



THE LAW OF DEFAMATION AND THE RIGHT TO FREEDOM OF SPEECH:

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Every person has the right to freedom of expression in terms of section 16 of the Constitution of South Africa, 1996 (*“the Constitution”*). It is however very important to remember that this right, along with all other human rights contained in the Constitution, can be limited in some ways. One way in which this right can be limited is, when it is weighed up to another person’s right to human dignity in terms of section 10 of the Constitution. When a person however oversteps these limitations and infringe on the rights of others through your freedom of expression, it can lead to the defamation of another person’s good name and reputation. This is the instance where the law of defamation will be applicable and where the requirements of defamation must be met for any claim to be successful in our courts.

Defamation violates a person’s dignity, and more specifically his or her reputation or *fama*. It thus follows that a person who is defamed must have legal recourse to protect and vindicate their constitutional right to human dignity as mentioned above. A party who intends to claim for defamation must do so in terms of the common law rules and not rely directly on the Constitution.¹

Defamation is a part of the law of delict and can be defined as any damaging statements made publicly with the intention to harm or damage someone’s good name and reputation. For a person to succeed in a delictual claim of defamation, there are certain requirements that must be met. These requirements include

¹ Anonymous “Freedom of Speech and the Law of Defamation” (02-03-2020)
<https://www.strausdaly.co.za/freedom-of-speech-and-the-law-of-defamation/>

wrongfulness, intention and the publication of a defamatory statement or behaviour towards another.²

A statement will be regarded as defamatory if, “in the opinion of the reasonable person, the words have the tendency to undermine, subvert, or impair a person’s good name, reputation, or esteem in the community”, as stated in the case of *South African Associated Newspapers Ltd and Another v Yutar*³. A defamatory statement will thus be an insulting statement that negatively affects the way in which a person is seen by others.

A statement will be regarded as having been published if it is made to a person other than the aggrieved plaintiff or his or her spouse. Publication is furthermore not limited to speech or print, but images such as photographs, sketches, cartoons, and caricatures can also be regarded as defamatory. It is important to keep in mind that publication only occurs once the addressee understands the defamatory nature of the statement as quoted in the case of *Vermaak v Van der Merwe*.⁴ In the case of *Isparta V Richter*⁵ the court held that making, sharing or just being tagged in a defamatory post on Facebook could lead to you being held liable therefor.

The requirements of wrongfulness and intention shall be deemed to be present once a person has proven the publication of a defamatory statement. The court has stated in this regard that “once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention.” The court stated this in the case of *Khumalo v Holomisa*.⁶

If you feel that another person has defamed you and that these actions or conduct meets the above-mentioned requirements, we at Malan Lourens Viljoen Inc. will be

² Neethling, Potgieter, Visser *Law of Delict* 7th Edition (2015).

³ 1969 2 SA 442 A.

⁴ 1981 1 ALL SA 432 N.

⁵ 2013 6 SA 529 GP

⁶ 2002 ZACC 12; 2002 5 SA 401 CC.

more than happy to assist you with the appropriate legal action given the circumstances of the particular case.

Article by **Charl Otto (LLB)**, Candidate Attorney at Malan Lourens Viljoen Inc.

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