



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A171/2023

In the matter between:

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

FIRST APPELLANT

ANDILE WISEMAN ZITHO

SECOND APPELLANT

MAMOJABENG CONSTANCE MOLATHLOE

THIRD APPELLANT

and

K[...] A[...] B[...]

RESPONDENT

Neutral citation: *National Union of Metal Workers of South Africa and Others v B[...]*
(A171/2023) [2025] ZAFSHC 337 (28 October 2025)

Coram: MHLAMBI ADJP, LOUBSER J *et* DE LA REY AJ

Heard: 25 July 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 12h00 on 28 October 2025.

Summary: Defamation – unauthorised disclosure of HIV status – action based on defamation and on breach of privacy are independent and distinct actions that must be pleaded separately.

ORDER

- 1 The late filing of the appellants heads of argument is condoned.
 - 2 The appeal is upheld with costs with counsel's fees to be taxed on scale B.
 - 3 The order of the court *a quo* is set aside and replaced with the following order:
'The plaintiffs' claim is dismissed with costs.'
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JUDGMENT

De la Rey AJ (Mhlambi ADJP and Loubser J concurring)

Introduction

[1] The respondent, K[...] A[...] B[...] (B[...]) instituted action against the first appellant, the National Union of Metal Workers of South Africa (Numsa), the second appellant, Andile Wiseman Zitho (Zitho) and third appellant, Mamojabeng Constance Molathloe (Molathloe) for defamation. The court *a quo* upheld B[...]’s claim and granted damages in the amount of R100 000. This appeal is with leave of court *a quo*.

Condonation

[2] The late filing of the appellant’s heads of argument is condoned.

Background

[3] The material facts in this matter are largely common cause and can briefly be summarised as follows. On the 27 February 2021, Zitho, in his official capacity, during a grievance meeting held at the office of the first appellant in front of approximately 14 members of Numsa uttered the words: ‘You Constance told me that P[...] [as B[...] is referred to at work] is HIV positive and I never told anyone.’ The very purpose of the grievance meeting was *inter alia* to discuss the issue of confidentiality at work.

[4] B[...]’s HIV status was known to Zitho since around the year 2010 when he was told thereof by Molathloe, who was a friend and a co-worker of B[...] and with whom she shared the fact that she was HIV positive during 2007. Prior to making the statement, Zitho warned the members in attendance that what he was about to say was going to cause commotion amongst the members, whereafter he proceeded to utter the words as

stated above and thereby making public that B[...]’s HIV status without her consent and without her prior knowledge that he was about to do same. The disclosure by Zitho upset the meeting and it had to be adjourned for a while because B[...] felt hurt and betrayed and became emotional. Zitho did apologise to B[...] afterwards, but she still felt hurt and stressed and had to consult psychologist to cope. B[...] understood the statement to mean that she was a sick person that may infect others and could not do her duties. Irrespective of the incident, B[...] remained employed at Numsa thereafter.

[5] From his evidence, it appears that Zitho made the statement to show the parties that he was able to keep the respondent’s HIV status a secret. Thus, to prove that he was able to keep the members personal medical information a secret, he revealed B[...]’s medical status. In his plea, Zitho largely defended his actions by claiming B[...]’s HIV status was common knowledge. This was not evidenced during trial, and his case evolved to be largely based on an acknowledgement that he erred by making the statement but that he never had the intention to defame B[...].

Pleadings

[6] The purpose of pleadings is to define the issues for the other party and the court and, it is for the court to adjudicate upon the disputes and those disputes alone.¹ The relevant paragraphs setting out the cause of action in B[...]’s particulars of claim reads as follows:

‘9. The statement made by the first defendant is wrongful and defamatory towards plaintiff, which instigated the plaintiff to open a *crimen injuria* case against the defendant at Park Road police station and a CAS number 892/03/2021 which matter is still pending the criminal courts.

10. The statement made by the first defendant was understood by both the plaintiff and her colleagues to mean that the plaintiff is a sick person, may infect others or cannot perform her duties.

11. The words uttered by the first defendant defame the plaintiff’s *fama*, *corpus* and *dignitas*.’

Legal principles

[7] The *actio iniuriarum* protects the rights entrenched in the Bill of Rights as

¹ *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28, with reference to *Fisher and another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.

contained in ss 10 (human dignity), 12 (freedom and security) and 14 (privacy) of the Constitution. A claim based on the violation of any of these rights must not be founded on the constitutional right, for in our constitutional order no sharp line can be drawn between the actions for claims for injuries to reputation (*fama* and *dignitas* concerning the individual's own sense of self-worth, and including a variety of personal rights, for example, privacy), and the cause of action should be pleaded on the elements sustained by the *actio iniuriarum*.²

[8] Although drafted inelegantly, B[...]’s cause of action is clearly based on defamation. The requirements for defamation, as held by the Constitutional Court in *Le Roux and Others v Dey* are: (a) the wrongful; (b) intentional; (c) publication of (d) a defamatory statement and concerning a plaintiff.³

[9] Once a plaintiff establishes publication of defamatory words, it is presumed that the statement was both wrongful and the publisher acted *animo iniuriandi*. It is then for the defendant, who bears the onus to be discharged on a preponderance of probability, to negate or raise a defence. As B[...] based her claim on defamation, the relevant question that needs to be answered first is whether the words uttered by Zitho were defamatory of her. This question was authoritatively answered in *N M v Smith and Others (NM)*,⁴ where the court held:

‘It is trite that the *actio iniuriarum* under the common law protects both dignity and privacy under the concept of *dignitas*. There is nothing shameful about suffering from HIV/AIDS. HIV is a disease like any other; however the social construction and stigma associated with the disease make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment. These pessimistic perceptions persist to fuel prejudice towards people living with HIV/AIDS. Living with HIV/AIDS should not be viewed as a violation of one’s dignity. Rather, an acceptance that HIV/AIDS should be treated like any other disease would help to destigmatise negative perceptions and pave the right channels to encourage positive change in the lives of those afflicted with HIV/AIDS, as well as in the treatment of the disease. It is, however, an affront to the infected person’s dignity for another person to disclose details about that other person’s HIV status or any other private medical information without his or her

² *Mdhlovu v National Director of Public Prosecutions* [2022] ZAMPMBHC 36; [2023] 1 All SA 458 (MM) para 19.

³ *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) para 84.

⁴ *NM and Others v Smith and Others* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (NM) para 48.

consent.'

[10] The clear conclusion of this passage from *NM* is that the fact that B[...] is HIV positive and the publication of this personal information cannot be defamatory. Holding otherwise would negate the very essence of the finding in *NM*. As stated by O'Regan J in a minority judgement in *NM*:⁵

'In dealing with cases concerning people living with HIV/AIDS, courts and lawyers must take care not to develop rules that will strengthen rather than diminish the stigma attached to HIV/AIDS. In time, we should hope that those living with HIV/AIDS should be seen merely as members of our community who have a disease for which treatment exists.'

[11] Much was made of the fact that in her particulars of claim B[...] failed to plead that Zitho had the necessary *animus iniuriandi* being an essential element in defamation. In *Moaki v Reckitt and Coleman (Africa) Ltd*,⁶ Wessels JA held that 'not only is *animus iniuriandi* an essential element in defamation, but also that the plaintiff must aver its presence in his pleadings'. Any argument that *animus iniuriandi* follows by necessary implication and can be presumed because Zitho warned and cautioned the attendees of a possible commotion before uttering the words cannot be sustained as it was not pleaded and, in any event, revealing B[...]’s HIV status is not defamatory. In the absence of a defamatory statement the relevance of this issue falls away. At best Zitho could have had the necessary *animus iniuriandi*, to, in breach of her privacy, disclose B[...]’s HIV status, but this was not the case pleaded or before the court *a quo*.

[12] With regard to a breach of privacy the court in *Bernstein and Others v Bester NO and Others* held:⁷

'In South African common law the right to privacy is recognised as an *independent personality right* which the courts have included within the concept of dignitas. Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state. In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person.' (My emphasis.)

⁵ Ibid para 141.

⁶ *Moaki v Reckitt and Coleman (Africa) Ltd* 1968 (3) SA 98 (A) at 105G–106A.

⁷ *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 para 68.

[13] An action based on defamation and one based on a breach of privacy, although both based on the *action iniuriarum*, remain independent and distinct actions that must be pleaded separately. The court *a quo*'s judgement must be considered with this distinction in mind.

[14] The court *a quo* held that:⁸

'[Sic] The Second Defendant to disclose in a meeting of 14 people, the HIV status of the plaintiff should be regarded as public defaming of one's privacy, dignity and reputation of her name. It is indeed not the Second Defendant's place to disclose the HIV status of the Plaintiff to disclose such sensitive detail about one's health in a meeting which had nothing to do with the Plaintiff's state of health.

. . .

I am therefore persuaded that the Second Defendant in mentioning the Plaintiff's HIV status in a meeting, constituted a wrongful act on his part and has thus defamed the Plaintiff's dignity, reputation and further violated her right to privacy of personal information.'

[15] The court *a quo* misconstrued the nature of the claim based on defamation by disregarding the fact that an action based on breach of privacy is an independent action and cannot be conflated with an action based on defamation. The unauthorised disclosure of B[...]s HIV status cannot amount to defamation of her privacy or dignity as held by the court *a quo*.

[16] The Constitutional Court, in holding in the *NM* matter that the 'uttering of a person's HIV status without their consent does undermine their dignity to the extent that it denies those living with HIV Aids the right to determine to whom and when their illness should be disclosed, which is in itself an aspect of the right to privacy'⁹ does not bring a breach of privacy under the umbrella of defamation, but rather confirms the independent personality right, a breach of which might be actionable.

[17] In the matter under consideration, the plaintiff's claim was, however, not based on the breach of her right to privacy in relation to her HIV status and the question arose as to whether considering the elements of the *actio injuriarum* the undisputed fact that her

⁸ Para 35 and 38 of the court *a quo*'s judgement.

⁹ *Op cit* fn 5.

HIV status was made public during the meeting can on the cause of action as pleaded by the plaintiff justify the relief sought.

[18] On the pleaded cause of action of defamation, the publication of B[...]’s HIV statement and the words uttered by Zitho clearly cannot be regarded as defamatory which leaves the remaining elements of defamation that one needs to consider irrelevant. If the statement and the publication thereof was not defamatory, then an action based on defamation cannot succeed. The plaintiff’s decision to base her claim on defamation, rather than on the breach of her privacy is fatal to the action and, it follows that the finding by the court *a quo* that ‘[t]he second defendant in mentioning the plaintiff’s HIV status in a meeting, constituted a wrongful act on his part and has thus defamed the plaintiff’s dignity, reputation and further violated her right to privacy of personal information’ is incorrect and inconsistent with B[...]’s pleaded case.

Conclusion

[19] It follows that the plaintiff’s pleaded claim could not have succeeded and the appeal stands to be upheld.

Order

[20] The following order is granted:

- 1 The late filing of appellants heads of argument is condoned.
- 2 The appeal is upheld with costs with counsel’s fees to be taxed on scale B.
- 3 The order of the court *a quo* is set aside and replaced with the following order:
‘The plaintiffs’ claim is dismissed with costs.’

H E DE LA REY
ACTING JUDGE OF THE HIGH COURT

J J MHLAMBI
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

P J LOUBSER
JUDGE OF THE HIGH COURT

Appearances

For the appellant: S Mabaso

Instructed by: S Mabaso Attorneys, Johannesburg
c/o E G Cooper Majiedt Inc, Bloemfontein

For the respondent: S Ngombane

Instructed by: Queen Mokhele Attorneys Inc, Bloemfontein.