuing with their attacks.

[6] Plaintiff further testified that these statements angered him to a point of wanting to fight but was however, prevented from fighting them. The beer party was then dispersed. The statements which he is complaining about were made in the presence of other people and according to him were false and therefore defamatory.

[7] The next witness was Antonio Lungameni. He is also a businessman in the Okalongo area and he was part of the beer party on the day in question. He witnessed the accusation of plaintiff being referred to as a Rally for Democracy and Progress (RDP) member, which is also referred to as Radopa. He, further, stated that plaintiff was upset by this accusation which resulted in him threatening to assault the defendants and the party was eventually dispersed. To his knowledge plaintiff is a member of SWAPO and not Rally for Democracy and Progress (RDP).

[8] Defendants gave evidence and they denied ever uttering defamatory statements about plaintiff although they confirm that they were part of the beer party. Pastor Jesaya Hanghuwo also gave evidence. His evidence was that he is a pastor

of the Evangelical Lutheran Church in Namibia and the beer party was held at his house. He, however, did not hear the alleged defamatory statement, but, he witnessed a commotion among the patrons. Whatever was said, occurred when he was outside the house.

[9] Jefelina Ndeutala also gave evidence. It was his evidence that he noticed a commotion and in fact he quelled the disturbance, but, he did not witness the alleged issuance of defamatory words. He infact managed to hold and subdue plaintiff when he threatened to assault defendants.

[10] Looking at the evidence led in this matter, the following was clearly established by plaintiff:

- 1) there was a beer party where many people attended;
- 2) first and second defendants uttered words which were aimed at plaintiff;
- 3) these words led to a commotion wherein plaintiff threatened to assault the two defendants; and
- 4) Jefelina Ndeutala, intervened by preventing plaintiff from fighting with the two defendants.

[11] I find that indeed defendants uttered the said statements which were wrongful and false. What falls for determination is whether or not the said statements were defamatory in terms of the law.

[12] It is trite that defamation is founded on the utterance/publication of a statement about another person which statement is false, injurious to them and unprivileged. This statement was made in the presence of other people, therefore, it was indeed published. The fact that it was false admits of no doubt. It was also not privileged.

[13] What remains is whether or not it was injurious within the meaning of defamation. An injurious statement is that which causes demonstrable damage to the plaintiff. Such a statement is that which would cause plaintiff to lose work or be shamed by neighbours, friends and family.

[14] However, for a public figure, the enquiry goes further and enquires as to whether there was malice in addition to the statement being demonstrably false. Defamation, harms the reputation of another and deters other people from associating with him.

[15] It has to cast doubt on plaintiff's moral turpitude, morality or integrity. Plaintiff must prove that he was injured in his reputation which has resulted in those around him shunning him.

[16] The statement must be an intentional false communication either written or spoken that harms a person's reputation, decreases respect or lowers his/her esteem. In *casu*, it would have resulted in the exodus of customers from plaintiff's business.

[17] Plaintiff is a self-confessed politician and is regarded as such. His life is in the public eye. Plaintiff is an accomplished politician and businessman. He is a public figure. Public figures are, therefore, expected to develop a thick skin and should be equipped with political shock-absorbers. In as much as plaintiff is an established member and supporter of SWAPO, which is the only party that wedged the armed struggle for Independence in Namibia, its members are tolerant of other political parties, hence the existence and representation of other parties in Parliament including Rally for Democracy and Progress (RDP) which hold different opinions from it. By doing so, plaintiff's party has demonstrated that it can co-exist with other political parties in the spirit of the exercise of democracy as the Honourable President, Doctor Hage Geingob often states: "All Namibians belong to the Namibian house and no one should be left outside."

[18] As a public figure he voluntarily placed himself in a position that invites close scrutiny, whereas, a private citizen who has not entered public life, his reputation and privacy interests tends to outweigh free speech considerations. In my view such deserves greater protection from the courts. A person who is a public figure is so public that his name is so familiar to an extent of being household in his community.

They normally refer to them as thick skinned, meaning that they must expect some measure of political jokes or false statements, which test their competences to lead.

[19] The test for defamation is an objective one see, *Afshani & Another v Vaatz* 2006 (1) NR 35. I will examine this below.

[20] This nation, is, composed of right-thinking people who in my opinion cannot regard any person's choice of a lawful political party as defamatory. It would have been different if Rally for Democracy and Progress (RDP) was generally regarded as a hostile party, which is not. If it had been, then no doubt, it would have been regarded by right-thinking people as a party of the enemy of the people. Rally for Democracy and Progress (RDP) might hold a different political view and may not be liked by certain members of society, but, that does not mean that it is viewed with such abhorrence to the point of being regarded as outcast which makes anybody who is its member repugnant.

[21] Plaintiff gave evidence very well. He is an active member of SWAPO and is well known both as a businessman and a politician in Okalongo. This was not only confirmed by his witness, but, also by defendants and two other witnesses. His business acumen is therefore beyond doubt.

[22] The question then is, does plaintiff's alleged association with Rally for Democracy and Progress (RDP) lower his esteem in the minds of right thinking people in Okalongo. In my opinion, this cannot be, for the following reasons:

- a) Rally for Democracy and Progress (RDP) is a lawful political party with representation in parliament, and
- b) Rally for Democracy and Progress (RDP) is not a subversive or clandestine organisation. Its operations as a political party is due to the fact that Namibia is a multi-party democracy, open minded and tolerant of other political parties.

[23] Defendants gave evidence and denied uttering the words complained of. Despite these denials, I find that they uttered such statements while drinking Omagongo. This is evidenced by the fact that plaintiff was visibly upset and

threatened to beat one of them. Further, to this, the beer party was disrupted and the patrons dispersed, as a result of this incident and this was not denied by the defendants.

[24] The question that falls for determination is whether the words uttered by defendants qualify for a defamation law suit.

[25] It is not in doubt that the defendants uttered the said words, that is publication. It is also not in doubt that the said words were false as all those who gave evidence testified that indeed plaintiff was a SWAPO member and an active one for that matter.

[26] In my view, this should be determined by examining plaintiff's social status and then apply an objective test. In order to succeed in a defamatory action plaintiff has to prove on a balance of probabilities that he has been defamed in the eyes of the community or within a defined group.

[27] In some instances it is said that the statement complained of must be:

- a) Wrongful;
- b) Intentional;
- c) Must have been published; and
- d) To a third person.

[28] Defamation is determined by the application of an objective test which was clearly set out in *Afshani & Another v Vaatz 2006 (1) NR 35*.

[29] Plaintiff has established the existence of the two requirements, namely that the statement was published and that it was false. However, this is not all. In order to succeed, plaintiff, must go further and prove that the said statement was injurious to his reputation, dignity, moral turpitude or integrity.

[30] Consequently, the reference to a political party which is lawful and is represented in parliament as a result of democratic elections should not, in my view,

be regarded as defamation as it cannot be said to lower one's esteem, dignity or integrity in the eyes of reasonable and right-thinking members of the public.

[31] This is further demonstrated by the fact that there is no evidence to prove on a balance of probabilities that plaintiff lost customers as a result of defendants utterances. Infact it was stated during the trial that customers do not buy in shops by virtue of political affiliations, but, that their purchasing activities are guided by the availability of commodities and good services.

[32] There is no doubt that plaintiff was upset by those utterances, but, this does not qualify as defamation in our law. Statements of this nature made at a beer drink where patrons are normally not in control of their faculties due to the intake of alcoholic beverages should be viewed with caution by the courts.

[33] In my opinion these are the sort of utterances which indeed could have annoyed plaintiff, but, not to an extent of being viewed as defamatory. The said statements did not result in him being shunned by the community or exposed him to contempt or injure his business or trade. The statements were offensive, but, not defamatory.

[34] I, therefore, find that plaintiff failed to prove on a balance of probabilities that the words uttered by defendants were defamatory and his claim cannot succeed. The following is the order of court.

Order:

The claim is dismissed with costs.

M Cheda
Judge

APPEARANCES

PLAINTIFF: A. Kamanja
 Of Amupanda Kamanja Inc., Windhoek

DEFENDANTS: JR Kaumbi
 Of JR Kaumbi Inc., Windhoek