NOT REPORTABLE

CASE NO.: I 1817/2009

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

MAIN DIVISION

In the matter between:

TOINI HAUSIKU	**PLAINTIFF/RESPONDENT**

and

DEMOCRATIC MEDIA HOLDINGS (PTY) LTD	**1ST DEFENDANT**
CHRIS JACOBIE	**2ND DEFENDANT**
NEWSPRINT NAMIBIA (PTY) LTD	**3RD DEFENDANT**
ESTELLE DE BRUYN	**4TH DEFENDANT**
HERBERT SHIKONGO SHIXWAMENI	**5TH DEFENDANT**
FREE PRESS OF NAMIBIA (PTY) LTD	**6TH DEFENDANT/ 1ST EXCIPIENT**
GWEN LISTER	**7TH DEFENDANT 2ND EXCIPIENT**
BRIGITTE WEILICH	**8TH DEFENDANT/ 3RD EXCIPIENT**

CORAM: HOFF, J

Heard on: 29 June 2010

Delivered on: 02 July 2010

Reasons on: 25 April 2012

JUDGMENT

HOFF, J: [1] This Court on 2 July 2010 gave the following order:

> "That the first exception raised by sixth, seventh and eight defendants is hereby upheld with costs which costs shall include the costs of taking the third exception."

[2] These are the reasons for the above-mentioned orders.

Background

[3] The plaintiff in a combined summons instituted an action against the defendants for damages as a result of defamation. In her second amended particulars of claim the plaintiff claimed that an article was published in "The Namibian" newspaper concerning the plaintiff in that plaintiff said during an argument with one Kasekere that "APP members could be injected at the Rundu hospital so that they would die".

Plaintiff claimed that the said words in the context of the article were wrongful and defamatory of plaintiff in that it was intended and understood by readers of the Namibian newspaper to mean that plaintiff is dangerous and harbours murderous tendencies.

[4] On 20 February 2009 an article entitled:

> **"Namibia: APP Allegations of Violence Untrue – Swapo" was published in the Namibian newspaper.**
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> The contents of the article reads as follows:
>
> "The Swapo regional co-ordinator for the Kavango Region, Vincent Likoro, has denied allegations of violence against members of the All People's party (APP) at Kaisosi outside Rundu as "untrue".
>
> APP Kavango co-ordinator Herbert Shikwameni accused Likoro of assaulting APP member Veronika Kasekere on Sunday, February 1.

Allegedly Likoro and Swapo member Toini Hausiku, a nurse stopped at Kasekere's house, and when she said she was not a Swapo member, they allegedly told her that they were "registering only Swapo members for drought relief".

An exchange of words ensued and Shixwameni says Likoro became physically violent towards Kasekere. The APP lodged a complaint against Likoro with the Police, with Case number CR/16/02/09.

Likoro also denied that he and Hausiku said they were "sent by President Pohamba" to register people for drought relief.

"This matter is now in the hands of the Police, we want justice to be done" Likoro said in his response.

According to Shikwameni, Hausiku said during the argument with Kasekere that "APP members could be injected at the Rundu hospital so they would die".

Another Swapo member accompanying Likoro and Hausiku allegedly threatened that "two trucks would come from South Africa to kill APP members".

"Likoro personally accused me of having allegedly stolen millions of dollars from a school construction project when I was still a Swapo regional councilor and that is why I resigned from the party" Shiwameni told the Namibian last week.

"I am consulting my lawyers and will not hesitate to sue all those who spread these defamations." "

[5] In the original particulars of claim the plaintiff claimed that the words:

" … Hausiku said during the argument with Kasekere that APP members could be injected at the Rundu hospital so that they would die."

were intended and were understood to bear seven meanings (as alleged in paragraphs 17.1 to 17.7).

[6] The 6th, 7th and 8th defendants requested further particulars on 30 July 2009 namely as to which words were relied upon for the seven different meanings contended for in the seven subparagraphs of paragraph 17 of the particulars of claim.

[7] The request for further particulars further stated:

> "Insofar as the words attributed to the plaintiff allege that "APP members could be injected at Rundu hospital so that they would die", without any reference to conduct on *her* part, the plaintiff is hereby given notice in terms of Rule 23 that the particulars do not disclose a cause of action, alternatively that the particulars of claim are vague and embarrassing. The plaintiff is afforded the opportunity to remove the cause of complaint.
>
> Does the plaintiff rely upon any facts or circumstances *dehors* what is stated in the particulars of claim in support of the meanings contended for in paragraph 17 ? If so, full particulars are requested."

[8] There was no response to this request. Instead there was a notice to amend and paragraph 17 was then amended to remove five of the seven meanings originally contended for. It was contended the remaining words were intended and understood by the readers of "The Namibian" to mean that the plaintiff:

1. "is dangerous";
2. "harbours murderous tendencies".

[9] Since the request for further particulars of 30 July 2009 was not answered by the plaintiff, 6th, 7th and 8th defendants again filed a request for further particulars on 25 September 2009, enquiring again precisely which words were relied upon for the meanings contended for which remained after the amendment. Notice was again given in

terms of Rule 23 and the plaintiff was afforded the opportunity to remove the cause of complaint.

Plaintiff's reply was that these questions (in the request for further particulars) were not understood as there were no paragraphs 17.5 and 17.7 in the amended particulars of claim. This was correct since there had been a renumbering of the paragraphs. Despite this the plaintiff failed to provide the requested further particulars.

[10] On 27 October 2009 the 6th, 7th and 8th defendants gave notice in terms of Rule 23 to the plaintiff in which the defendants contended that the particulars of claim, as amended, disclosed no cause of action and are vague and embarrassing. Three different exceptions formed the basis of the notice in terms of Rule 23.

[11] In brief the first exception refers to the fact that further particulars were requested as to precisely which words were relied upon for the meanings contended and simultaneously notice was given that the words attributed to the plaintiff merely allege that:

> "APP members could be injected at the Rundu hospital so that they would die."

without any reference to conduct *on the part of the plaintiff*.

[12] Mr Smuts submitted firstly that these words in their ordinary sense are not capable of bearing the meanings as contended for by the plaintiff and secondly the plaintiff in her particulars of claim did not refer to any facts or circumstances *dehors* the particulars of claim for any reliance for the meanings contended for. Last mentioned it was submitted would have been necessary had plaintiff relied on a secondary meaning of the words which is not an issue in the plaintiff's claim.

[13] It was submitted that the statements are not *per se* defamatory of the plaintiff nor are they reasonably capable of being intended or understood to be defamatory in the sense alleged by the plaintiff in her amended particulars of claim.

[14] It was further submitted by Mr Smuts that it is a question of law whether words complained of are reasonably capable of conveying to the reasonable reader a meaning which is defamatory of a plaintiff (*Mohamded v Jassiem* 1996 (1) SA 673 (A) at 703 – 704) and that it is well-established that this question can be decided on exception.
(See *Argus Printing and Publishing Co. Ltd and Others v Esselen's Estate* 1994 (2) SA 1 AD at 20; *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 616).

[15] In *Argus Printing (supra)* Corbett CJ at 20 E – H remarked as follows:

> "… it appears that Hatting J adopted, as the basic criteria for adjudicating the merits of the first ground of exception, the test as to whether a reasonable person of ordinary intelligence *might* reasonably understand the words of the article to convey a meaning defamatory of the plaintiff. This is unquestionably the correct approach and, as this formulation indicates, the test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural or ordinary meaning the Court must take account not only of what the words expressly say but also of what they imply. As it was put by Lord Reid in *Lewis and Another v Daily Telegraph Ltd*; *Same v Associated Newspapers Ltd* [1963] 2 ALL ER 151 (HL) at 154 E – F:
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> 'What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.'

and continues at 21 A:

> "And I must emphasise that such an implied meaning has nothing to do with innuendo, which relates to a secondary or unusual defamatory meaning which can be attributed to the words used only by the hearer having knowledge of special circumstances."

[16] In *Afshani and Another v Vaatz* 2006 (1) NR 35 HC at 45 (par. 22) this Court expressed itself as follows (per Maritz J, as he then was):

> "Whether the defendant's statement is defamatory – given my earlier finding regarding its contents and the context in which it was made – falls to be determined objectively: the Court will construe the statement, draw its own inference about the meaning and effect thereof and then assess whether it tends to lower the plaintiff 'in the estimation of right-thinking members of society generally' (*per* Greenberg JA in *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 at 1018). The standard from which the enquiry should depart, Ponnan AJA more recently said in *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at 360 H – I, 'is the ordinary reader with no legal training or other special discipline, variously described as a "reasonable", "right-thinking" individual of "average education" and "normal intelligence". It is through the eyes of such a person who is not "super-critical" or possessed of a "morbid or suspicious mind" that I must read' the statement. In appraising whether the statement is defamatory or not, as Didcott J remarked in *Demmers v Wyllie and Others (supra)* at 629 C:
>
> > 'A Judge would doubtless hesitate to see himself as the epitome of al "right-thinking" persons, or to say so at any rate. He is seldom likely, on the other hand, to attribute to the "right-thinking" a viewpoint sharply in conflict with his own. More often he decides what he personally thinks is right, and then imputes it to the paragons. To others, however, the tenets thus decreed may seem merely the innate prejudices of the group or class from which he has sprung. That they indeed are is the danger against which he must guard.'

[17] Mr Narib who appeared on behalf of the plaintiff submitted that the statement:

> "APP members could be injected at the Rundu hospital so that they would die."

wrongfully attributed murderous intention to the plaintiff and is thus defamatory of the plaintiff; the allegation that the plaintiff uttered that those words, is tantamount to the allegation that plaintiff associated herself with those murderous tendencies, and that the allegation properly understood indicated that the nurse (plaintiff) associated herself with the conduct of killing members of another political party, by lethal injections.

[18] Mr Narib submitted that the *onus* is on sixth, seventh and eight dependants (as excipients) to satisfy this Court and on all reasonable construction of plaintiff's particulars of claim as amplified and amended and on all possible evidence that may be led on the pleadings, no cause or action is or can be disclosed.

[19] I agree that the excipient bears the *onus* of proof.

[20] In *Amalgamated Footwear & Leather Industries v Jordaan & Co. Ltd.* 1948 (2) SA 891 CPD at 893 Herbstein J stated the following:

> "It seems to me that in so far as there can be an onus on either party on a pure question of law, it rests not upon the plaintiff but on the excipient. It is the excipient who is alleging that the summons does not disclose a cause of action and he must establish that on all possible meanings no cause of action is disclosed."

and in *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 WLD at 632 C – G Marcus AJ (Flemming DJP concurring) remarked as follows:

"When an exception is taken to a pleading, the excipient proceeds on the assumption that each and every averment in the pleading to which exception is taken is true, but nevertheless contends that, as a matter of law, the pleadings do not disclose a cause of action or defence, as the case may be. (See, for example, *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244 B – 245 E and *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C). An exception will not succeed unless no cause of action or defence is disclosed on all reasonable constructions of the pleading in question (*Callender-Easby and Another v Grahamstown Municipality and Others* 1981 (A) 810 (E) at 812 H – 813 A). When, as in the present case, the exception is based upon an interpretation of a contract, it is necessary for the excipient to demonstrate that the contract is unambiguous. This is well illustrated by the case of *Sacks v Venter* 1954 (2) SA 427 (W). In that case, a clause in a deed of sale of certain immovable property provided that the sale was subject to a particular condition. An exception was taken to the declaration, *inter alia*, on the basis that it disclosed no cause of action. Ramsbottom J observed at 429 C – D:

> 'I think it is clear that the condition is unambiguous so that evidence is not admissible for its interpretation, the question of its interpretation can properly be decided on exception; *Standard Building Society v Cartoulis 1*939 AD 510 is authority for this . The question then is whether clause 7 unambiguously bears the meaning contended for … or whether it is ambiguous and whether evidence of the circumstances in which the agreement was made would be admissible to elucidate its meaning. In order to succeed, the excipient must show that the clause is unambiguous and that the meaning for which he contends is the correct meaning.'

(See also *Theunissen en Andere v Transvaalse Lewendehawe Ko-op Bpk* 1988 (2) SA 493 A at 500 E; *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817 F – G; and *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 HC at 158 G – H).

[21] The approach which should be adopted where an article is capable of more than one meaning was considered in *Demmers v Wyllie and Others* 1980 (1) SA 835 (A) at 842 H – 843 E.

"Then there was some discussion before us as to the approach which should be adopted where an article is capable of more than one meaning. In this regard our attention was drawn to the following passage in the judgment of Colman J in *Channing v South African Gazette Ltd and Others* 1966 (3) SA 470 (W) at 473 E:

"The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defence which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails (see *Gluckman v Holford* 1940 TPD 336)." Our attention was also drawn to a recent decision *Minister of Justice v SA Associated Newspapers Ltd and Another* 1979 (3) SA 466 (C) in which Van Zijl JP stated at 474 G – 475 A:

"In the first place the words complained of do not directly charge or accuse the Minister of a crime or fault, nor do they directly involve him with any accusation or charge. If the words do any of these things they must do it by implication. For the words to be defamatory in such circumstances the implication must be one that must inevitably be drawn by an ordinary reasonable reader. The Minister says this is exactly what has happened, the words involve him 'with the so-called Information scandal' and the ordinary reasonable reader may reasonably come to such a conclusion. It is not sufficient that the words *may* cause the ordinary reasonable reader to come to such a conclusion. They *must* cause the ordinary reasonable reader to come to such a conclusion. The words in fact are such that they cause an ordinary reasonable reader to come to other conclusions that are not defamatory, e.g. that the words of Minister wished to have cleared were a statement that dealt with some matter unconnected 'with the so-called Information scandal' but were politically embarrassing to him and which, if published, would mean the end of his political career for instance as a member of his party. The words are therefore not *per se* defamatory."

In my opinion the test applied by Colman J is the correct test. In a civil case the degree of proof is a preponderance of probabilities and that, I think, is the approach which should be adopted when an article is capable of more than one meaning and the Court has to decide which meaning the article would have had to the ordinary reader."

[22] It is apparent from *Channing (supra)* that if a Court finds on a preponderance of probabilities that an article bore a defamatory meaning that meaning is to be preferred even though there is room for a non-defamatory interpretation.

[23] A plaintiff is bound by the selection of meanings of the offending words and is restricted by the pleadings not to go beyond the selected meanings of words.

[24] In *HRH King Zwelithini of Kwa Zulu v Mervis and Another* 1978 (2) SA 521 WLD at 524 G – H McEwan J stated the following with reference to certain reported cases:

> "Those cases indicate that once a plaintiff has selected the meanings of offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear *per se*, unless he has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory *per se*."

[25] In my view the article which appeared in the Namibian newspaper focused on the alleged violence between members of political parties namely between APP and SWAPO. The article relates to an alleged assault (which was denied) allegedly committed by Swapo regional co-ordinator (Mr Likoro) and a complaint laid against Mr Likoro with the police. It was not suggested that plaintiff played any part in this alleged assault. The statement that APP members could be injected at the Rundu hospital so they would die do not state what plaintiff's role would be in carrying out such a threat or that it could be inferred that she herself (being a nurse) would actively take part in the execution of such a threat. This is a threat to commit murder which is a much more serious offence than the alleged assault alluded to in the article and one would have expected this threat to commit murder would have been at the forefront of this article. There is no suggestion in the article that any criminal complaint has been laid against the plaintiff based on this threat.

[26] As indicated aforementioned whether a statement is defamatory falls to be determined objectively i.e. whether the ordinary reader would understand the words used

within the context of the article as a whole to have a defamatory meaning keeping in mind that the ordinary reader is not “super critical” or possessed of a ”morbid or suspicious mind”.

[27] In the context of the article I am of the view that the words used did not lower the plaintiff in the estimation of right thinking members of society and find that the words used were incapable of a defamatory meaning in the sense alleged by the plaintiff in her particulars of claim.

[28] I am satisfied that the excipients have discharged the required *onus* in the sense that they had established on all possible meanings, that the particulars of claim do not disclose a cause of action.

[29] The 6th, 7th and 8th defendants did not proceed with the second exception.

[30] In respect of the third exception Mr Narib conceded that the plaintiff is liable to pay the costs of the 6th, 7th and 8th defendants, limited to the costs incurred by the 6th, 7th and 8th defendants in preparation and filing of the third exception.

HOFF, J

ON BEHALF OF THE PLAINTIFF/RESPONDENT **ADV. NARIB**

Instructed by: **CONRADIE & DAMASEB**

ON BEHALF OF THE 6TH, 7TH & 8TH DEFENDANTS: **ADV. SMUTS**

Instructed by: **LORENTZ ANGULA INC.**