REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2976/2010

In the matter between:

ERKKI NGHIMTINA **PLAINTIFF**

and

TRUSTCO GROUP INTERNATIONAL LIMITED **FIRST DEFENDANT**
MAX HAMATA **SECOND DEFENDANT**
FREE PRESS PRINTERS **THIRD DEFENDANT**

Neutral citation: *Nghimtina v Trustco Group International Ltd* (I 2976/2010) [2014] NAHCMD 11 (23 January 2014)

Coram: PARKER AJ
Heard: **21 – 23 October 2013**
Delivered: **23 January 2014**

Flynote: Defamation – Media – Defence of reasonable publication – Defendant must show that publication was reasonable and in the public interest in order to establish that publication was not wrongful – Court held that French philosopher Voltaire's counsel that in the case of news, we should always wait for the sacrament of confirmation finds expression in the Code of Ethics of the Society of Professional Journalists and a factor to be taken into account in determining whether publication is reasonable.

Summary: Defamation – Media – Defence of reasonable publication – Defendant must show that publication was reasonable and in the public interest in order to

establish that publication was not wrongful – In instant case the weekly newspaper *Informanté* published by the first defendant and printed by the third defendant published material that is defamatory of the plaintiff, a Cabinet Minister – Defendants raised the defence of reasonable publication – Court found that steps taken by the defendants to confirm the story from an anonymous source was not enough and the defendants breached certain tenets of the Code of Ethics of the Society of Professional Journalists – Court found that the second defendant (editor of *Informanté*) was not prepared to wait any longer to obtain comments from the plaintiff after his reporters had failed to obtain such comments for fear that some weekly newspaper would beat *Informanté* to it by publishing the story – The defendants were accordingly not prepared to wait for the sacrament of confirmation – Consequently, court found that defendants have failed to establish the defence of reasonable publication and therefore the publication was wrongful and the defendants liable to the plaintiff.

ORDER

(a) Judgment is granted against the defendants, jointly and severally; the one paying, the other to be absolved, in the amount of N$60 000.

(b) The defendants must jointly and severally pay interest on the N$60 000, at the rate of 20 per cent per annum, calculated from the date of judgment to the date of payment.

(c) The defendants are jointly and severally to pay the costs of the plaintiff in this action.

JUDGMENT

PARKER AJ:

[1] This is an action for defamation instituted against the first defendant, second defendant and third defendant, ie the publisher, editor and printer, respectively, of *Informanté*, a weekly newspaper in Namibia. The circulation of *Informanté* is approximately 65000 copies per week. It is also available on the internet. (*Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 382B)) The plaintiff is the Minister of Works and Transport.

[2] The caption of the article that gave rise to the action for defamation is 'Nghimtina hijacks rural power plan to pamper in-laws', and the opening paragraph reads:

> 'Former Minister of Mines and Energy, Erkki Nghimtina, allegedly abused his power as Energy Minister to electrify his mother-in-law's homestead in Omusati, depriving a number of businesses, schools and families Informanté can reveal.'

[3] The opening paragraph sets the tone for what the rest of the article is all about. The following sentence in the article is also relevant for our present purposes:

> 'Efforts to get comment from Nghimtina (has) proved fruitless since Tuesday, as his mobile phone went unanswered.'

[4] In the pleadings the defendants place their defence on 'truth and public interest', 'fair comment' and 'reasonable reporting'. But Mr Barnard, counsel for the defendants, submitted that since the defendants could not establish the truth of the allegations in the article, the defence of truth and public interest and fair comment were not pursued at the trial. The defendants rather pinned their defence solely on 'reasonable publication'. Thus, the defendants deny that the allegations are wrongful on the basis that the publication of the article was reasonable and in the public interest.

[5] The pivotal question to answer at the threshold is this: Was the article defamatory? In my opinion, an ordinary reader of the article would have understood the caption and contents of the article to mean that the plaintiff, using his position in

Government irregularly and unjustly, arranged for his mother-in-law to receive electricity supply in her homestead by causing it to be put on hold the supply of electricity to business houses, homesteads, a cuca shop, a primary school, a church and clinic whose turn it was at the time to receive electricity at their premises. Such ordinary reader would further have understood the article to mean that the plaintiff irregularly and unjustly used his position as former Minister of the Ministry of Mines and Energy, the Ministry responsible for the Government's rural electrification programme, in order to benefit his mother-in-law. Moreover, the ordinary reader would have, therefore, understood the article to mean that the plaintiff abused his power as a political leader in the interest of his mother-in-law; thus, disregarding the interests of the greater community, including schools, businesses, a church and a clinic in the community.

[6] For all these and in the circumstances of the case, I have no difficulty – none at all – in finding that the article was defamatory of the plaintiff.

[7] I now proceed to consider whether the defendants have established the defence of reasonable publication.

[8] '… the development of a defence of reasonable or responsible publication of facts that are in the public interest', said O'Regan AJA in *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 395F, 'will provide greater protection to the right of freedom of speech and the media protected in art 21 (of the Namibian Constitution) without placing the constitutional precept of human dignity at risk'.
The learned judge continued at 396C–D:

> 'The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity.'

[9] The substance of the evidence of the plaintiff (no one else gave evidence for the plaintiff) is briefly this. He was deeply hurt by the article because the allegations are simply not true: they are false. In particular he testified that he never gave any instructions to have his mother-in-law's house included in the rural electrification programme.

[10] I need not search the nook and cranny of the body of evidence to come to the conclusion that the plaintiff's evidence should be accepted as true. The article was published in the 22–28 July 2010 issue of *Informanté*. Barely one month after the publication of the article, on 18 August 2010 the Ministry of Mines and Energy issued a Press Release, entitled 'Ministry of Mines and Energy's Response on (to) Alleged Commission of Infrastructures from Rural Electrification Programme', under the hand of the Permanent Secretary of that Ministry. As I see it, the Press Release was issued to clear the wrong impression created by the article. The opening paragraph of the Press Release is aimed at responding to, and setting the record straight respecting, the article. In sum, the Press Release supports the plaintiff's evidence in material respects.

[11] At this point as regards the Press Release I shall repeat what I said in *Pohamba P Shifeta v Raja Munamava and Others* Case No. I 2106/2006 (judgment: 5 December 2008) (Unreported), para 42:

> '… whether a newspaper acted reasonably and carefully when it published a story which becomes the subject matter of a defamation suit must be determined at the time the publication took place; not some considerable time after the publication of the defamatory imputation. To hold otherwise would be unjust and unsatisfactory, and would fly in the teeth of common sense and human experience.'

[12] In the instant case, it is my view that the ordinary reader of the *Informanté* would have formed his or her view of the reputation of the plaintiff, as I have found previously, at the time he or she read the article not some time later.

[13] 'In considering whether the publication is reasonable, one of the important considerations will be whether the journalist concerned acted in the main in

accordance with generally accepted good journalistic practice.' (*Trustco Group International v Shikongo* at 399G) During the trial Mr Brandt, counsel for the plaintiff, invited the second defendant, the editor of *Informanté* at the material time the article was published, to admit certain principles set out in the 'Code of Ethics of the Society of Professional Journalists'. The second defendant did. The particular principles put to the second defendant are these:

> '(It is) to identify sources whenever feasible and its total reliability and to always question sources, motives before promising anonymity and to make certain that headlines and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context. A journalist should avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public.'

[14] As O'Regan AJA stated in *Trustco Group International v Shikongo* at 399H, 'Codes such as these provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article'. In determining the question whether the publication was reasonable, I make the following factual findings that are relevant to the determination of the question.

[15] Before publication of the article one of the reporters who wrote the article, Faith Sankwasa (the other was Patience Nyangove) decided to investigate what an unnamed source had told her. Faith visited the area in question and talked to some people there. For instance, she spoke to the plaintiff's mother-in-law, who is mentioned in the article. One would say Faith conducted some kind of inspection in loco. The mother-in-law informed her that she was going to receive electricity supply in her homestead. This piece of information, in my opinion, is colourless in these proceedings. It has not been established that the mother-in-law was not entitled to benefit from the rural electrification programme; and I leave it at that. In any case that is not the essence and thrust of the article.

[16] Faith's attempts to contact the plaintiff in order to elicit his comments on the story by phone came to no avail. Eventually, Faith left two voice messages on the plaintiff's mobile phone, informing the plaintiff about the *Informanté's* plan to publish

the story about the plaintiff's mother-in-law receiving electricity at her homestead over the heads of other members of the community.

[17] The second defendant sent Patience over to the plaintiff's office in order for her to obtain the plaintiff's comments after the abortive attempt by Faith. Unfortunately, by some twist of fate, Patience went to the wrong address.

[18] Thus, Patience's attempt, too, was abortive for obvious reasons, as mentioned in the preceeding paragraph. But I accept Faith's evidence as possibly true that she left voice messages on the plaintiff's mobile phone but the plaintiff did not respond. From his own testimony, it is clear that the plaintiff does not respond to communication on his mobile phone from communicators he did not know. As I understood the plaintiff's testimony, that practice is the plaintiff's personal policy. As to his reason for such policy; the plaintiff mentioned more than once that it is because the mobile phone is his private device. I find it odd and inexplicable for the plaintiff to turn round now and say that he did not receive the message from Faith. The probabilities are that the plaintiff received Faith's messages but decided to ignore them, in keeping with his aforementioned personal policy.

[19] It is my view that any reasonable person would have responded to the voice messages. But the plaintiff did not do so, albeit, in my opinion, it was in his interest to have responded to those messages. If he was too busy to respond himself, he could have instructed any official in his Ministry to attend to the matter. I think if that had happened the matter would have been cleared up. Indeed, that is exactly what the Press Release sought to achieve, as aforesaid.

[20] Be that as it may, I do not think the efforts of the reporters and the second defendant were adequate. I say so because at the material time neither the reporters nor the second defendant was aware of the plaintiff's aforementioned personal policy. That being the case, I conclude that the second defendant (as the editor who decided whether to publish or not to publish) and his reporters had at that material time no good reason to assume that the plaintiff had received the messages left on his mobile phone and that he was ignoring the reporter in keeping with his personal

policy. This conclusion is borne out by the following. The second defendant's evidence is that he knew the plaintiff very well; in fact he and the plaintiff shared some consanguine relationship. The second defendant testified further that the plaintiff was a political leader who cooperated with journalists, including the second defendant, and the second defendant had good cooperative and amicable professional relationship with the plaintiff. In the face of all these factual findings, I fail, then, to see why, after the attempts by Faith and Patience had not yielded the required result, the second defendant could not have driven (or walked) to the plaintiff's office in order to seek the plaintiff's comments, if the second defendant was minded to get the plaintiff's comments first before publishing the article. Indeed, to and behold; one of the reporters the second defendant sent to seek comments from the plaintiff did not do a good job of it: she went to the wrong address, as I have mentioned previously. She lost her way.

[21] The imperative need for the second defendant to have made double sure that the plaintiff's comments were at hand before the article was published is accentuated by this irrefragable fact. The original source of the story expressed his desire to Faith that he or she would like to remain anonymous. It should have occurred to the second defendant, an editor who has considerable formal education and experience in journalism, that it is risky for a journalist to put his or her faith completely in such source, as Faith did put her faith, and which the second defendant accepted, without really getting to the bottom of the story by obtaining the other side of the story.

[22] The risk that such anonymous source may be serving a particular agenda – not so noble and purposeful – different from that of the journalist cannot so easily be discounted. Such hidden agenda may not be apparent to the journalist, as Mr Brandt submitted.

[23] I find that the reason why the second defendant was not prepared to wait in order to get to the bottom of the story is clear in his testimony. The second defendant testified – and he was honest about it, in my opinion – that *Informanté* is a weekly newspaper and he felt the pressure to publish the story. I understood the second defendant to mean that he was apprehensive that one of the dailies circulating in

Namibia would pull the rug from under the feet of *Informanté* by publishing the story and beating *Informanté* to it. But we are reminded by the wise counsel of the French philosopher Francois Marie Arouet (who later assumed the name Voltaire) that 'In the case of news, we should always wait for the sacrament of confirmation'. Voltaire's counsel is directly in point and it finds expression in the aforementioned Code of Ethics of the Society of Professional Journalists; and so, it is a factor that a court should take into account when considering whether a publication is reasonable; as I do.

[24] After a careful consideration of the facts and circumstances of the case, I come to the reasonable and inevitable conclusion that the second defendant's conduct as analysed previously offends some of tenets of the aforementioned Code of Ethics of the Society of Professional Journalists, particularly that a journalist should test the accuracy of information from all sources and exercise care to avoid inadvertent error. Looking at the Press Release, the conclusion is unavoidable that the second defendant did not take care to test the accuracy of the story from all sources so as to avoid inadvertent error in breach of one of the tenets. Furthermore, the second defendant failed to honour the tenet that the public is entitled to as much information as possible on the reliability of sources. Additionally, the second defendant failed to question the motive of the source of the story before promising anonymity, also in breach of one of the tenets.

[25] On any pan of scale the fact that *Informanté* did not publish a retraction some four weeks after the publication of defamatory material when the Press Release was issued so as to correct that which the *Informanté* had published about the plaintiff should in the scales weigh heavily against the defendant. Indeed, the second defendant was adamant in his view that the story that his reporters Faith and Patience had presented to him was true. In that event, I should say the second defendant had faith in the reporters and no patience to take a step back and take a second look at the draft story. Accordingly, the second defendant's insistence in the witness box that the plaintiff did not demand an apology and so none was forthcoming from *Informanté* is, with the greatest deference to the second defendant, bunkum. A man of the second defendant's fine education, a man with an impressive

string of University degrees and considerable professional experience, should do that which is decent without being prodded. In this regard, I find as unfair Mr Barnard's submission that the plaintiff's claim has the markings of a desire to punish and vexatiousness.

[26] For these reasoning and conclusions, I find that the defendants have failed to establish the defence of reasonable publication. The defendants acted wrongfully when they published the defamatory article concerning the plaintiff. The defendants are, accordingly, liable to the plaintiff.

[27] What remains to determine is the quantum of damages. It is now settled that in order for the court to determine an appropriate amount it is useful for the court to compare the award being considered to other awards of damages recently made for defamation. In *Shidute and Another v DDJ Investment Holdings CC and Another* Case No. I 2275/2006 (judgment: 11 March 2008) (Unreported) the amount awarded was N$30 000. The story published in *Namib Times* was about the first plaintiff, alleging that the first plaintiff (an assistant controller at Walvis Bay Municipal Council) paid her electricity and water accounts late. The story was untrue but the defendants refused to acknowledge this. The amount claimed was N$30 000, and the court awarded that amount.

[28] In *Shifeta v Munamava and Others* the plaintiff was the Deputy Minister of Youth, National Service, Sport and Culture. The defamatory material published in *New Era* read that the plaintiff, a former secretary-general of the National Youth Council, was under investigation in relation to the disappearance of National Youth Council funds amounting to N$40 000. The story was not true. The plaintiff claimed damages in the amount of N$500 000. The court awarded N$50 000. In *Shifeta*, *New Era* published subsequently an item entitled 'Matter of Fact' aimed at clarifying certain aspects of the defamatory article; even if the 'Matter of Fact' was not a retraction *in sensu stricto*.

[29] There is also the defamation case of *Rauha Amwele v Alina Ndeyapo Amunyela-Namukwambi* Case No. I 1218/2011 (judgment: 7 March 2012)

(Unreported). There, the plaintiff was a female high ranking police official (holding the rank of Deputy Commissioner in Namibia Police (NAMPOL)). The defendant made defamatory imputation of adultery about the plaintiff that she had had illicit affairs with a Regional Commander of Police. The defamatory material was published in *Informanté*, but *Informanté* was not a party to the suit. The story was not true. The plaintiff had claimed N$100 000 damages. In his submission, counsel for the plaintiff graciously conceded that, considering the amount awarded for defamation around that time, N$100 000 was on the high side. In my opinion, to make untrue imputation of adultery about a married woman is by any standard the pinnacle of the most disparaging, most damaging and most mischievous defamatory material any one can publish about a married woman in any decent society like ours; and yet the amount awarded was N$30 000. In this regard, I do not accept the plaintiff's testimony that the choice of the word 'hijack' in the caption of the article connotes an allegation of criminal conduct on the part of the plaintiff. The ordinary reader of the *Informanté*, which is an English publication, would not have understood the caption of the article to mean an allegation that the plaintiff had committed the crime of hijacking of a thing capable of being hijacked.

[30] I have set out the aforementioned defamation cases and the quantum of damages awarded for a purpose. It is to come to conclusion that in claiming N$500 000 the plaintiff set his eyes too high in the skies. In any case, in his submission Mr Brandt stated that N$250 000 would be appropriate.

[31] In the instant case, it is worth noting that the publication of the article has not in any way dimed the political career of the plaintiff. He is still a Cabinet Minister. Nevertheless, in response to Mr Barnard's argument that being a politician the plaintiff 'should be less sensitive, more robust and durable, and not sensitive and meek', I should say I have heard that argument before, that is, in *Shifeta*; and my response there at para 53 was this:

> 'I am also unpersuaded by the argument that in defamation cases politicians, like the plaintiff, ought to be put in a different pan of scale from that of other persons. That would mean that when a politician is defamed, however serious or disparaging, he or she must simply grin and bear it. I do not believe that is the law.'

[32] I do not think that is the law because Article 8 of the Namibian Constitution, which guarantees the individual's right to dignity, does not designate the right to dignity of politicians as lower than that of other persons.

[33] Aggravating factors weighing against the defendants are that up to the commencement of the trial the defendants had taken the untenable position that the story was true, despite the Press Release which should have goaded the defendants to print a retraction and give it the same prominence the defamatory article was given in the issue in question. The defendants did not wait for the sacrament of confirmation, as I have found already. The second defendant was not prepared to be beaten to it by some daily newspaper. He did not have patience, but had plenty of unjustified faith in Faith and Patience (his reporters).

[34] Be that as it may, standing in favour of the defendants and against the plaintiff is his personal policy of not responding to messages left on his mobile phone by unknown persons. About the personal policy; I accept Mr Barnard's submission that the plaintiff has himself to blame for not responding to Faith's messages left on his mobile phone; thanks to his personal policy. The plaintiff's personal policy has not done him any good in these proceedings; I should say. Additionally, I find that the Press Release did some good as it took a great deal of sting from the damaging effect of the article, even if, as I have said no retraction was issued by *Informanté* following upon the Press Release.

[35] I have carefully weighed these competing factors in a balanced manner. I have also taken into account awards of damages made recently for defamation. I have, further taken into account the particular facts and circumstances of the case. Furthermore, I have considered Mr Brandt's gracious submission, mentioned previously, that although the plaintiff claims N$500 000 in the Particulars of Claim, an amount of N$250 000 would be appropriate. Counsel, it would seem, has taken a cue from counsel for the plaintiff in *Rauha Amwele*. On his part, Mr Barnard submitted that 'the circumstances dictate that a conservative award be made, (that is) not more than N$20 000'.

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[36] In all this, in my opinion, the award of damages must not aim at destroying the defendants financially, it must rather signalize the point that as newspaper editors, reporters and publishers, they cannot go around defaming other persons with impunity by 'frolicking upon journalistic sensationalizism' (*Shifeta*, para 51).

[37] Keeping all the aforegoing in my view, I think an award of N$60 000 is appropriate, and it meets the justice of the case. I accordingly, make the following order:

(a) Judgment is granted against the defendants, jointly and severally; the one paying, the other to be absolved, in the amount of N$60 000.

(b) The defendants must jointly and severally pay interest on the N$60 000, at the rate of 20 per cent per annum, calculated from the date of judgment to the date of payment.

(c) The defendants are jointly and severally to pay the costs of the plaintiff in this action.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	C Brandt Of Chris Brandt Attorneys, Windhoek
DEFENDANTS:	P C I Barnard Instructed by Van der Merwe-Greeff Inc., Windhoek