

Short notes on:

Your right of recourse for defamation of character

Introduction

In legal terms “defamation” refers to any statement that is made or published with the effect of damaging the good reputation of another person. The person who has been defamed by this 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 Constitution¹. 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.

As such, the complexity of a claim for defamation lies in this balance that needs to be maintained between two fundamental rights and testing those rights to what the broader society finds acceptable or unacceptable. With changing morals in modern society, it might become even harder in the near future to prove a defamatory comment.

The question is: how do you prove defamation and what is your right to recourse in terms of South African law?

Characteristics of defamation

Defamation is the wrongful and intentional publication of defamatory words or conduct that refers to another person. 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 person². There are three essential elements that must be present in order for a person to be successful in a claim for defamation:

¹ The Constitution of the Republic of South Africa, 1996

² *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 18

1. **Wrongful** (i.e. unlawful)

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.

2. **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.

3. **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 test³. 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 Facebook⁴, Twitter, etc.

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

³ National Education, Health and Allied Workers Union v Tsatsi 2006 1 All SA 583 (SCA) 586 para 8

⁴ In the case of Isparta v Richter 2013 6 SA 4529 (GP) the plaintiff instituted an action for defamation against the defendants following comments made by the first defendant on her "Facebook Wall".

proof that a wrongful and factual violation has occurred based on the essential elements set out above. To succeed with your action, you will also need to show that:

- The remarks were defamatory (determined in the context and circumstances in which they were used);
- The remarks referred to you (a reasonable person would know it refers to you)⁵; and
- They were published by the defamer.

This might seem to be a daunting task, but 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 or evidence that a wrongfulness presumption cannot be made and ultimately prove that there is no claim.

It is immaterial – for purposes of liability – whether one or a thousand people heard or read the defamatory remarks or only a few. It is a requirement however that at least one third party did.

What defences can be used as a justification for defamation claims?⁶

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

1. 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.

2. 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

⁵ *Isparta v Richter* 2013 6 SA 529 (GNP) para 20

⁶ See also *Borgin v De Villiers* 1980 3 SA 556 (A.)

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.

3. **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.

Damages

All statements, written or spoken about you, which diminish your good reputation in the eyes of an objective and reasonable person, and which were made with that intention, will give you grounds for an action for damages for defamation.

Damages are calculated on the basis of the harm done to your reputation. You do 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 your good reputation. If for instance, the defamation was published to only one or two persons, the damage to your reputation may be very slight, in which case the damages awarded to you will not be substantial. Similarly, persons with a more public profile may suffer more harm through a defamatory statement that you or I may.

Conclusion

As is clear from the above, the law of defamation is one of the more branches of our law. You will need professional legal assistance to prove a defamation of character case and claim the suitable damages.

At SchoemanLaw Inc we can assist you in applying to Court for an interdict, to stop someone from making continued defamatory statements or launch an action and claim the damaged you have suffered as a result of any defamatory remarks or statements made.

