

DEFAMATION AND THE RIGHT OF RECOURSE IN THE SOUTH AFRICAN LAW.

By Mmolawa Ndamulelo Gotso

Candidate legal Practitioner (Mudau and Netshipise Attorneys)

LLB: University of Venda

1. INTRODUCTION

Defamation can be said to be a demonstration where an individual harm somebody's character or notoriety by false proclamations that might be distributed through composition or by freely talking about someone in particular. Instances of criticism are extremely precarious and are just viewed as assaults in the event that they are made in a pernicious or malignant way. The individual's name is viewed as close to home as well as trademarked right of notoriety and it is one that is enrolled during childbirth and does not really have to be one of a kind or something that has never been heard, names can be indistinguishable yet as long as it is enlisted every last individual is shielded from unlawful encroachment.

The inquiry is: how would one demonstrate unlawful encroachment made by another to his untainted reputation and what is the individual's entitlement to institute legal action as far as South African law is concerned?

Defamation is synonymous with the words libel and slander as far as the law is concerned. Defamation is a term that envelops both libel and slander. To be more exact and lower the level of perplexity, Libel is a term used to depict visual criticism; as in daily paper articles or deluding pictures. Slander depicts defamation that you can hear, not see. It is generally oral explanations that stain somebody's notoriety.

The person who has been defamed by the statement will have legal recourse and is able to claim damages from the person who made the harmful or defamatory statements.

Defamation of character claims can however be tricky, as our Courts always try to preserve freedom of expression as enshrined in Section 16 of our Constitution. But at the same time, the right to freedom of expression can also be limited and may not encroach on any other person's rights, in this case the right to an untainted reputation. The question is how do you prove defamation and what is your right to recourse in terms of South African law?

2. CHARACTERISTICS OF DEFAMATION

The common law elements (of the delict) of defamation are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning another person. There are three essential elements that must be present in order for a person to be successful in a claim for defamation.

(a) Wrongful

The defamatory statement must be made *contra boni mores* (against public morals). This simply means that the broad public must see the statement as wrongful and unacceptable. It is here where the Courts have the difficult task of balancing the rights enshrined in the Constitution; on the one hand someone's right to an untainted reputation and character and on the other hand freedom of expression.

(b) Intention

The person committing the defamation must firstly intentionally focus his or her will on damaging the other person's reputation with a comment or statement, and secondly the person making the statements must have known that what he or she is doing is wrongful or unlawful in the eyes of the law and will cause damage to the other person. This is probably the hardest element to prove and the utmost care must be taken when presenting this element to the Court.

(c) Publication

Defamation of character is only a factual violation of one's right to an untainted reputation when a defamatory statement is communicated by one person to another i.e. through publication thereof. It is important to note that "publication" here does not only mean in writing, but also includes a statement made verbally or even by using body language or hand gestures. The test applied by the Court is the reasonable person test. This means the communication is a "publication" if a reasonable objective person hearing or reading the words would think any less of you as a result thereof. Also remember that this element now includes any posts on social platforms including Facebook, Twitter.

3. PROVING DEFAMATION OF CHARACTER

In South Africa, the onus of proof lays on the person claiming that defamation has taken place to prove same along the lines set out above. The person bringing the matter to Court must submit proof that a wrongful and factual violation has occurred based on the essential elements set out above. To succeed in the defamation claim one has to show that the remarks were defamatory (determined in the context and circumstances in which they were used), the remarks are referred to them (a reasonable person would know it refers to them); and they were published by the defamer. The law upholds a presumption that the defamer's conduct was unlawful, and that the defamer acted with intent. So, the onus of proof then automatically shifts to the defamer to state his case or evidence that a wrongfulness presumption cannot be made and ultimately prove that there is no claim.

4. POSSIBLE JUSTIFICATIONS FOR DEFAMATION CLAIMS

In South African law there are three defences most commonly used to justify a defamatory statement made or claim launched, namely:

Truth and in public interest / public benefit

The defamer must prove that the statement is substantially true, and that the public has an advantage or legitimate interest therein. The fact that the public may be interested in a particular matter does not mean that it is in the public interest to publish it. In other words, it is not a question whether the public wants certain remarks to be published but whether they ought to be published.

Fair comment

This defence protects the right of a South African citizen to honestly express his or her genuine opinion i.e. freedom of expression. Most expressions of opinion are protected and entail no liability for defamation, even where they defame a person. However, the opinion expressed must be based on fact and be expressed on a matter of public interest for it to qualify as a protected opinion.

Privileged occasion

There must be a certain type of relationship between the person making the defamatory statement and the person to whom the content was communicated, for example an attorney-client relationship. Whether the comment is true or untrue does not matter in this case as the circumstance under which the statement was made, is privileged.

5. DAMAGES

Statements, written or spoken which diminishes ones good reputation in the eyes of an objective and reasonable person, and which were made with that intention, will give grounds for an action for damages for defamation.

Damages are calculated on the basis of the harm done to the reputation. The defamed does not have to prove any actual loss. Nor is there any type of scale for such

damages. The assessment will depend largely on the views of the judge or magistrate, who is guided firstly by previous awards in similar cases and secondly by numerous factors, such as:

- Malice and the nature and extent of the publication.
- Presence or absence of an adequate apology; and
- Rank or social or professional status of the party whose reputation was allegedly damaged.

The amount of damages is assessed on the basis of the extent of the damage to the good reputation. If for instance, the defamation was published to only one or two persons, the damage to the reputation may be very slight, in which case the damages awarded may not be substantial. Similarly, persons with a more public profile may suffer more harm through a defamatory statement than a normal civilian.

It has been accepted that in some type of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the defamer of the necessity of paying damages for his breach. The courts have indicated in some instances that the purpose of damages for defamation is not to punish the defendant but to offer solace to the plaintiff by payment of compensation for the harm caused and to vindicate someone's dignity.

6. Conclusion

This end calls for input. In the first place, courts ought to be wary when examining whether proclamations or delineations are defamatory not to take the reason or point of such productions as being characteristic of its defamatory nature. Furthermore, it is in understanding to this exploration that there is no uniform enactment that control defamation but precedent-based law and it has additionally demonstrated that there are requirements for such enactment to be instituted for general and consistency in the ramifications of defamation law in South Africa.