NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No: I 2572/2010

In the matter:

ALOIS NYANDORO	**PLAINTIFF**

And

FREE PRESS OF NAMIBIA (PTY) LTD	**FIRST DEFENDANT**
GWEN LISTER	**SECOND DEFENDANT**
JANA-MARI SMITH	**THIRD DEFENDANT**

Neutral citation: *Nyandoro v Free Press of Namibia (Pty) Ltd* (I 2572-2010) [2015] NAHCMD 116 (11 August 2015)

Coram: VAN NIEKERK J

Heard: 1, 2, 3, 4, 5, 8 October 2012; 12 November 2012; 24 January 2013

Delivered: 26 May 2015

Flynote: Defamation claim – Defences of truth and public interest, fair comment, qualified privilege and reasonable publication in public interest raised and discussed – Defences rejected – Damages of N$80 000 awarded.

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] In this matter I made the following order on 26 May 2015 and indicated that reasons would follow:

> "Judgment is given for the plaintiff against the defendants jointly and severally in the following terms:
>
> 1. Payment in the sum of N$80 000.00.
>
> 2. Interest on the said sum at the rate of 20% per annum from date of judgment to date of payment.
>
> 3. Costs of suit."

[2] These are the reasons for the order. The plaintiff instituted action for defamation against the first defendant as the "owner" and the second defendant (as the editor at the relevant time) of a newspaper called "The Namibian" ("the newspaper"). It later became common cause that the first defendant is actually the publisher of the newspaper. It is further common cause that the newspaper is a daily national newspaper with wide circulation in Namibia, that it is also

accessible on the internet and that it is widely read by the general public. The action arises from an article published in the newspaper on 11 March 2010. The third defendant, a journalist then employed at the newspaper, wrote the article. At all relevant times the plaintiff was a duly qualified pilot and employed as the Head of Training and Standards at Air Namibia (Pty) Ltd. The plaintiff claims damages from the defendants in the amount of N$500 000.

The article

[3] The article appeared as the lead story in the newspaper on 11 March 2010. It reads as follows (I have numbered the paragraphs for ease of reference):

> "**Air Namibia 'bypasses' pilot licensing rules**
>
> By: JANA-MARI SMITH
>
> 1. **PRESSURE by a senior manager of Air Namibia to falsify information for a South African to get a local flying licence led to the sudden resignation of a flight instructor at the national airline.**
>
> 2. Ralph Brammer, official trainer and certified Directorate of Civil Aviation (DCA) examiner, handed in his resignation this week after persistent pressure from Head of Training and Standards at Air Namibia, Alois Nyandoro, to falsify information on a DCA form to get the necessary certification for the SA citizen to fly Air Namibia's domestic Beechcraft 1900 fleet. Sources have confirmed that Cebile Mndawe, a South African citizen, was employed by Air Namibia during the last 2009 intake.
>
> 3. Air Namibia applied for the validation certificate from DCA as required, in order to obtain permission for her to fly in Namibia.
>
> 4. Air Namibia's General Manager Human Resources, Theo Namases, denied that the airline ever attempted to "bypass proper procedures and regulations."
>
> 5. She said that the "system has waterproof checks and balances, with the Directorate of Civil Aviation acting as the watchdog".
>
> 6. However, according to confidential informants, the DCA initially granted Mndawe the papers necessary to fly in Namibia but withdrew the validation when they were notified that Mndawe was not in possession of a valid South African pilot's licence, a strict requirement when applying for the Namibian licence.

7. Furthermore, the DCA heard that Mndawe's flying skills were "sub-standard" and that she would need to undergo additional practical flight examinations before she would be permitted to fly in Namibia.

8. Mndawe, before joining Air Namibia was employed with SA Express, but "she did not pass her type conversion training required by the airline, and we then redeployed her into air operations" – a desk job, the public relations department of SA Express confirmed yesterday.

9. When it was discovered that Mndawe was not in possession of a valid SA flying licence, the DCA withdrew her validation certificate and requested that she renew her South African pilot's licence.

10. She was also required to re-do the practical flying examination before they would reconsider granting her permission to fly in Namibia.

11. Internally, it was recommended that a review board should be convened to evaluate Mndawe's performance in order to decide whether she should undergo additional training or otherwise be dismissed, sources claim.

12. The review board was not held, however, for unknown reasons, and sources claim that senior management of Air Namibia approached the DCA and asked for an explanation for the withdrawal of Mndawe's Namibian flying certification.

13. They were apparently again informed that Mndawe would need to get her South African pilot's licence renewed and that she must undergo a practical flying examination.

14. Last week, Nyandoro allegedly instructed the senior DCA-approved examiner, Brammer, to transfer information from an unrelated form onto the DCA form, which would have created the impression that Mndawe had completed the required practical flight test as requested by the DCA.

15. The Namibian was reliably informed that Nyandoro insisted that the practical flight examination could be skipped and told Brammer to copy the initial recommendations for Mndawe's employment onto the DCA form.

16. One of the reasons allegedly advanced by Nyandoro to backdate the practical flying test results, and ignore the direct instructions from the DCA to complete a new flying test, was because it would apparently be too expensive for Air Namibia to repeat the test.

17. Nyandoro also allegedly insisted that the DCA was willing to accept the outdated, and invalid, practical flying test results.

18. In reaction to the pressure from his senior, Brammer this week resigned from Air Namibia, and sources say that he was unwilling to become involved in questionable practices and procedures used to employ people at Air Namibia. Brammer could not be reached for comment.

19. Another source yesterday confirmed that had Brammer agreed with the request from Nyandoro, it would have been deemed "highly illegal and it wouldn't have been approved by the DCA"."

The pleadings

[4] Relevant parts of the plaintiff's particulars of claim read as follows:

"6. The article stated, alternatively implied the following of the plaintiff:

6.1 that the plaintiff persistently pressured one Ralph Brammer, an official trainer and certified Directorate of Civil Aviation ("DCA") examiner to falsify information in order for a South African, Cebile Mndawe, to obtain the necessary certification in order to get a local flying licence, which led to the resignation of Ralph Brammer;

6.2 that the plaintiff allegedly instructed Mr Brammer to transfer information from an unrelated form onto the DCA form which would have created the impression that Ms Mndawe had completed the required flight test as requested by the DCA;

6.3 that the Namibian newspaper was reliably informed that the plaintiff insisted that the necessary practical flight examination could be skipped, and instructed Mr Brammer to copy the initial recommendations for Ms Mndawe's employment onto the DCA form;

6.4 that one of the reasons advanced by the plaintiff to backdate the practical flying test results and to ignore the direct instructions from the DCA to complete a new flying test, was because it would be too expensive for Air Namibia to repeat the test;

6.5 that the plaintiff allegedly insisted that the DCA was willing to accept the outdated and invalid practical flight test results;

6.6 that the plaintiff was involved in questionable practices and procedures used to employ people at Air Namibia;

6.7 that the request from the plaintiff to Brammer would have been deemed highly illegal and would not have been approved by the DCA.

7. The words and allegations in the context of the article are wrongful and defamatory of the plaintiff, alternatively false and defamatory of the plaintiff, in that they were intended to and understood by readers of the newspaper to mean or impute that the plaintiff

7.1 was involved in fraudulent attempts to falsify documentation in order to enable an unqualified pilot to fly a Namibian aeroplane;

7.2 was prepared to falsify important information and thereby place passengers in mortal danger when travelling in an aeroplane that was piloted by an unqualified pilot;

7.3 abused his position as a Senior Manager of Air Namibia (Pty) Ltd to pressure Mr Brammer to falsify information;

7.4 was a corrupt manager;

7.5 used his influence for an improper purpose;

7.6 has no respect for the law or for following proper procedures invoked for purposes of the certification of pilots;

7.7 is not to be trusted to conduct proper procedures;

7.8 is unprincipled and dishonest;

7.9 is not a man of integrity;

7.10 placed the reputation of Air Namibia and its reputation for flying standards into disrepute.

8. The statements concerning the plaintiff in the aforesaid article were made with the intention to defame the plaintiff and injure his reputation.

9. As a consequence of the publication the plaintiff has been defamed in his good name and reputation and has suffered injury to his feelings and dignity.

10. As a result of the defamation, the plaintiff has been damaged in his reputation and dignity and has suffered damages in the amount of N$500,000.00.”

[5] The defendants requested the following further particulars:

"1.

Ad paragraph 6

1.1 Which words are relied upon for the implication that the plaintiff "persistently pressured" Mr Brammer as is alleged in subparagraph 6.1?

1.2 Which words are relied upon for the implication in subparagraph 6.1 that the alleged pressure was "persistently" applied?

2.

Ad paragraph 7

2.1 What words in the report are relied upon for the meaning contended for in subparagraph 7.1? Full particulars are requested.

2.2 What words in the report are relied upon for the meaning contended for in subparagraph 7.2? Full particulars are requested.

2.3 What words in the report are relied upon for the meaning contended for in subparagraph 7.3? Full particulars are requested.

2.4 What words in the report are relied upon for the meaning contended for in subparagraph 7.4? Full particulars are requested.

2.5 What words in the report are relied upon for the meaning contended for in subparagraph 7.8? Full particulars are requested."

[6] The following further particulars were provided:

"1.

AD PARAGRAPH 1 THEREOF

1.1 *Inter alia* the words *"… after persistent pressure from Head of Training and Standards at Air Namibia, Alois Nyandoro …"* contained in the article.

1.2 *Inter alia* the words *"… after persistent pressure from Head of Training and Standards at Air Namibia, Alois Nyandoro …"* contained in the article.

AD PARAGRAPH 2.1 THEREOF

2.1 *"…after persistent pressure from Head of Training and Standards at Air Namibia, Alois Nyandoro to falsify information on a DCA form to get the necessary certification for the SA citizen to fly Air Namibia's [d]omestic Beechcraft 1900 fleet."*

2.2 "*However, according to confidential informants, the DCA initially granted Mndawe the papers necessary to fly in Namibia but withdrew the validation when they were notified that Mndawe was not in possession of a valid South African pilot's licence, a strict requirement when applying for the Namibian licence. Furthermore, the DCA heard that Mndawe's flying skills were 'sub-standard' and that she would need to undergo additional practical flight examinations before she would be permitted to fly in Namibia".*

2.3 *"Last week, Nyandoro allegedly instructed the senior DCA-approved examiner, Brammer, to transfer information from an unrelated form onto the DCA form, which would have created the impression that Mndawe had completed the required practical flight test as requested by the DCA. … Nyandoro insisted that the practical flight examination could be skipped and told Brammer to copy the initial recommendations for Mndawe's employment onto the DCA form."*

3.

AD PARAGRAPH 2.2 THEREOF

See *inter alia* paragraph 2 above.

4.

AD PARAGRAPH 2.3 THEREOF

See *inter alia* paragraph 2 above.

5.

AD PARAGRAPH 2.4 THEREOF

See *inter alia* paragraph 2 above.

6.

AD PARAGRAPH 2.5 THEREOF

See paragraph 2 above. And: *"Nyandoro also allegedly insisted that the DCA was willing to accept the outdated, and invalid, practical flight test result*" and *"… had Brammer agreed with the request from Nyandoro it would have been deemed 'highly illegal and it wouldn't have been approved by the DCA'."*

[7] The defendants pleaded *inter alia* as follows to the particulars of claim as amplified by the further particulars thereto:

"1.

Ad paragraph 1

The defendants admit the plaintiff's identity and capacity to sue and his employment position. The defendants have no knowledge of the further allegations contained in this paragraph, do not admit them and put the plaintiff to proof thereof.

2.

Ad paragraph 2

Save to point out that the first defendant is the publisher of the *Namibian*, (and not "owner"), the further allegations contained in this paragraph are admitted.

3.

Ad paragraphs 3, 4, and 5

The defendants admit these allegations.

4.

Ad paragraph 6

The defendants admit the article stated the allegations contained in subparagraphs 6.1, 6.2, 6.3, 6.4 and 6.5 concerning the plaintiff. The defendants deny that the allegations in subparagraphs 6.6 and 6.7 were as stated in the article or with reference to the plaintiff.

5.

Ad paragraph 7

Whilst the defendants admit that (*sic*) the meanings contended for in subparagraphs 7.3 and 7.5 and that the article stated that the plaintiff was involved in attempts to falsify documentation for the purpose of validating the licence for a pilot not entitled to fly Namibian registered aircraft without such validation licences (*sic*), the further meanings contended for in this paragraph are denied as if separately set out. Subject to the aforegoing the allegations contained in these paragraphs are denied. Insofar as it is held that the statements contained in the article were defamatory of the plaintiff, then the first, second and third defendants deny on the alternative bases set out below

in the alternative to each other that they published the articles wrongfully, wilfully, negligently or maliciously.

Alternative defences

Truth and public benefit and fair comment

6.

The defendants deny that the article as a whole was published in an unlawful manner in that, insofar as it contained statements of fact in (*sic*), these are essentially the truth and that the publication thereof was in the public interest and insofar as the report contained allegations of the nature of a comment, the comment concerned matters of public interest and was fairly and reasonably made in the circumstances and based upon facts which are essentially the truth.

Qualified privilege

7.

7.1 Irregularities with regard to the issuing of commercial pilots licences or their validation is a matter of high public interest.

7.2 The public had the right to be informed and the media had the corresponding right or duty to keep the public informed of allegations of any irregularity and/or unlawful conduct in connection with the issuing of commercial pilots licences or their validation, especially in respect of pilots of the national airline, Air Namibia (Pty) Ltd. These rights and duties arise at common law and from Article 21(1)(a) of the Constitution.

7.3 The statements of which the plaintiff complains were part of the fair and substantially accurate report by the third defendant and the newspaper in question of such a matter.

7.4 The defendants accordingly deny that the publication of the statements concerning the plaintiff complained of were wrongful.

Reasonable publication

8.

8.1 Following receiving a report that there were issues concerning a pilot in the employ of Air Namibia (Pty) Ltd (“Air Namibia”) who hailed [from] South Africa and her competence as a pilot, the third defendant was referred to and contacted a source concerning such matter.

8.2 The source informed the third defendant *inter alia* that:

8.2.1 the commercial pilot licence validation of a certain Ms Cebile Mndawe, a South African pilot in the employ of Air Namibia, had been withdrawn by the Directorate of Civil Aviation ("DCA") of the Government of the Republic of Namibia;

8.2.2 the form used to effect the validation had been incorrect and not appropriate, and that DCA required a correct form to be utilized and required that Ms Mndawe would need to be tested for the validation to be re-issued;

8.2.3 a designated examiner accredited with the DCA engaged by Air Namibia, Captain Ralph Brammer ("Brammer"), had informed the plaintiff, the Head of Training and Standards of Air Namibia, that Ms Mndawe would need to undergo a test for the purpose of re-issuing of a validation of her commercial pilot's licence;

8.2.4 the need for such a test was further and in any event justified by reason of complaints made and questions raised concerning Ms Mndawe's flying skills and ability;

8.2.5 Brammer has also been aware that concerns and questions had been raised relating to Ms Mndawe's flying skills and level of her competence;

8.2.6 the plaintiff sought to pressurize Brammer to complete the DCA form without Ms Mndawe undergoing a test, citing the cost of the test as a justification, and requested Brammer to proceed to complete the necessary DCA form for submission to DCA without such test for the purpose of the validation being re-issued;

8.2.7 Brammer declined to do so and preferred to resign his appointment with Air Namibia upon 30 days notice;

8.2.8 the completion of a DCA form without such a test would create a false impression and it would have been incorrect for Brammer to have done so and would have amounted to falsification of information;

8.2.9 Ms Mndawe had previously worked for SA Express and had been grounded and given a desk job by reason of lack of flying skills.

8.3 The third defendant was provided sight of emails exchanged between the plaintiff and Brammer on certain of the aforegoing issues, which served to confirm certain of the above matter disclosed by the source to the third defendant and *inter alia* revealed the following:

8.3.1 the plaintiff had resisted accepting a re-testing of Ms Mndawe for the purpose of seeking the validation of her licence, citing the costs of such a test;

8.3.2 Brammer pointed out that Ms Mndawe would require to be re-tested and that it was not merely a question of completing a different form for the re-issuing of the validation of her commercial pilot's licence;

8.3.3 the plaintiff disagreed with the aforegoing approach, citing costs as a justification not to proceed with the test;

8.3.4 Brammer declined to follow the behest of the plaintiff and instead terminated his contract with Air Namibia on 30 days notice, and pointed out that DCA insisted upon a re-test of Ms Mndawe for the re-issue of the validation of her commercial pilot's licence;

8.3.5 Brammer had pointed out that the plaintiff's comment to the effect that merely a wrong form had previously been used, was incorrect.

8.4 The third defendant received confirmation of concerns raised relating to [M]s Mndawe's flying skills.

8.5 The third defendant contacted the DCA and spoke to its licensing officer, Mr Graeme van Niekerk who *inter alia* informed the third defendant:

8.5.1 Ms Mndawe's validation of her commercial pilot's licence had been withdrawn;

8.5.2 a validation test was required by DCA for Ms Mndawe for the re-issuing of the validation of her commercial pilot's licence;

8.5.3 a designated examiner accredited to the DCA had been put under pressure to sign the necessary DCA form to seek the re-issue of the validation of Ms Mndawe's licence without a test;

8.5.4 Ms Mndawe would not appear to meet the standards of a commercial pilot and that there had been complaints concerning her ability;

8.5.5 it would be highly illegal to have permitted a validation purely on the strength of completing the DCA form without a test.

8.6 The third defendant endeavoured to contact the plaintiff on 10 March 2010. When calling his office on such date, she was informed that she

would need to speak to Ms The[o] Namases of Air Namibia in order to obtain comment on the allegations.

8.7 The third defendant thereafter on 10 March 2010 contacted Ms Namases' office and was informed that she was required to send her questions in writing to Ms Namases for comment.

8.8 The third defendant thereafter addressed an email on 10 March 2010 to Ms Namases, annexed and marked "P1" setting out her request for comment on the matters referred to therein.

8.9 Ms Namases thereafter responded on 10 March 2010 to annexure "P1" in the terms set out in annexure "P2" hereto.

8.10 The third [defendant] telephonically contacted the offices of SA Express airline and was referred to its public relations officer. The public relations officer of SA Express stated to the third defendant that Ms Mndawe did not pass her type conversion training required by the airline and that she had then been redeployed in air operations, a desk job.

8.11 The third [defendant] endeavoured to [contact] Mr Ralph Brammer …… but was then unable to secure his comment on the allegations as he did not want to become involved "involved in questionable practices and procedures used to employ people at Air Namibia".

8.12 The third defendant obtained confirmation of the termination by [Brammer] of his contract with Air Namibia.

8.13 The third defendant thereafter prepared her report on 10 March 2010 which was then published in the newspaper on 11 March 2010.

8.14 The third defendant in the circumstances acted reasonably and without negligence and in good faith in writing and publishing the statements complained of in the report.

8.15 The second defendant as editor of the newspaper and the first defendant as publisher of the newspaper relied upon the third defendant having acted reasonably and without negligence and in good faith in publishing the statements complained of in the report.

8.16 The publication of the statements concerning the plaintiff was reasonable in all the circumstances.

8.17 The defendants accordingly deny that the publication of the statements of which the plaintiff complains was wrongful, wilful or negligent.

Ad paragraph 9 and 10

The defendants deny these allegations."

Case management pre-trial proceedings

[8] During case management pre-trial proceedings the parties effectively agreed that the following issues were to be resolved at the trial: (i) the allegations in paragraphs 6.6 and 6.7 of the particulars of claim; (ii) whether the content of the published article received widespread coverage; (iii) whether the statements in paragraphs 6.1 to 6.7 were intended and were understood by the readers of the newspaper to mean or to impute the allegations made in paragraphs 7.1 – 7.10 of the particulars of claim (while noting that the defendants admitted the allegations in paragraphs 7.3 and 7.5); (iv) whether the aforesaid statements concerned the plaintiff and whether, in the context of the article, read as a whole, the statements are wrongful and defamatory of the plaintiff; (v) whether the aforesaid statements were published by the defendants with the intention to defame the plaintiff and injure him in his good name and reputation; (vi) whether the plaintiff had a good name and reputation and if so, whether, as a result of the aforesaid publication, the plaintiff had been injured in his good name and reputation; (vii) whether the plaintiff suffered any damages and if so, whether he suffered damages of N$500 000; (viii) whether the defendants are jointly and/or severally liable for the damages; (ix) the alternative defences of the defendants.

The approach to be adopted in interpreting the article

[9] It is trite that the approach to be adopted in determining whether a defamatory meaning is to be attached to a newspaper article is –

> "… an objective one, namely what a reasonable reader with normal understanding and development would have understood when he/she reads the article. It is also common cause that the reasonable man is not the astute lawyer or a supercritical reader. The court has to determine the meaning which a reasonable man would likely give to the statement in its context and whether that meaning is defamatory."

(*Shikongo v Trustco Group International Ltd* 2009 (1) NR 363 (HC) at 387B (footnotes omitted)).

[10] In *Afshani v Vaatz* 2006 (1) NR 35 (HC) 45B-E it was put as follows (the omission is mine):

> "[22] Whether the defendant's statement is defamatory ... falls to be determined objectively: the Court will construe the statement, draw its own inference about the meaning and effect thereof and then assess whether it tends to lower the plaintiff 'in the estimation of right-thinking members of society generally' (per Greenberg JA in *Conroy v Stewart Printing Co Ltd* 1946 AD 1015 at 1018). The standard from which the enquiry should depart, Ponnan AJA more recently said in *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at 360H-I, 'is the ordinary reader with no legal training or other special discipline, variously described as a "reasonable", "right-thinking" individual of "average education" and "normal intelligence". It is through the eyes of such a person who is not "super-critical" or possessed of a "morbid or suspicious mind" that I must read' the statement."

[11] In *Tuafeni Hangula v Trustco Newspapers (Pty) Ltd* (I 4081/2011) [2012] NAHCMD] 77 (26 November 2012) Smuts J (as he then was) quoted the following with approval from *Tsedu v Lekota* 2009 (4) SA 372 (SCA) 377C-F (the insertion is mine):

> "[13] In deciding whether the statements I have outlined are defamatory, the first step is to establish what they impute to the respondents. The question to be asked in that enquiry is how they would be understood in their context by an ordinary reader. Observations that have been made by our courts as to the assumptions that ought to be made when answering that question are conveniently replicated in the following extract from a judgment of an English court [Simon Brown LJ in *Mark v Associated Newspapers Ltd* 2002 EMLR 839 ([2002] EWCA Civ 772) para 11]:
>
> > 'The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the

> impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'"

[12] While these cases set out the approach to be followed to determine the statements complained of are defamatory in their context, it seems to me that the same approach should be followed when the meaning of the context is determined.

The allegations in paragraphs 6.6 and 6.7 of the particulars of claim

[13] Applying the aforesaid approach I now turn to a consideration of the allegations set out in paragraphs 6.6 and 6.7, which concern certain statements, express or implied, in the article. In view of the defendants' denial in respect of the allegations contained in the above-mentioned paragraphs, it is convenient to determine at this stage whether the allegations are well founded, as this determination is not dependent upon the presentation of any evidence.

[14] The allegation in paragraph 6.6 is that the article states, alternatively implies, that the plaintiff was involved in questionable practices and procedures used to employ people at Air Namibia. The allegation is evidently based on paragraph 18 of the article, which reads as follows:

> "18. In reaction to the pressure from his senior, Brammer this week resigned from Air Namibia, and sources say that he was unwilling to become involved in questionable practices and procedures used to employ people at Air Namibia. Brammer could not be reached for comment."

[15] The only person of Air Namibia referred to throughout the article who allegedly attempted to involve Mr Brammer in bypassing proper procedures is the plaintiff. According to the article Mr Brammer resigned in reaction to pressure by the plaintiff. The clear implication in the quoted paragraph is that the resignation was in response to pressure by the plaintiff for Mr Brammer to become involved in questionable practices and procedures used to employ people, like the pilot in question, at Air Namibia. As such it follows by necessary implication that the

plaintiff is also involved in questionable practices and procedures used to employ people at Air Namibia as alleged in paragraph 6.6.

[16] The allegation in paragraph 6.7 is that the article states, alternatively implies, that the request from the plaintiff to Mr Brammer would have been deemed highly illegal and would not have been approved by the DCA. These allegations appear to be based on the article's last paragraph, which should be read in context with what was stated a few paragraphs earlier. The relevant extract reads as follows:

> "14. Last week, Nyandoro allegedly instructed the senior DCA-approved examiner, Brammer, to transfer information from an unrelated form onto the DCA form, which would have created the impression that Mndawe had completed the required practical flight test as requested by the DCA.
>
> 15. The Namibian was reliably informed that Nyandoro insisted that the practical flight examination could be skipped and told Brammer to copy the initial recommendations for Mndawe's employment onto the DCA form.
>
> 16. One of the reasons allegedly advanced by Nyandoro to backdate the practical flying test results, and ignore the direct instructions from the DCA to complete a new flying test, was because it would apparently be too expensive for Air Namibia to repeat the test.
>
> 17. Nyandoro also allegedly insisted that the DCA was willing to accept the outdated, and invalid, practical flying test results.
>
> ……
>
> 19. Another source yesterday confirmed that had Brammer agreed with the request from Nyandoro, it would have been deemed "highly illegal and it wouldn't have been approved by the DCA"."

[17] Literally construed the last paragraph does not state that the plaintiff's request itself would have been deemed highly illegal, etc. It states that "had Brammer agreed with the request" from the plaintiff, "it" would have been deemed highly illegal and "it" wouldn't have been approved by the DCA. It seems to me that, strictly speaking, the word "it" refers to the act of agreeing with the request. However, in the context of the article I think the ordinary reader would have understood that it is implied that what was to be done in the execution of the

request by the plaintiff, namely to skip the re-test required by the DCA and to transfer information, being initial recommendations for Ms Mndawe's employment, and outdated and invalid practical flight test results from an unrelated form, onto the DCA form to give the impression that the re-test required by the DCA had been done, would have been deemed "highly illegal" and would not have been approved by the DCA. I think that the ordinary reader would have regarded it as further implied that the plaintiff's conduct itself, in instructing and requesting Mr Brammer to do so, would have been deemed "highly illegal" and would not have been approved by the DCA.

[18] I therefore hold that the allegations in paragraphs 6.6 and 6.7 are well founded in that the statements as alleged are implied.

Whether the content of the published article received widespread coverage

[19] By "widespread coverage" I understand that the matters mentioned in the article were widely reported on in the media. No evidence was presented on this issue. I therefore cannot make any finding on the matter.

The meanings imputed to the plaintiff and whether they are defamatory

[20] In paragraphs 7.1 to 7.10 of the particulars of claim the plaintiff sets out what he alleges are the various meanings in which the statements in the article would be understood by readers of the newspaper. The defendants admit that the article intended to convey only those meanings set out in paragraphs 7.3 and 7.5, i.e. that the plaintiff abused his position as a senior manager of Air Namibia to pressure Mr Brammer to falsify information; and that he used his influence for an improper purpose. As I understand the pleadings the defendants did not admit that these admitted meanings were defamatory, but during argument Mr *Corbett*, who appeared on behalf of the defendants, made it clear that it is further conceded that the aforesaid meanings are *per se* defamatory of the plaintiff.

[21] In the pleadings the plaintiff's case is that, in the context of the article, all the statements set out in paragraph 6 and the meanings imputed to them as set out in

paragraph 7, including the amplification provided by the further particulars, are defamatory of him. This was also the case which the parties agreed should be met by the defendants during the trial. The plaintiff did not deviate from this position while giving evidence-in-chief. However, during cross-examination he was referred to the article and asked to identify the paragraphs which in his view were defamatory of him. He only identified the first two paragraphs (strictly speaking the first two sentences, but nothing turns on this) and then emphatically stated, “That is it.” When defendants’ counsel enquired, “Is that it?” he replied, “Yes.”

[22] With hindsight I am not sure that the plaintiff understood the implications of this testimony, but the issue was not taken up in re-examination. Counsel for the defendants thereafter conducted their case on the basis that the plaintiff’s cause of action was based only on these two paragraphs. During argument the plaintiff’s counsel took issue with this approach in so far as it might mean that the rest of the article should be ignored and submitted that the first two paragraphs should be considered in the context of the article as a whole. I did not understand the defendants’ counsel to argue otherwise, subject to submissions he made about the effect of certain admitted inaccuracies in the rest of the article, to which I shall return at a later stage. It remains the task of the Court to consider as a matter of law whether the first two paragraphs, in the context of the article as a whole, are reasonably capable of conveying to the reasonable reader the meanings which the plaintiff alleges in paragraphs 7.1, 7.2, 7.4, 7.6, 7.7, 7.8, 7.9 and 7.10 of the particulars of claim are imputed to the plaintiff and whether these meanings defame the plaintiff.

[23] For ease of reference it is convenient to quote these two paragraphs again:

> **“PRESSURE by a senior manager of Air Namibia to falsify information for a South African to get a local flying licence led to the sudden resignation of a flight instructor at the national airline.**
>
> Ralph Brammer, official trainer and certified Directorate of Civil Aviation (DCA) examiner, handed in his resignation this week after persistent pressure from Head of Training and Standards at Air Namibia, Alois Nyandoro, to falsify

> information on a DCA form to get the necessary certification for the SA citizen to fly Air Namibia's domestic Beechcraft 1900 fleet. Sources have confirmed that Cebile Mndawe, a South African citizen, was employed by Air Namibia during the last 2009 intake."

[24] In the *Collins Concise English Dictionary* (1992) the word "falsify" is defined as "**1.** to make (a report, evidence, etc.) false or inaccurate by alteration, esp. in order to deceive. **2.** to prove false." Clearly the second meaning does not apply to the word as used in the article.

[25] In *Universal Church of the Kingdom of God (Incorporated Association Not For Gain) v Namzim Newspaper (Pty) Ltd t/a The Southern Times* 2009 (1) NR 65 (HC) at 73H-74C this Court referred to useful English authority about the use of the word "false":

> "[29] In the English case of *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Oldhams Press Ltd* 1940 (1) CA 1, a report was published in a popular newspaper under the following heading which appeared in heavy italics:
>
> **'False Profit**
>
> **Return Charge**
>
> **Against Society'.**
>
> The newspaper published a report of criminal proceedings brought against the society for allegedly submitting a false return of its profits. The society had not deliberately falsified its accounts - it had simply taken the view based on professional advice - that a particular item of income was not a profit but a capital receipt, and had accordingly reflected it as a profit in its accounts. The Court of Appeal found that the use of the word 'false', in the headline, in bold print, would, under the circumstances convey to the ordinary reader, not the innocent meaning of false, namely a technical inaccuracy, but its meaning of deceit, dishonesty and fraud. For this reason, although the article itself was a fair account of the facts, the newspaper was found liable for defamation on the strength of the headline."

[26] The word "falsify" as used in the article would, to my mind, convey to the reasonable reader that the DCA document would not have been true, but would have contained false information calculated to deceive and defraud. In this sense the ordinary reader would have understood that the plaintiff was involved in

attempts to deceive the DCA by dishonestly and fraudulently representing in the document that the pilot is fit or entitled to obtain a local flying licence or the necessary certification to fly in Namibia (part of the meaning contended for in paragraph 7.1). The reasonable reader would have understood that the plaintiff was a corrupt manager, in the sense that he is engaged in dishonest behaviour (paragraph 7.4); that he has no respect for the law or for following proper procedures invoked for purposes of the certification of pilots (paragraph 7.6); that he is not to be trusted to follow proper procedures (paragraph 7.7); that he is unprincipled and dishonest (paragraph 7.8); and that he is not a man of integrity (paragraph 7.8).

[27] The falsification relates, according to the article, to obtaining a local flying licence for a foreign pilot who has no valid pilot's licence, whose flying skill are "substandard"; who would need to undergo additional practical flight examination before she would be permitted to fly in Namibia; who before joining Air Namibia was redeployed to a desk job by the airline which was her previous employer because she did not pass her type conversion training as required by the airline; and in respect of whom there had been an internal recommendation that a review board evaluates her performance to decide whether she should undergo additional training or be dismissed. From these statements the ordinary reader would have understood that the pilot was not competent or qualified to fly an aeroplane (paragraph 7.1). Furthermore, I think it follows as a necessary implication in the article that this pilot at the time posed a safety risk and that anyone flying with her would be exposed to mortal danger. As the alleged falsification relates to the plaintiff's attempts to pressurize the instructor to falsify information with which to deceive the DCA into granting her a licence to fly, the meaning conveyed to the reasonable reader would have been that the plaintiff was prepared to falsify important information or at least to be a party to such falsification to obtain a licence for the particular pilot "and thereby place passengers in mortal danger when travelling in an aeroplane that was piloted by an unqualified pilot" (paragraph 7.2).

[28] The headline of the article states “Air Namibia ‘bypasses’ pilot licensing rules”. In the context of the article as a whole it is clear that the ‘bypassing’ did not actually take place because the attempts at it failed. However, the reference to a “senior manager of Air Namibia” and to the plaintiff as the “head of Training at Air Namibia” and his pressurisation of an instructor at the airline to falsify information to deceive the DCA thereby to enable an incompetent and unqualified pilot to fly certain of Air Namibia’s planes would be understood by the ordinary reader as a poor reflection on Air Namibia and as identifying the plaintiff as the cause of bringing the airline into disrepute. To this extent the meaning contended for in paragraph 7.10 is established. This paragraph also alleges that there is an imputation that the plaintiff placed Air Namibia’s reputation for flying standards into disrepute. This allegation assumes that the ordinary reader would know that Air Namibia in fact has a reputation for upholding flying standards. I am not sure that this would be the case. I therefore prefer to hold that this imputation has not been established.

[29] To sum up thus far, subject to the last qualification, all the meanings and imputations contended for by the plaintiff have been established. The next question is whether they tend to lower the plaintiff in the estimation of right-thinking persons generally. I have no doubt that they do and find it unnecessary to elaborate any further on the issue. It only remains to state that the above-mentioned concession by the defendants’ counsel in regard to paragraphs 7.3 and 7.7 was well made.

The onus

[30] During argument the parties were in agreement that the onus is on the plaintiff to prove the publication of the defamatory matter concerning him. Based on the defendants’ admission of the publication and the defamatory nature of certain of the meanings to be imputed to the relevant statements in the article, coupled with the Court’s findings concerning the other implied and imputed meanings of the relevant statements in the article and the defamatory nature thereof, the plaintiff has acquitted himself of this onus.

[31] Counsel were in agreement that this fact gives rise to two rebuttable presumptions, namely that the publication was wrongful and intentional and that the defendants carry the onus to establish on a balance of probabilities any defence in rebuttal (*Trustco Group International Ltd v Shikongo* 2010 (2) NR 377 (SC) para [24] at 388B-D).

The evidence on behalf of the plaintiff

[32] The plaintiff testified as the only witness in support of his case. When he testified he was 49 years old and born and educated in Zimbabwe. He started his flying career as a pilot in the Zimbabwean air force where he spent 11 years, holding a commissioned officer's rank as squadron commander. He also trained other pilots as an instructor. He holds an airline transport pilot's licence which enables him to fly as captain on large aeroplanes. He left the air force in 1993 and flew for several airlines in Zimbabwe, e.g. Avertur, Millionaire, Zambia Express Airways and Zimbabwe Airlines.

[33] In 1999 he came to Namibia to fly the President of Namibia as well as to train other pilots who fly the President. He joined Air Namibia in 2008 as the Head of Training and Standards. His duty was to ensure that the training of pilots, cabin crew and flight operations officers is of the highest standard and in accordance with the Namibia Civil Aviation Regulations ("NAMCARS"). In terms of an agreement between Air Namibia and Government Air Transport Services he continued to fly the President from time to time and to train other pilots to do so. He holds a Grade 1 instructor's licence which is considered to be the highest instructor's level in Namibia. At the end of 2011 he resigned from Air Namibia, but still did pilot duties for the President.

[34] He explained that the aviation industry is subject to the Aviation Act, 1962 (Act 74 of 1962), which is applied by means of a government agency called the Directorate of Civil Aviation ("the DCA"). Its responsibility is to ensure that the aviation industry is conducted in accordance with the Aviation Act. In every aviation organization there is an accountable manager responsible for flight crew.

This manager must be accepted by the DCA before the organization can be certified. It is as this manager that he occupied his position as Head of Training and Standards at Air Namibia. As he described it, he was "an extension of the DCA at Air Namibia". He is also an examiner designated or recognised by the DCA. At the relevant time in this case the contact person responsible for licencing at the DCA was Mr Graeme van Niekerk, who was a witness for the defendants.

[35] When asked how he rated himself in terms of experience in comparison to other pilots in Namibia, the plaintiff replied that his standing in the aviation industry was such that at times he is called upon by the DCA to assist in the formulation of regulations, particularly with regard to training and testing. He also represented the aviation industry when Mr van Niekerk was interviewed for his position at the DCA as he was requested by the Ministry of Works and Transport to be a member of the interview panel.

[36] The plaintiff also holds a Bachelor's Degree in Business Administration and at the time of the trial was completing an MA in Business Administration in Aviation.

[37] While the plaintiff was still employed at Air Namibia, he was not involved in recruitment of new staff, but he was responsible for training the staff. He had about 10 pilots employed by Air Namibia to train during about 2009 – 2010. Amongst them was Ms Cebile Mndawe, who was a pilot from South Africa and who held a SA commercial pilot licence (no. 0271014235) which was to be renewed. He arranged for these pilots to go to South Africa for training in about August - September 2009 on the Beechcraft B190, a type of aircraft which takes 19 passengers and which was used by Air Namibia at the time for domestic flights. Ms Mndawe went through the initial part of the training, called conversion training. It is a type of training done on each specific aeroplane, going through its systems and being trained in how that specific aeroplane is supposed to be flown or operated. Although one is a pilot, one needs training specific to the type of aircraft to be able to fly it. The training is initially done in a simulator. Ms Mndawe completed the simulator training satisfactorily. Thereafter she completed "base training", which means that she underwent training in the actual aircraft with an

instructor, but without passengers. On 11 September 2009, one of the instructors, Mr JC Boardman, recommended her for “line training” (see Exh “L”). This is on the job training in the actual aircraft doing normal flights with passengers, with another pilot as instructor.

[38] On 19 September 2009 Ms Mndawe passed a South African “skill test for initial or revalidation of instrument rating” in which the B190 was used. On the same date she also passed a type rating test to enable her to obtain an endorsement on her SA licence permitting her to fly the B190. She needed such a type rating to do the line training.

[39] These two tests were done by Mr Brammer, who was an independent contractor from South Africa. The plaintiff specifically chose Mr Brammer to conduct these tests because he is not only a South African examiner, but he also had accreditation to examine pilots in Namibia. As Ms Mndawe’s licence was South African he would “kill two birds with one stone”, as the plaintiff put it – he could at the same time do the tests for the South African Civil Aviation Authority (“SACAA”) and for the validation of her South African licence in Namibia, as these tests were practically the same and required the same standards to be met because the NAMCARS and the SA Civil Aviation Regulations (“SACARS”) were the same. In fact, the plaintiff testified that the SA type rating test was the equivalent of the Namibian validation test. Validation means that the DCA recognizes the foreign licence and all the privileges it entails, which then permits the pilot to fly in Namibia. The validation may be granted subject to certain conditions and limitations.

[40] Mr Brammer filled in the South African forms for the two tests on 19 September 2009 (Exh “M”, p 30 – 36 of plaintiff’s bundle). On the same date Mr Brammer also completed a “Check 6” form in respect of Ms Mndawe (Exh “N”). It is common cause that the “Check 6” form is also known as an “operator proficiency check” (“OPC”) form; that the DCA has approved this form for use by Air Namibia; and that such a form is completed in respect of each pilot employed by Air Namibia when the pilot is routinely tested for proficiency. This “check” is a

test required by law to be performed every six months, but it is done internally by the operating entity, in this case Air Namibia. The Check 6 test form indicates that Mr Brammer, like Ms Boardman, recommended Ms Mndawe for line training on the B190.

[41] Ms Mndawe used the two SA flight test results to apply to the SACAA and, according to Exh "D", her SA licence was renewed on 29 September 2009 and from that date included an endorsement to also fly the B190.

[42] She then applied for the validation of the South African licence by the Namibian DCA. On 24 November 2009 the DCA issued her a validation certificate (Exh "O") in accordance with NAMCARS (2001), more specifically, regulation 61.01.10. The certificate states, *inter alia*, that it – "validates all the privileges of the Foreign Commercial Pilot Licence (A) # 0271014235 issued by **South Africa** for Ms. **MNDAWE** Cebile and recognises it as the equivalent of a Namibian **Commercial** Pilot Licence restricted …", *inter alia*, to be valid for Air Namibia operations only and for the B190 as co-pilot only. The certificate further specified that it was valid from 24 November 2009 to 18 February 2010 and that the validation was contingent upon the continuing validity of the foreign licence.

[43] After Ms Mndawe received the validation certificate, the plaintiff put her through the next stage of line flying training. In about January 2010 the DCA informed Ms Mndawe in writing that her validation had been withdrawn, which meant that she could not continue with line training. The letter by the DCA (Exh "A") was written and signed by Mr van Niekerk on 27 January 2010 and directed at Ms Mndawe. The relevant part reads as follows:

> "**REMOVAL OF NAMIBIAN FOREIGN LICENCE VALIDATION CERTIFICATE**
>
> The **Director of Civil Aviation** would hereby like to inform you that your **Namibian Licence Validation** is hereby withdrawn.
>
> The licencing office made an error in issuing the document to you as not the correct **Official Namibian Commercial Practical Flight Test form** was submitted.

> Your Namibian validation will be re-issued as soon as you submit the correct **Official Namibian Commercial Practical Flight Test form** signed by a **Namibian Designated Examiner**.
>
> Should you however require further information, please do not hesitate to contact us."

[44] At about this time the plaintiff was abroad. After his return he learnt of the letter and its contents, as it was reported that Ms Mndawe could not continue her training as she was not allowed to fly in line. At first the plaintiff did not have sight of the actual letter, but he understood that there was nothing in the letter which indicated that there had to be a retest. The plaintiff stated that in his experience with the DCA, whenever it required a retest, it would state so clearly and explicitly. He then went to meet with Mr van Niekerk at his office to as for an explanation for the withdrawal and to clarify what had to be done. The latter explained that he had realised that the validation had been issued on the basis of a Check 6 OPC form, which is not the correct form and that he wanted the correct form to be submitted, then he would issue the validation. It is common cause that the correct form was a DCA form referred to as a "practical flight test report" (Exh "P"). The plaintiff said he specifically asked Mr van Niekerk if a retest was required and he said "no, he just wanted a correctly completed flight test report". In cross-examination the plaintiff also stated that he asked the DCA "precisely what they meant and they said, you know the information, if it is put on the correct form, presented to the DCA, they will reissue the validation."

[45] The plaintiff testified that Mr Brammer should not have completed the Check 6 form, because Ms Mndawe had not yet been in Air Namibia's employment for six months. (I pause to note that the third defendant agreed in testimony that her investigation revealed that this was indeed the case.) According to the plaintiff, Mr Brammer should have completed the practical flight test report form at the same when he completed the SA test forms previously referred to.

[46] The plaintiff later expanded upon this evidence in cross-examination and testified that after he had spoken to Mr van Niekerk he had two options which were both legal. Firstly, he could have approached the same examiner who

initially tested Ms Mndawe to transfer the information from the wrong form to the correct form and to sign it as required by Mr van Niekerk. The other alternative was to look for a new examiner and to have him test Ms Mndawe and then complete and sign the correct form. However, if the second option was followed, Air Namibia would then have to pay for the test. He weighed the two options, and as Mr Brammer was still available and the DCA did not specifically require a retest as long as the correct form was filled in and signed by a designated examiner, he chose the cheaper option. This he did because he would have to report to his superiors about the costs involved in having a retest done. A further consideration was that Air Namibia used, *inter alia*, tax payers' money and funds were scarce. He therefore first wanted to exhaust the cheaper option. As it turned out in the end when Mr Brammer refused to transfer the information, he followed the second option by arranging with another examiner to test Ms Mndawe.

[47] Acting upon his understanding of the situation, the plaintiff therefore first contacted Mr Brammer by telephone and requested him to fill in the correct form, indicating that, if he had forgotten the particular grading allocated to the pilot, he should use the Check OPC form which had already been completed to transfer the information onto the correct form. Mr Brammer declined to do so, stating that Ms Mndawe did not have a valid SA licence at that time (i.e. at the time during September 2009 when he did the SA flying tests and filled in the Check 6 OPC test form.)

[48] Thereafter certain e-mails were exchanged between them which became an important part of the evidence in this matter (Exh "H", "I", "J" and "K"). It is best to quote them in full. For ease of reference I shall allocate a number to each. The subject matter in each is "Test form for F/O Mndawe".

[49] <u>E-mail #1 (Exh "H"): E-mail from plaintiff to Mr Brammer dated Thursday 4 March 2010</u>

> "Hello Ralph,

As per out telephone conversation, I am kindly requesting you to transfer the flight test information from the Check 6 form attached to the Practical flight test report also attached and return to me as soon as possible. This is because the form that was used was not appropriate.

Your cooperation will be greatly appreciated.

Kind regards

Captain Alois Nyandoro"

[50] E-mail #2 (Exh "H"): E-mail from Mr Brammer to plaintiff dated Thursday 4 March 2010

"Hello Alois,

Yes, the Nam DCA form was not appropriate as F/O Mndawe did not at that stage have a valid South African Licence to allow her to have a validation test done (what was to be validated?).

The only paperwork completed by myself was the South African licence renewal form and type rating form and also the Air Namibia OPC (Check 6).

With whom at the Nam DCA have you been dealing, I would like to contact them to get the full story. It doesn't make sense to me.

Regards,

Ralph"

[51] E-mail #3 (Exh "I"): E-mail by plaintiff to Mr Brammer dated Friday 5 March 2010 (copied to Mr van Niekerk and Mr William Ekandjo)

"Hello Ralph,

My request to you is the transfer of flight test information from the wrong form which was used onto the correct form which I have provided. The rest of your concern is neither mine nor your problem. The DCA is a competent authority which works on regulations based on the country's laws. Lets (*sic*) respect their expertise and competency and stick to our duties and responsibilities.

Kind regards,

Alois."

[52] E-mail #4 (Exh "J"): E-mail from Mr Brammer to plaintiff dated Friday, 5 March 2010 (copied to Mr van Niekerk and Mr Ekandjo)

> "Alois,
>
> I am not questioning the DCA's authority.
>
> Your comment that the wrong from was used is incorrect: the NamDCA form was intentionally (and not incorrectly) not completed as there was no current licence to validate ie, a validation test would have been a farce.
>
> The only alternative is that F/O Mndawe had at that time completed the Nam Air Law exam and was doing an initial test. I was not aware that she had done this exam.
>
> May I remind you that part of my delegated duties and responsibilities as an appointed NamDCA examiner are to ensure that all criteria are met prior to doing tests. In my opinion, at the time, the criteria for doing a Nam initial test were not met, namely no valid foreign licence nor proof of having passed Nam Air law theory.
>
> My suggestion is that F/O Mndawe, now that she has a valid SA licence, does her validation test for a Nam validation or licence.
>
> If my understanding of the relevant parts of the law or my duties are incorrect, I will gladly accept clarification and correction and do what is required.
>
> Regards,
>
> Ralph"

[53] E-mail # 5 (Exh "J"): E-mail by plaintiff to Mr Brammer dated Friday, 5 March 2010 (copied to Mr van Niekerk and Mr Ekandjo)

> "Hello Ralph,
>
> On the check 6 form your recommendations were "**Recommended for line training"** which implies you were satisfied with the standard, the standard which equals that required for a practical flight test. This is the basis upon which I am requesting you to transfer the information on the test form I provided. It is very costly for Air Namibia to repeat a test that was conducted satisfactorily and which the authorities are ready to recognize. We are talking about Namibian taxpayer's scarce financial resources.
>
> Kind regards,
>
> Alois"

[54] E-mail #6 (Exh “K”): E-mail by Mr Brammer to plaintiff dated Monday, 8 March 2010 (copied to Mr Ekandjo, Ms Theo Namases and “Fleet Captain Domestic”)

> “Dear Alois,
>
> Following your email below and two phone conversations today, one with yourself and the second with the DCA, I would like to inform you that I will not be able to complete the form as you request. Mr Van Niekerk, Nam DCA, (who had been copied by you on the previous emails), was well aware of the situation and immediately insisted that Air Namibia had already been advised that a re-test would be required. No mention of any other option was made!
>
> My questions to you regarding F/O Mndawe’s eligibility to do an initial Nam CPL or validation test have gone unanswered. I have therefore drawn the conclusion that I was indeed correct in my belief that F/O Mndawe was ineligible for a Nam test.
>
> The issue at hand has led to many unfair insinuations levelled at me and I believe that I have no place in such a hostile environment. I therefore regret to advise you that I am giving the required 30 days notice to terminate my contract with Air Namibia.
>
> Should you wish to discuss the matter or have any duties for me during my notice period, please feel free to call or email me.
>
> Regards,
>
> Ralph Brammer.”

[55] E-mail #7 (Exh “K”): E-mail by plaintiff to Mr Brammer dated Tuesday 9 March 2010 copied to Mr Ekandjo; Ms Namases and “Fleet Captain Domestic”)

> “Hello Ralph,
>
> It is unfortunate that you found my request “hostile”. I tried to make the matter as transparent as possible by keeping all stakeholders copied in on all communication.
>
> It is entirely your prerogative to draw any inferences from this matter. However, be assured from my side that it was never the intention to make this place a “hostile environment”.
>
> This matter has also given us an insight in the kind of people we are dealing with.
>
> Kind regards,

Alois."

[56] After Mr Brammer gave notice of the termination of his contract, the plaintiff in his capacity as Head of Training and Standards at Air Namibia did not make use of his services any longer.

[57] On 10 March 2010 the third defendant, identifying herself as a journalist of the newspaper, telephoned the plaintiff and said that she wanted to pose questions with regard, *inter alia*, to Ms Mndawe's licencing. The plaintiff informed her that the practice at Air Namibia is that all communication with the media should be handled via the Corporate Communications office which resorts under the Department of Human Resources, the head of which was Ms Namases and to whom he referred the third defendant. They did not discuss any further details.

[58] It is common cause that the third defendant sent the following e-mail (Exh "B") to Ms Namases on 10 March 2010 at 10h59:

> "Dear Ms Namases,
>
> As per our telephonic questions, kindly note that my deadline for this story is at 16h00.
>
> My questions are the following:
>
> **1.** In regard to a South African citizen, Cibile (*sic*) Mndawe, I have been informed that Air Namibia has attempted to by-pass proper procedures and regulations in order to get Ms Mndawe her validation to fly in Namibia.
>
> It was explained to me that the DCA requested that Ms Mndawe has to undergo a practical flight test in order to receive proper validation, but that Air Namibia is in the process of trying to use old, and invalid, information in order to force the DCA to give her the validation.
>
> Is it true that a review board procedure has been by-passed, which should have decided whether Mndawe's capabilities as a pilot are good enough to qualify for a pilot position?
>
> Please comment.

……
……
……

I appreciate your assistance."

[59] The e-mail was forwarded to the plaintiff who assisted in drafting a response (Exh "C"). He testified that he drafted the response in paragraph (i). The full response reads as follows:

"i) There has never been an attempt to bypass proper procedures and regulations by Air Namibia. In any event, the system has waterproof checks and balances, with the Directorate of Civil Aviation acting as the watchdog."

ii) The review board is an internal process designed to address training matters for pilots undergoing training. Unfortunately, Air Namibia is not in the habit of disclosing training details of employees."

[60] The next day on 11 March 2010 the newspaper published the article. The plaintiff requested his employer to formulate a response to the article which was done in the form of a press release a few days later (Exh "G"). It reads as follows:

"1. F/O Mndawe started her training in Air Namibia in August 2009 together with 10 other pilots. She **successfully** completed the conversion course on 11 September 2009. The test was done by Captain Charles Boardman (Conversion training report available but confidential)

2. She did a type rating test with Captain Ralph Brammer (South African CAA and Namibian Designated Examiner used by Air Namibia on ad hoc basis) on 19 September 2009 which she **passed**. The examiner filled in 2 forms: SACAA type rating test forms and OPC Check 6 form. (signed forms available)

3. The pilot was issued a South African CAA B1900 license as of 19 September 2009 and a Namibian DCA validation on 24 November 2009 after satisfying the requirements of the regulator. (Validation and SACAA license available)

4. F/O Mndawe started route training with the last flight done on 22 December 2009. She has not flown since then.

5. Her validation was withdrawn on 27 January 2010 by the DCA sighting (*sic*) incorrect form used as the basis for issuance of the validation certificate. (Letter available)

6. The DCA letter states that the re-issuance of the validation will be done ***"…as soon as you submit the correct official flight test form signed by a Namibian Designated Examiner"***.

7. Air Namibia approached the DCA, specifically Mr. Graeme van Niekerk, to clarify whether another flight test would be needed or transfer of flight test information from the OPC Check 6 form to the correct DCA required form would suffice, since the entire required test standards are reflected. Air Namibia's understanding, after this meeting with Mr. van Niekerk, was that transfer of flight test information from the one form to another would be acceptable to the authorities if signed by the testing Examiner.

8. On 04 March 2010, Air Namibia Head of Training and Standards, Captain Alois Nyandoro, requested the original Examiner, Captain Brammer, to transfer the flight test information as agreed by the DCA. Mr. van Niekerk was copied on all the correspondence to Captain Brammer to clearly indicate the transparency of the matter. (email available)

9. F/O Mndawe will resume her route training after all the Namibian DCA requirements have been complied with.

10. Air Namibia has and shall always uphold processes, procedures and standards required in terms of the Namibian Civil Aviation Regulations, in the interest of the stakeholders and safety of the flying public. As an IOSA Certified Airline our conduct and standards are always transparent as

> evidences by our engagements and information sharing with the authorities. Safety of the flying public is always at the heart of everything we do within the airline, and we are proud of the quality of our operating crew products."

[61] The plaintiff also telephoned the third defendant on 11 March 2010 and arranged to meet her at the newspaper's offices on or about 12 March 2010. He disputed the allegations in the article and showed her "the evidence", including the e-mails exchanged between him and Mr Brammer and Exh "A". (According to the third defendant's evidence, he also showed her a copy of Ms Mndawe's SA pilot's licence). For some reason he understood that the third defendant intended writing another article stating that he was not qualified for his position and therefore also showed her all his qualifications.

[62] On 23 March 2010 his legal practitioners of record directed a letter of demand at the second defendant, stating that the allegations that he exerted persistent pressure on Mr Brammer to falsify information on a DCA form to get the necessary certification for a South African citizen to fly Air Namibia's domestic Beechcraft 1900 fleet were devoid of any truth and are defamatory of the plaintiff. In the letter payment of damages of N$500 000 was demanded within 20 days, failing which summons would be issued. In the letter it was suggested that the second defendant publishes an unconditional apology featuring prominently on the front page of the paper and on its online version for purposes of mitigating damages suffered by the plaintiff. The defendants did not publish any apology.

[63] The plaintiff denied that he pressurised Mr Brammer or that he attempted to have any information falsified as alleged in the article. He testified that he acted in accordance with what the regulator, i.e. the DCA had indicated may be done and that his request to Mr Brammer was lawful. The plaintiff testified that the third defendant at no stage posed any question to him to the effect that he had persistently placed pressure on Mr Brammer to falsify information or asked him to comment on any such allegation. The plaintiff expressed his dissatisfaction with

this omission while he was in the witness stand and indicated that he was not given an opportunity to respond to the very serious allegations made in the article.

[64] The plaintiff also testified about the effect of the article on his reputation and feelings. I shall revert to this evidence at a later stage.

[65] During cross-examination the plaintiff testified that he was not aware of the complaints made to the DCA about Ms Mndawe. However, he did state that, while Ms Mndawe was on line training in the Beech 190, he had, as a matter of normal routine, received reports about her training after each flight. Three instructors, Messrs Gariseb, Boardman and Roud, mentioned that she was experiencing some problems with her landing technique. The plaintiff indicated that, generally speaking, he very regularly would receive such reports as pilots in training commonly have problems with landing technique and that is precisely why pilots need to do line training before they can be released to fly on their own. He was therefore not especially concerned about the "challenges" she experienced and stated that there was no need for alarm, also because the instructors have the capability to remain in control to handle the aeroplane. The matter was discussed and he received the assurance from the instructors that the problem was routine and that they would "sort it out". He also stated that their reports served as "red flags that we might probably come to a request for further training for Ms Mndawe". At another stage he explained that pilots usually have a set period within which to complete their training, but that extensions may be granted where needed.

Impressions of the plaintiff as a witness

[66] As a witness the plaintiff was confident and emphatic, even when subjected to some probing and robust cross-examination, which was aimed at times at casting him in an unprofessional light. It was put to him that he "cut corners" in certain respects relating to his work and other professional matters. Although the cross-examination understandably tended to get under his skin, he acquitted himself quite well. In certain other respects his evidence was not entirely satisfactory or

convincing. These aspects, as well as some points of criticism on credibility made by the defendants' counsel in argument, can be more conveniently considered at a later stage when specific issues are dealt with during the course of this judgment.

[67] In my view the plaintiff tended, perhaps prompted somewhat by his counsel's focus when leading evidence (although I also take into consideration that this focus might have been taken because of the plaintiff's specific instructions), to over-emphasise the seniority of his position and rank as a pilot, instructor and examiner. Nevertheless, on the whole the plaintiff made a relatively good impression as a witness.

The evidence on behalf of the defendants

[68] The defendants presented evidence of the second and third defendants, as well as that of Mr van Niekerk.

Gwendoline Anne Lister

[69] Ms Lister is the second defendant in this matter. She is the founder of the newspaper and served as its editor from 1985 to October 2011, which means that she was the editor at the time the article in question was published. She explained that she is also a director of the first defendant, which she represented in the court proceedings. She furthermore is the chairperson of the Namibia Media Trust which owns the newspaper.

[70] She holds a BA Degree in Political Philosophy, Ethics and History. During her long career of thirty-six years as a journalist she received several international and regional media awards for her work. In addition she was the founder of the Media Institute of Southern Africa (MISA) and served first as the chairperson of its governing council for a number of years, where after she continued to assist the organization in various ways. MISA does advocacy for press freedom in Southern Africa and also concerns itself with upholding professional standards in journalism and provides training to journalists. She furthermore assisted in the setting up of

a self-regulatory framework for the media in Namibia which includes a Media Ombudsman whose task it is to deal with complaints by the public about media reporting.

[71] The second defendant described the ethos of the newspaper as being one in which much emphasis is placed on a code of journalistic ethics. She described the newspaper as a "serious" one (as opposed to a tabloid newspaper) that adheres very stringently to the Namibian Constitution and that strives to find a balance between the rights to freedom of speech and the press and the rights of the individual to privacy. During her time as editor the newspaper was oriented toward upholding human rights; speaking out on behalf of the public where it was in the public interest; being a watchdog against corruption; and striving in its reporting to be fair and balanced at all times. She described the need to report the truth, "as near as we can get to it," as "absolutely critical".

[72] The second defendant further elaborated by stating that the newspaper involved itself in investigative journalism as part of its role as a watchdog over public resources and abuse of power by, *inter alia*, government and parastatals. She emphasized the critical part played by the media in a developing democracy such as Namibia where there is still a large number of people unsure about their rights and responsibilities under the Constitution and where a vibrant civil society is lacking.

[73] She set out the general manner in which the newspaper's team of journalists and editorial staff would work and interact on the various stories and articles considered for publication. She stated that fair and balanced reporting requires, *inter alia*, that "single source stories" are discouraged, but that it is generally required of the reporter to approach multiple sources to ensure the accuracy of the story. Furthermore, in the case of an investigative story, the person who is at the centre of the story and specifically if the story is negative about this person, should be approached for comment and further input. She emphasized the importance that a reporter should do all the groundwork to establish the truth as far as possible before that person is confronted.

[74] The second defendant stated that she was not involved in the actual writing of the article in question, but that the news editor worked with the third defendant quite closely. He then reported to the second defendant at the daily meeting of editorial staff. (The news editor was not called as a witness). As the second defendant was not personally involved in the collection of information for the article, it means that her evidence about what the third defendant did, investigated and established, is hearsay and should not be relied upon to establish the truth of its contents or as corroboration for the third defendant.

[75] The second defendant stated that reporting on the general issue of the falsification of information concerning the licensing of Air Namibia pilots would be in the public interest for three reasons, namely, it raises the critical issue of air safety; secondly, it concerns irregularities occurring in a parastatal; and thirdly, in this case it involved a very senior official of the organisation.

[76] Referring to the plaintiff's letter of demand she stated that there was no basis for a retraction of the story and a blanket apology. She said that on the part of the defendants there was a belief that the facts mentioned in the story were correct and, in addition, the plaintiff had been approached for comment prior to publication. Alluding to the fact that there might have been one or two technical details in the report which were not correct, she said that if these had been pointed out to have been incorrect with a request for rectification, this would have been done as quickly as possible on page 2 of the newspaper where mistakes are usually acknowledged and rectified.

[77] In her view the headline of the article was quite neutral. The newspaper did not try to sensationalize the matter by using the names of any persons in the headline. The fact that the word "bypass" was put in inverted commas intends to convey, not that Air Namibia makes a point of always bypassing pilot licensing rules, but that in this particular case it looks as though an attempt was made to do so. She explained that the headline actually softens the word "bypasses' by using inverted commas. I agree with this interpretation of the headline and think that the ordinary reader would understand it in this way.

[78] The second defendant confirmed the contents of the defendants' plea, although it is clear that in the respects already mentioned, her evidence is based on hearsay. She also stated on various occasions that there was no malicious intent on the part of the defendants to defame the plaintiff and that she regarded the article to be in the public interest.

[79] The second defendant also gave other evidence which is relevant to the last alternative defence of reasonable publication. I shall deal with that evidence at a later stage.

[80] During cross-examination the plaintiff's counsel placed on record that both he and the plaintiff respected the newspaper in question. He made it clear that the plaintiff's case is not that, as far as its background and history is concerned, the newspaper is "bad" and that it, generally speaking, does not adhere to journalistic standards. It was placed on record that the plaintiff also did not take issue with the fact that the second defendant has considerable experience as a journalist. Moreover, the plaintiff was not out to prove a specific malicious intent against him. Counsel explained to the witness that the plaintiff's case is that, just in respect of the particular article in question, the defendants failed "somehow".

[81] The second defendant expanded in cross-examination upon her earlier admission that there are, what she described as "technical inaccuracies" in the story. The one inaccuracy related to the allegation that Ms Mndawe did not have valid SA pilot licence. She identified the second "technical inaccuracy" as the following: the form from which Mr Brammer was asked to transfer information was a "different form", but it was not an "unrelated" form as was alleged in paragraph 14 of the article.

[82] The second defendant further testified, in effect, that an allegation of falsification is clearly an allegation of dishonesty, something with which the third defendant was also in agreement.

[83] The third defendant confirmed the ethos of the newspaper as set out by the second defendant and said that she applied its governing principles when she wrote the article. She also expressed similar views as the second defendant did about the newspaper's role in reporting on matters which are relevant to air safety.

[84] She testified that her first source spoke generally about the matter on which she reported. This source referred her to a second source who gave more detailed information. She obtained the e-mail correspondence (Exh "H" – "K") between the plaintiff and Mr Brammer from an undisclosed source. She contacted the public relations department of SA Express to confirm the information about Ms Mndawe's employment with that organisation as set out in the article. She spoke to Mr van Niekerk, and tried to interview Mr Brammer, who merely confirmed his "resignation". She said that Mr van Niekerk had told her that the plaintiff came to see him to obtain clarification about the withdrawal of the validation certificate.

[85] She did not have sight of Mr van Niekerk's letter withdrawing the pilot's validation (Exh "A") before the article was published. She later explained that she only saw the letter for the first time when the plaintiff visited her office a few days after the article was published.

[86] When she telephoned the plaintiff, she was investigating allegations about Ms Mndawe and another pilot. She told the plaintiff who she was, that she was investigating a story about two pilots, whom she mentioned by name and mentioned that there were allegations that procedures and regulations were not being followed with Ms Mndawe, in particular to get the validation for her flying in Namibia. She confirmed that the plaintiff told her to contact their corporate communications officer, Ms Namases. She contacted the latter's office and was advised to put the questions in writing. She confirmed that she sent the e-mail (Exh "B") and that Air Namibia provided its response (Exh "C").

[87] She acknowledged that the allegations regarding the pilot's SA licence were based on an error. She said she realized it after the publication and that it was a

misunderstanding. On another occasion she referred to the mistake as a “writing error.”

[88] She confirmed the plaintiff’s evidence that he telephoned her during the evening of 11 March and that he asked if he could meet her at the office the next day or so. During that meeting his version was that he did not pressurize anyone and that he did not ask for falsification. The witness added that he said “everything he is saying now”. He gave her a copy of Ms Mndawe’s SA licence and told her that the allegations about the SA licence in the article were wrong. He also showed her a copy of Exh “A”. He said that he had done nothing illegal and he also then for the first time said he was considering to sue the newspaper, except if there would be an apology published very prominently on the front page. She then called in her news editor and the issue was discussed. They then informed the plaintiff that they would do a follow-up story in which his version of events, would be reflected, but that it would be a story, which meant that they would again phone all the sources and the contact at the DCA to obtain everyone’s version of events and to the story. However, the plaintiff declined this “offer” and said he wanted an apology. I note that this version about the follow-up story, etc., was never put to the plaintiff in cross-examination and he also denied it when the third defendant was cross-examined on the point.

[89] In cross-examination she agreed that it was in the public interest to inform the public about the error she had made regarding the allegation in the article that the DCA had withdrawn the validation because there had been non-compliance with the “strict requirement” of the pilot having to be in possession of a valid SA pilot licence, rather than letting the public remain alarmed and continue thinking negatively about the plaintiff because this “strict requirement” was not met, but could not explain why the newspaper did not publish a rectification. She could not remember if she had approached the news editor to request a rectification. She did state, though, that because the plaintiff had indicated that he was considering to institute action against the defendants, it was decided to wait and see how matters developed.

[90] The third defendant explained that she based the statements in the article about “pressure” and “persistent pressure” exerted by the plaintiff on what the sources and Mr van Niekerk had conveyed to her. She also interpreted the e-mail correspondence between the plaintiff and Mr Brammer as evidence of persistent pressure being brought to bear by the plaintiff on Mr Brammer.

[91] She indicated that her investigation revealed that when Mr Brammer completed the Check 6 OPC form (Exh “N”), Ms Mndawe had not yet reached the six month stage where she should have been tested internally by Air Namibia. She agreed that Mr Brammer should not have done this check at the time. In this respect her testimony is the same as that of the plaintiff.

[92] During cross-examination she agreed that no dishonest intent on the part of the plaintiff is suggested by e-mails #1 and #2, but said that the pretence that a retest had been done is to be gathered from the progression of e-mails.

[93] She also stated that the statement in the article about an internal recommendation for a review board to be convened to consider Ms Mndawe’s performance was based on “sources” which she did not name and that she “also had documentary proof.” However, this proof was not handed in during the trial.

[94] The third defendant testified that Mr van Niekerk told her what is alleged in paragraph 8.5 of the plea. She further gave evidence in line with the various defences raised in the defendants’ plea, most specifically the defence relating to reasonable publication. This evidence will be set out and discussed in more detail when those defences are discussed.

Graeme van Niekerk

[95] Mr van Niekerk was called both as an expert witness on the licensing of pilots in Namibia and as a witness to certain events.

[96] He is the Chief of Personnel Licences at the DCA and was so at the relevant time during 2009 – 2010. His task is to issue licences to all who require such documents in the aviation industry, including aviation schools, designated

examiners and instructors. He is also a commercial pilot with such number of flying hours as is in line with 25 years' aviation experience.

[97] He explained the role of the DCA and stated that if complaints are received regarding air safety matters the DCA is generally under obligation to look into such complaints immediately and to take steps to correct such matters.

[98] At the relevant time he oversaw the licencing of about 1 200 – 1,500 pilots. He had two licencing clerks to assist him, as well as the services of an expert advisor in licencing from the International Civil Aviation Organisation (ICAO).

[99] He knew Mr Brammer at the time in a professional sense. The latter was a South African examiner validated and designated by the DCA, based on his foreign examiner status, to examine in Namibia. He was very experienced and considered to be a very highly rated examiner in South Africa. Mr Brammer did examination of pilots full time for a living. He stated that the plaintiff only had examiner status for a very short time and that he did not consider him to be much more experienced than Mr Brammer.

[100] He explained that a designated examiner does examinations on behalf of the DCA and must make sure that he acts in compliance with NAMCARS. In such capacity an examiner is answerable only to the DCA. Interference with the contents of an examination or the requirements of an examination is not acceptable to the DCA.

[101] According to the witness the requirements to obtain a validation certificate in respect of a foreign licence in Namibia at the time were a pass in the Namibian Air Law examination, a satisfactory practical flight check by a designated examiner and copies of the foreign licence. He said that Ms Mndawe had obtained a pass in the Namibian Air Law examination on the third attempt. I understood him to say that she already had this pass on 19 September 2009 when Mr Brammer did the SA flying tests and the Check 6 test.

[102] He further confirmed that when Ms Mndawe became employed by Air Namibia she had a SA commercial pilot's licence. She was employed to fly the B190 but her licence initially did not entitle her to fly that aircraft as she did not have the B190 on her type-rating. In order for her to qualify to fly this aircraft in Namibia, she first of all had to get the type-rating of her SA licence signed off by a SA designated examiner to enable the SACAA to endorse the type on her licence. She would have to provide the DCA with certified copies of the SA licence to endorse the validation, i.e., as he explained, to allow the privileges of the foreign licence to be exercised on Namibian registered aircraft. The practice is that the DCA first verifies the information on the foreign licence with the foreign civil aviation authority to make sure the information on the licence is true and correct.

[103] He confirmed that the Check 6 OPC form (Exh "N") is an internal document used by Air Namibia. He said that the NAMCARS require an operator like Air Namibia to do the six monthly test to show that the pilot in question is proficient in flying the particular aircraft in line. The NAMCARS require that the operator keeps the completed form as part of its records. He further confirmed that the one SA flying test form (Exh "M" p30) which was also completed by Mr Brammer on 19 September 2009 was to renew Ms Mndawe's SA instrument rating, i.e. to fly an aeroplane only on instruments. He explained that a pilot can have commercial pilot's licence without such a rating.

[104] Mr van Niekerk explained what led to him to withdraw Ms Mndawe's validation certificate when he wrote Exh "A". During 2009 he received complaints from two pilots about Ms Mndawe's landing abilities as a pilot in the B190. These complaints were of a serious nature and were a major concern to Mr van Niekerk because of the implications relating to air safety. He went through Ms Mndawe's file and started reviewing how events had led to the DCA issuing a validation allowing her to fly in line. He noticed that the file contained the Check 6 OPC form filled in by Mr Brammer (Exh "N") and analysed it. He realized that the OPC form contains similar checks and information that is required in the practical flight test report form (Exh "P"), but that it was not the test required for validation.

[105] He explained that the licensing clerk who initially worked with Ms Mndawe's file and prepared the validation certificate for his (Mr van Niekerk's) signature, had made an error by accepting the Check 6 OPC form. The clerk should have required that a form like Exh "P" (i.e. the so-called DCA form, which is "the correct form") be submitted. As his office was understaffed and he was overloaded with work, Mr van Niekerk did not initially check the file thoroughly and he signed the validation certificate in the belief that all was in order.

[106] Either prior to or just after writing the letter withdrawing the validation certificate (Exh "A"), he contacted Mr Brammer. In the record he testified as follows about this conversation:

> "I reported to him that I received complaints from pilots flying with her and that it [was] felt that she was not up to standard and that she required further training so therefore Air Namibia would obviously go back to him to ask him to do another check or even to put the information over as I suspected and that he should do that, he should do a full flight check and then if he found her deficient he would then have to recommend her for training."

[107] He further explained that by referring to the "full flight check" he meant that the test as required by Exh "P" would have to be done and that this would be a "retest".

[108] When asked by counsel what he meant by the third paragraph in Exh "A" (which reads, "Your Namibian validation will be re-issued as soon as you submit the correct Official Namibian Commercial Practical Flight Test form signed by a Namibian Designated Examiner"), he answered, "Basically for an examiner to fill out the check 6 form they would have to comply with that full check on Exhibit P, they would have to fully comply with this government form, all those checks would have to be done and then it would satisfy the regulator that the person is up to standard to receive the validation." Read in context, the first part of this answer does not make sense, but I shall assume in favour of Mr van Niekerk that the reference to the "check 6" form was a slip of the tongue and that he meant to refer to the "correct" form as described in the letter.

[109] Counsel referred the witness to the plaintiff's alleged understanding of the letter that all that was required was that Ms Mndawe submits the correct form, to which he answered, "No, definitely not because it was a, I received reports of the safety hazard and therefore I wanted a full flight check to be complied with to make sure the quality is up to standard." I pause to note that the witness never informed the plaintiff about the safety hazard reports and also not that he wanted a full flight check to make sure the quality of the pilot was up to standard.

[110] Mr van Niekerk also denied that he specifically said to the plaintiff that a flight retest was not required.

[111] Initially Mr van Niekerk said that the SA type-rating test and the Namibian validation test could not be done at same time, because the SA licence did not yet have Beech 1900 type-rating endorsed on it which could be validated. However, he later gave evidence to the effect that the two tests could be done at the same time and the endorsed SA licence obtained, followed by the application for a Namibian validation. However, this would be dependent on how soon the SA licence would be endorsed and provided that there was not a long time lapse between the validation test and the application for validation. In other words, he in effect confirmed that one could "kill two birds with one stone" as the plaintiff testified. However, Mr van Niekerk stated, this is not what actually happened in this case. In these respects he confirms the plaintiff's evidence.

[112] He testified that he never read the e-mail correspondence copied to him by the plaintiff and Mr Brammer until he consulted with the defendants' lawyers in preparation for the trial. He explained that during the time the e-mails were sent he received about 100 – 200 e-mails per day. This was overwhelming and he would only select the important ones to read. He did not explain why he did not consider the e-mails with the subject "Re: Test Form for F/O Mndawe" important in light of all the surrounding circumstances of which he was aware at the time. These circumstances include the fact there had been serious allegations about the standard of the pilot's flying abilities; the fact that he suspected in advance that Mr Brammer would be requested to "put the information over" (from which I

understand him to refer to the transfer of information from the Check 6 OPC form to the DCA form); and the fact that he had made arrangements with the pilot, Messrs Brammer and Boardman in advance without informing the plaintiff or Air Namibia. This is an unsatisfactory aspect of his evidence. At another stage he sought to defend himself by stating that he does not conduct his work communications by means of e-mail, but that persons wishing to communicate with him should write a letter or telephone or visit his office. However, this is also not a satisfactory explanation, not only because in this day and age it is inherently unlikely, but also because the number of e-mails he received is in itself an indication that he probably did nothing to discourage this form of communication.

[113] Counsel asked him to comment on the following sentence in e-mail #6 by Mr Brammer to the plaintiff: "Following your email below and two telephone conversations today, one with yourself and the second with the DCA, I would like to inform you that I will not be able to complete the form as you request. Mr Van Niekerk, Nam DCA, (who had been copied by you on the previous emails), was well aware of the situation and immediately insisted that Air Namibia had already been advised that a re-test would be required. No mention of any other option was made!" The following exchanges then occurred:

> "Yes I just speak (*sic*) to Mr Brammer telling him that, of the problems with the lady pilot and that Air Namibia would try and force him to just sign her off but he must test her and then if he finds problems he must recommend her for training.
>
> "You said problems, were these the complaints you referred to? --- Those are the problems that I received from the pilots and I did also, telling [tell him?] that I am sure that Air Namibia would try to let him just put the information onto a new form and I would not be happy."

[114] I pause to note that on other occasions clarified that this conversation with Mr Brammer took place some time before 8 March 2010, i.e. roundabout 27 January 2010.

[115] He confirmed that he told the third defendant what is stated in paragraph 8.5 of the defendants' plea.

[116] During cross-examination Mr *Namandje* on behalf of the plaintiff confronted Mr van Niekerk with NAMCAR 61.01.10 that governs applications for validation of foreign licences and more specifically sub-regulation (2) thereof, which states that an application for a validation referred to in sub-regulation (1) shall be accompanied by (a) the appropriate fee as prescribed in part 187; (b) a copy of the licence and rating to which the validation pertains; (c) a valid medical certificate; and (d) in the case of an application for the validation of a licence and rating for the purpose of being employed as a pilot in Namibia an employment permit and a letter of appointment from a Namibian employer who requires the services of the applicant. The point being made by counsel was that the regulation does not require a practical flying test result form ("the DCA form") signed by a designated examiner (or, for that matter, a pass in Namibian Air Law).

[117] In response Mr van Niekerk stated with regard to the practical flying test, "If it was not in the regulations we would not ask for a flight check to be done and ever since I joined the DCA it is required." However, in spite of repeatedly insisting that this requirement must be or, indeed, was in the regulations, Mr van Niekerk was at a loss to point out the regulation which requires a full practical flight test (and proof of a pass in Namibian Air Law). He stated that when he told the third defendant that a test was required by "by law" he was under the impression that it was contained in the regulations and that he understood it to be the law.

[118] He also said at one stage that the requirement was contained in the "NAM-CATS-FCL61", which appear to be certain technical standards, which are supposed to be contained in a certain document, but he seemed to state that these were actually never written. From an extract of the regulations on "Grade II Aeroplane Instructor Rating" (regulations 61.19.1 – 61.19.10) handed in by the defendants during the trial, it appears that certain regulations refer to a "Document NAM-CATS-FCL61" in which is supposed to be prescribed certain forms, training, theoretical knowledge, procedures, manoeuvres, skill tests and proficiency checks. For instance, regulation 61.19.3 states that "An applicant for the issue of a Grade II aeroplane flight instructor rating shall have successfully completed the

appropriate training as prescribed in Document NAM-CATS-FCL 61." However, if I correctly understand Mr van Niekerk's evidence, this document had not been written, or at least completed, in 2010. In any event, even if the document did exist, it is clear that, unlike, for instance, regulations 61.19.3, 61.19.4, 61.19.5(1), 61.19.6(a), 61.19.7(2), 61.19.9(h) and 61.19.10(1), the relevant regulation dealing with foreign licence validations, i.e. regulation 61.01.10(2) does not require anything to be done in accordance with the Document NAM-CATS-FCL61 at all.

[119] Mr van Niekerk later stated that, in the absence of this document, best recommended practices laid down by the ICAO would have to be followed, but did not say what these were. At a later stage in his testimony he stated "you will not go anywhere in the world and be able to get a validation of your foreign licence without complying with the check card from a designated examiner". He testified that he only realised in the witness box that there is no requirement in the law that a practical flight test was required in order to obtain a validation certificate. He referred to the revelation as opening "a can of worms" as he appeared to fear that foreign pilots would begin to question the basis upon which the DCA requires a practical flying test to be done before granting validation. He further indicated that during 2009 – 2010 he had just started working in the licensing office and he was then still under training, but persisted in saying that since he "got into the system everybody [who] did a validation had to do a check".

[120] While Mr van Niekerk was certainly embarrassed by this confrontation by the plaintiff's counsel, there might be some consolation to be found therein that the plaintiff did not appear to know any better, because he did not deny during his testimony that there is any regulation setting out the requirements mentioned by Mr van Niekerk. Indeed, the plaintiff testified that a practical flying test report filled in on Exh "P" was required for validation; that Exh "P" was the correct form; and that this is the form which Mr Brammer should have filled in instead of the Check 6 OPC form.

[121] Counsel did not alert the Court to any other legal provision dealing with the matter. In light of the available evidence it seems to me that I must conclude that

the practical flying test was not required by NAMCARS, but that there was a practice or other requirement, the legal status of which is unclear, that a practical flying test must be done. This also means that Mr van Niekerk's testimony that the plaintiff should have known that a test was required for validation as he assisted in drawing up the regulations cannot be accepted.

[122] Mr van Niekerk gave rather startling evidence that even if he had read the e-mails between the plaintiff and Mr Brammer, he would not have reacted to them because he had a "sealed deal" with the latter to retest Ms Mndawe personally as he knew what the problem was (i.e. that there were complaints about her flying) and as he already had "lined up" Mr Boardman to train her and then to sign the paper work. According to him, Messrs Brammer and Boardman were satisfied with this arrangement.

[123] He was asked to comment on the statement by Mr Brammer in e-mail #6 that he had spoken to Mr van Niekerk on 8 March 2010. Mr van Niekerk responded that he could not remember when he spoke to Mr Brammer, but said that it was just prior to the withdrawal of the validation certificate (i.e. about 27 January 2009). In evidence he never confirmed that he had spoken to Mr Brammer on 8 March 2010. I also understood his evidence to be that he spoke only once to Mr Brammer about this matter. He further said he was not aware of the "debate" between the plaintiff and Mr Brammer, but from previously dealing with Air Namibia he knew at the time he spoke to Mr Brammer, that "they" (without specifying who at Air Namibia) would definitely put Mr Brammer under pressure. He added, "I work on a daily basis with Air Namibia and I know I have sort of more or less come across their strategy of trying to get things through. I was put under pressure to try and cut corners wherever they can." I pause to note that these allegations about Air Namibia were never put to the plaintiff during cross-examination.

[124] When Mr van Niekerk was asked on what basis he told the third defendant that a designated examiner accredited to the DCA had been put under pressure, he said he was not a source for this information, but that the third defendant told

him that she had spoken to Mr Brammer and that this what the latter had said. Mr van Niekerk said he responded to the third defendant that he had "suspected that this would be happening, that this would be the situation".

[125] He also told the Court that, when he spoke to Mr Brammer before the validation was withdrawn, the latter said that "they are going to force me, to put me under pressure to sign the paper." The plaintiff's counsel did not object to the hearsay evidence and posed further questions on this issue to which Mr van Niekerk answered, *inter alia*, that he had said to Mr Brammer that "they….[will] tell him to transfer the information." Mr van Niekerk then continued: "He said but then Nyandoro will put me under pressure and all sorts of nonsense. I said no a test is required."

[126] He stated that Ms Mndawe and the plaintiff knew very "clearly that a full check was required not an OPC 6 because they took a chance by sending it. Many times they get away with it." I do not know on what basis Ms Mndawe would have known this as she was a foreign pilot and if she consulted the NAMCARS, she would not have seen any requirement for the DCA form to be submitted. I also cannot see on what basis it can be said that she "got away with it many times", because she was a newly appointed pilot at Air Namibia. The plaintiff was not involved in Ms Mndawe's application for validation and therefore could not have been taking any chance by sending the OPC Check 6 form to the DCA. Perhaps when Mr van Niekerk stated "many times they get away with it", he meant to refer generally to pilots from Air Namibia applying for validation. If so, it indicates that the use of the OPC Check 6 form for validations was not unusual.

[127] What is also clear from his evidence is that it was not uncommon for information to be transferred from one test form to the other in certain cases as he clearly expected in advance that this would be done in this case and he specifically took steps to indicate to Messrs Brammer and Boardman that he would not be satisfied with such a procedure because of the serious complaints about the pilot's flying abilities.

[128] Mr van Niekerk learnt with surprise that an internal written check list in respect of Air Namibia pilots drawn up by the expert licensing advisor for use by the licencing clerks in his office after the issue arose with Ms Mndawe's validation certificate, required a "valid operational proficiency check" ("OPC") and did not state that a full flight check or practical flight test report (Exh "P") was required. He testified that the clerks knew that it is actually the latter check which was required; that the reference to an OPC was incorrect; and that he would immediately change this requirement on the check list when he returned to his office. He also explained that during the preceding year i.e. during 2011 he had spoken to the employee of Air Namibia who is responsible to send Air Namibia staff to the DCA for purposes of validation "a couple of times" to explain to her that he could not accept a Check 6 form, but considering the items mentioned on the check list it is, in my view, not surprising that she thought that the Check 6 OPC form was the correct form. This evidence does tend to reflect negatively on Mr van Niekerk's knowledge of the requirements set by the licencing office for validation. However, as this evidence deals with the situation after the events occurred on which this action is based, I shall accord it little weight.

[129] Mr van Niekerk confirmed that Ms Mndawe had a valid South African licence to fly the B190 and that it was an error to state in the article that the validation was cancelled because she did not have such a licence. He said he was not the source of this information.

[130] He also confirmed that when Air Namibia or their pilots apply for validations, they do not "force" the DCA (as the third defendant alleged in her e-mail to Ms Namases) to grant the applications and that it is the DCA which either grants or rejects the applications for validation.

[131] Counsel for the plaintiff asked whether Mr van Niekerk agreed that Exh "A" represents the official position of the DCA on the reasons for the withdrawal of the validation and on what action should be taken for the validation to be re-issued. Mr van Niekerk agreed, but added some information about which he did not testify during examination in chief. He stated that he actually deals mostly with the pilots

themselves and has little to do with Air Namibia. The reason is (as the plaintiff also testified) that the pilot applies for the validation in his/her personal capacity and the issue of the licence is a matter between the DCA and the pilot personally. He also stated that, after he had written Exh "A", he called Ms Mndawe in and handed her the letter. He orally informed her about the complaints he had received; that he had gone through her file and that the Check 6 form was the incorrect form. He also told her that he had spoken to Mr Brammer, that she could no longer use the validation and that she would have to re-do the "check rate". He also told her that she would have to receive more training as there obviously was a problem, referring to the complaints.

[132] The evidence took a rather surprising twist when he further testified under cross-examination that he had to write the letter in "very diplomatic way" because, being a white employee of the DCA, he would have been blamed for racism if he "just was crude about it." i.e. if he had stated that there were complaints about her flying abilities, that she was a safety hazard and that she would have to go for further training. He therefore preferred to inform her orally of the real reasons for withdrawing the validation and to word the letter as he did without any reference to these matters. He also stated that the words used in the last paragraph of the letter, namely "Your Namibian Validation will be re-issued as soon as you submit the correct Official Namibian Commercial Practical Flight Test form signed by a Namibian Designated Examiner" are "basically … saying that you would have to go and do a check rate again to get this", i.e. implying that she would have to be checked again by doing the practical flight test.

[133] At a later stage he again referred to the fact that he, in effect, carefully chose his words when he wrote this paragraph because he knew that there earlier was no practical flight test form completed in respect of Ms Mndawe. The effect of his evidence is therefore that, by stating that the correct form signed by a Namibian designated examiner must be submitted for the validation to be re-issued, and having made all the prior arrangements with Mr Brammer to ensure that the latter would not sign the pilot off on the basis of transferred information, he knew that

the result would be that a flight test would have to be done without him having to state this expressly in the letter and also without having to state it expressly to the plaintiff when the latter met him to clarify the letter Exh “A”.

[134] Although he earlier testified that he told Mr Brammer to test her and, if she needed training, to make such a recommendation, he later stated that what he told Ms Mndawe was that she would have to be trained first and then tested. He also told her that he would organise the training. This he did by making arrangements in advance with Messrs Brammer and Boardman. At various other stages he stated that he asked Mr Brammer to test the pilot and to recommend her for further training. My overall understanding of his evidence is that he had arranged with Mr Brammer to retest the pilot as a first step.

[135] Mr van Niekerk at one stage stated that if he had not received any complaints about the pilot’s flying ability, but had noticed that the file only contained the Check 6 OPC form, he would have done nothing about it, but have waited until the next six months or year when the validation would have to be renewed and then have made certain that the proper form was filled in. At a later stage he said that he would have brought the error to the attention of Air Namibia and he would have taken up the issue with Mr Brammer, but would have “left” the issue (i.e. had done nothing further about it) as the validation was due for renewal in a few days (here he was referring to a scenario, as in the case of Ms Mndawe, in which the validation would have expired on 18 February 2010 as stated in the validation certificate (Exh “O”)). From this evidence it is to my mind clear that the requirement of the “full flight check” or the “practical flying test” as on Exh “P” was not an inflexible or essential requirement, which perhaps explains why it is not contained in the NAMCARS as a requirement for validation. It is further clear that the only reason why the wrong form was a problem in this particular case, was because there had been serious complaints about the pilot’s flying ability, which required Mr van Niekerk to act immediately. He could not wait until 18 February 2010.

[136] He stated that if someone understood nothing about aviation, that person would think that the letter Exh “A” “obviously” required a transfer of information, but that the plaintiff would know exactly what it meant (i.e. that a practical flying test is required).

[137] Mr van Niekerk further explained that falsification would take place because the Check 6 OPC form would not have included all the checks required by Exh “P”, that there would be “big holes”, i.e. parts of the form that would not be completed and that one would have to “artificially” fill them in to complete the form. He said that Mr Brammer would not have done it that way and later added, “To me it was a closed book. Mr Brammer knew what had to be done so I did not concern myself.”

[138] He acknowledged that if a flight test report with the same date as the Check 6 OPC form had been handed in he would not have been deceived because he had knowledge of the matter and because he knew that such a form had not been completed on 19 September 2009. In re-examination he stated that someone else without his knowledge and working with the file would be misled.

Impressions of the defendants’ witnesses

[139] Regarding the second defendant’s evidence Mr *Namandje* submitted in the plaintiff’s heads of argument as follows:

> “28.2 During the witness’ evidence-in-chief (*sic*) she, apart from glorifying the past achievements of the first defendant as an institution, she further, notwithstanding her inability to answer specific questions on the article, glorified the third defendant’s work on the article and fully supported the article and its meaning, when she could not directly deal with the questions under cross-examination.
>
> 28.3 During cross-examination the witness was very evasive and not forthright as she appeared to have been during her evidence in-chief (*sic*).”

[140] I do not agree at all that the second defendant “glorified” anything in her testimony. She did not refer to past achievements of the first defendant, except to state on one occasion that no civil action for damages in relation to defamation against the defendants has ever succeeded. This is hardly “glorification”. I agree with the plaintiff’s counsel, though, that this evidence is irrelevant to decide this matter.

[141] The second defendant made it clear from the start that she was not involved in the investigation, the writing or the guidance of the third defendant and that this task was performed by the news editor. I therefore do not regard it as the fault of the second defendant or as a valid point of criticism against her that she could not always answer all questions. There were certain questions which she did answer, the subject matter of which at times fell outside her sphere of first-hand knowledge. While the answers would for this reason not always bear weight, I do not think that they reflect poorly on her as a witness.

[142] Whilst I do not agree with the description that the second defendant “glorified” the third defendant’s work, there are certain aspects of the second defendant’s evidence regarding the work done with which I do not agree and to which I shall return. Sometimes she expressed views about the steps taken or the work done by the third defendant although she did not have first-hand knowledge about the steps taken or the work done. I do not think that she intended thereby to state that the third defendant actually took those steps or did that work. I think that she was basing her view on the assumption that the third defendant took those steps as reported to the second defendant, possibly even after the article was published. In my view this would be acceptable as the second defendant was required to show that the publication of the defamatory matter was reasonable. Although this is ultimately an issue for the Court to decide, the second defendant’s assessment as editor of the newspaper and representative of the newspaper’s owner on whether sufficient enquiries and checking of information had been made and the reasons for this assessment, are relevant to the defendants’ defence.

[143] I further do not agree with the submission by the plaintiff's counsel that under cross-examination the second defendant admitted that the article was "riddled with" technical inaccuracies. I agree with Mr *Corbett* that this admission is not reflected in the record. The plaintiff's counsel is correct, though, in that there certainly were numerous inaccuracies in the article as will be discussed below.

[144] I further disagree with the submission by Mr *Namandje* that the second defendant was "very evasive" under cross-examination. I rather think that the second defendant was at times defensive and tended to repeatedly place blame on the airline and the plaintiff which they did not always deserve. I shall return to the specific aspects of the evidence at a later stage.

[145] The plaintiff's counsel further stated that the second defendant's evidence about journalistic ethics and the law pertaining to the press, freedom of expression and defamation did not contribute anything as there was no dispute between the parties on these issues. I also do not agree with this submission. The evidence was helpful to the Court in gaining an understanding of the particular ethical standards and values with which the defendants are familiar and which they accept in their daily work. The detail of these matters was not placed before the Court by agreement between the parties and therefore evidence was required.

[146] In the plaintiff's heads of argument his counsel made hyperbolically negative submissions in regard to the credibility and value of the third defendant's testimony and that of Mr van Niekerk. He submitted that under cross-examination they both behaved "exactly" like a certain witness described in unflattering terms by the Court in *Gordon v Mutual Insurance Associated Ltd* 1988 (1) SA 398 at 401, as not being an impressive witness, but a witness who "… contradicted herself, reconstructed freely and … may have felt that she should favour the defendant in her testimony"; who created an "overriding impression" of "dullness" and whose "…efforts to testify assertively about matters of which she had no clear memory, rendered her embarrassed and made her seem stupid". Counsel did not motivate his submission with reference to specific examples from the testimony

and none come to mind, even after some reflection. In my view counsel's submission is so obviously devoid of merit in relation to the third defendant and Mr van Niekerk that I summarily dismiss it without any further discussion.

[147] Counsel for the plaintiff further submitted that these two witnesses were "very bad" and that their "evidence carries no weight at all." Such sweeping generalizations about a witness are seldom accurate and provide little assistance to a court saddled with the burden of painstakingly having to analyse and weigh pieces of evidence. This is a task which requires a careful and reasoned approach and an awareness that witnesses are seldom such outright liars, or so completely discredited, or so palpably useless or unreliable that "their evidence carries no weight at all." I regret to say that counsel's submissions lose sight of the complexity of the matter and are therefore unhelpful.

[148] In my view the third defendant, who at first seemed very nervous, but gradually gained more confidence, in certain respects acquitted herself fairly well of her task as a witness. However, she was also defensive at times, which is probably understandable, as her conduct was under keen scrutiny. In certain instances she gave explanations which I do not think are satisfactory and I do not agree with her assessment of the adequacy of the steps she took before the article was published. However, these criticisms do not necessarily mean that she was a "very bad" witness as counsel for the plaintiff submitted. I shall discuss these aspects in more detail when I assess the relevant evidence.

[149] In respect of Mr van Niekerk, the plaintiff's counsel further submitted that he was rude, evasive and completely at a loss about the subject about which he was testifying. As a result, so the submission continued, the credibility of the witness was completely unimpressive. Counsel for the defendants, on the other hand, submitted that these criticisms of the witness were without evidential foundation, although he conceded that the witness might have been emotional in the witness box.

[150] In my view the witness was generally courteous and appeared to do his best to be of assistance to the Court. It was clear that he was not an experienced witness and that he took umbrage at the persistent and sometimes somewhat repetitive cross-examination. At one stage he voiced his frustration that counsel wanted to push him to a point and was “boxing him into a corner” and was trying to make him say something with which he did not agree. Eventually he became somewhat obstreperous and evaded the question by stating that he did not know and did not remember. This answer not only contradicted an earlier answer, but, as the discussion will show at a later stage, is clearly unacceptable on the probabilities. I take into consideration that the witness had been in the witness box for a long time and seemed, understandably, somewhat exasperated. However, I do not agree that he was generally evasive or rude. I think Mr *Corbett* was correct when he submitted that the witness was emotional at times, but then I think the same could be said here and there of the plaintiff under cross-examination.

[151] In certain instances Mr van Niekerk contradicted himself as the discussion of the evidence shows. However, I must say that in certain instances he displayed a degree of frankness that was, at times, startling. For instance, he readily conceded that he cut corners when he did not peruse the file when he signed Ms Mndawe’s validation certificate and that his office makes many mistakes. Other examples that come to mind is his unsolicited evidence in cross-examination about his fears of being accused of racism and the consequent “diplomatic wording” of Exh “A”; his scrupulously careful evidence about precisely what would have constituted falsification if information was transferred from the Check 6 OPC form to the DCA form; his evidence to the effect that, if he had discovered that the wrong form had been submitted, he would have left the matter in abeyance until the validation expired, were it not for the complaints about the pilot’s flying; his evidence that he would have done nothing about the issues raised in the e-mail correspondence between the plaintiff and Mr Brammer even if he had read it; and his evidence that he did not tell the plaintiff at their meeting that a retest was required, even though, in my view, he clearly should have done so. While I agree

that much of his evidence ultimately did not favour the defendants' case, I cannot say that his credibility was "completely unimpressive" overall as the plaintiff's counsel submitted.

[152] The plaintiff's counsel also took issue with the fact that the witness had been in the court room while the plaintiff was testifying, yet he did not alert the defendants' counsel to certain material matters which should have been put in cross-examination. However, my impression is that the witness, because of his inexperience and because he is not a party, probably did not always realize the need to do so or when such instances arose. I do not think this conduct was deliberate or an indication that he conveniently made up his evidence in the witness box.

[153] To sum up, I think it is best to discuss his evidence carefully and to consider what to accept and what to reject, rather than brushing it aside in one fell swoop.

Truth and public benefit

[154] I now turn to a discussion of the first of the defendants' defences in relation to the presumed unlawfulness of the defamation. In order to exclude the wrongfulness of the defamatory statements, the publication of the truth must be for the public benefit or in the public interest.

[155] In determining whether the defamatory statements are true, the approach at set out in the undermentioned authorities is to be followed. In *Johnson v Rand Daily Mail Ltd* 1928 AD 190 at 205 the Court stated:

> "Now the general rule has been thus stated: 'The plea of justification must be not only as broad as the literal language of the libel but as broad as the inferences of fact necessarily flowing from the literal language', (*Gatley*, p. 495). As a broad rule this is no doubt true, but like all general statements extracted from the consideration of particular cases it is somewhat vague. In cases where a man is charged with fraud or dishonesty or where criminal acts

> are attributed to him, the Court no doubt will exact from the defendant strict proof of every charge, but where incompetency is alleged of a caterer or where matters are described which will not necessarily appear the same to two different persons, the defendant is not required to justify every detail when in fact the gravamen of the charge has been amply justified. Why do we allow a defendant to justify at all, 'Because', in the words of LITTLEDALE, J., in *McPherson v Daniels*, 10 B. & C. p. 272, 'it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess.' Hence the Courts have modified the general rule by saying that the defendant need only justify the main charge or gist of the libel, - 'he need not justify immaterial details or mere expressions of abuse which do not add to its sting and would produce no different effect on the mind of the reader than that produced by the substantial part justified' (*Gatley*, p. 496)."

[156] Applying this approach, the Court in *Smit v OVS Afrikaanse Pers Bpk* 1956 (1) SA 768 (O) at 774B-C held that, if the respondent could prove that the sting of the publication was true and that the publication thereof was in the public interest, then it would completely upset the defamatory part of the publication, because the defamatory allegation would be substantially justified notwithstanding that the defendant may have failed to prove the literal truth or all the statements of fact contained in the defamatory matter.

(See also *Kemp v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E) at 264I-J)

[157] In Burchell, *Principles of Delict,* (1993), the author states (at p172):

> "The statement or statements alleged to be true need not be true in every minute detail. Only the material allegations or sting of the imputation must be true. The fact that there is some exaggeration in the language used will not deprive the defendant of the defence unless the exaggeration is such as is calculated to convey a wrong impression to the detriment of the plaintiff's reputation."

[158] The sting of the defamation, in the context of the article as a whole, is that Mr Brammer resigned from Air Namibia because the plaintiff had applied persistent pressure on him to falsify information, thereby to deceive the DCA into believing that Ms Mndawe, an incompetent, unqualified and unlicensed pilot had been retested in March 2010 as instructed by the DCA, in order that the DCA would re-issue her with permission to fly Air Namibia's B190 aeroplanes in Namibia.

[159] The article contains several inaccuracies. I shall first deal with those that are not in dispute and others which do not require much discussion. Firstly, the statements in paragraphs 1, 2 and 18 of the article that Mr Brammer was an instructor "at" Air Namibia; that the plaintiff was his "senior"; that Mr Brammer "resigned"; and that he "resigned from Air Namibia" are untrue. The impression is created in the article that he was an employee, but the evidence established that his services as a designated examiner in South Africa and in Namibia were utilized by Air Namibia and that he was an independent contractor. He gave 30 days' notice of the termination of his contract with Air Namibia. He did not "resign". However, this untruth is, in my view, not material to the gist of the defamation.

[160] Secondly, as Mr *Namandje* pointed out in argument, the reference in paragraph 1 of the article to a "local flying licence" is also not correct. The validation certificate is not a local flying licence as such. However, this inaccuracy if of a technical nature and not material.

[161] Thirdly, based on the evidence by both the plaintiff and Mr van Niekerk, the statement in paragraph 3 of the article that "Air Namibia applied for the validation certificate" in respect of Ms Mndawe is not true. It is clear on the evidence that it was Ms Mndawe in her personal capacity as the pilot who applied for the validation certificate. I also do not think this untruth is material.

[162] It is common cause that the statement in paragraph 6 of the article that the DCA "withdrew the validation when they were notified that Mndawe was not in

possession of a valid South African pilots' licence, a strict requirement when applying for the Namibian licence" is untrue in several respects, namely: (i) the DCA were not notified that Ms Mndawe was not in possession of a valid SA pilot's licence; (ii) the reason for the withdrawal of the validation was not because she was not in possession of such licence; (iii) when the validation was withdrawn Ms Mndawe indeed was in possession of a valid SA pilot's licence; (iv) when she applied for the validation she complied with the strict requirement mentioned, because she was in possession of a valid SA pilot's licence.

[163] It is further common cause that the statement in paragraph 9 of the article, namely "When it was discovered that Mndawe was not in possession of a valid SA flying licence, the DCA withdrew her validation certificate and requested that she renew her South African pilot's licence" is untrue in the following respects: (i) the DCA did not discover that she was not in possession of the said licence; (ii) the reason for the DCA withdrawal was not because of this reason; and (iii) the DCA did not request Ms Mndawe to renew the said licence; and (iv) Ms Mndawe was indeed in possession of such licence.

[164] It is also common cause that the statement in paragraph 13, read in context, that senior management of Air Namibia was "again informed that Mndawe would need to get her South African pilot's licence renewed" is untrue in that the senior management was never informed as alleged in the article. I note that the statement is qualified somewhat by the use of the word "apparently" which indicates uncertainty on the part of the writer.

[165] The second defendant expressed the view that the inaccuracy about the SA licence was a mere "technical inaccuracy" and not material. Mr *Corbett* submitted that this inaccuracy has no bearing on the crux of the article which the plaintiff claims forms the basis of his action. I respectfully do not agree with either of these views. I regard the untruths set out in the previous three paragraphs of the judgment, especially those in the first two, as material to the gist of the defamation. The reason is that the impression is created in the article that, not only is this particular pilot incompetent and dangerous, but she was at the time of

the withdrawal and also before, when she applied for the validation, not even in possession of a valid licence, a strict requirement when applying for validation and it is in respect of such a pilot that the plaintiff was putting persistent pressure on Mr Brammer to falsify information to make it appear that she has been re-tested so that certification may be deceitfully obtained for her to fly Air Namibia's B190 aircraft. It is my view that the allegation of falsification should not be viewed in isolation without having regard to the context in which the allegation is made. Part of the context is the nature of the falsification, what it is about and in respect of what and who there is an attempt to falsify information. To put it simply, the worse the pilot is, the more shocking becomes the attempt at falsification. Similarly, the more the instances in which the pilot does not comply with requirements to obtain permission to fly in Namibia, the more serious in the eyes of the ordinary reader would be an attempt at falsification to deceitfully obtain such permission. The allegation of pressure to falsify information in the said circumstances (as incorrectly alleged), makes the defamatory nature of the first two paragraphs of the article more serious.

[166] In paragraph 7 the article states that "the DCA heard ……..that she would have to undergo additional practical flight examinations before she would be permitted to fly in Namibia." This statement is not true. From Mr van Niekerk's evidence it is clear that the DCA did not "hear" this, the DCA decided this. However, this untruth is not material to the sting of the defamation.

[167] The statement in paragraph 11 that it was internally "recommended that a review board should be convened to evaluate Ms Mndawe's performance in order to decide whether she should undergo further additional training or otherwise be dismissed" was not proved by the defendants to be true. They presented no admissible evidence on this issue. Furthermore, the plaintiff denied that there had been such a recommendation. He testified that it was up to him to make such a recommendation in cases where a pilot does not progress satisfactorily in training. He stated that he never made such a recommendation because the pilot was still being trained in line and, in any event, there were still a certain number of hours of

extended training available to her which had not yet been exhausted. In my view this evidence indicates that the statement in the article is, in fact, untrue. I think it is material, as the statement in the article tends to make the standard of the pilot look even worse and therefore also makes the allegation of falsification in order to deceive the DCA more serious.

[168] The second defendant admitted in evidence that the indirect reference in paragraph 14 to the Check 6 OPC form as an "unrelated" form is incorrect. I did not understand the third defendant to also have admitted this. However, I agree with the second defendant that, on the available evidence, the Check 6 OPC form cannot be said to be "unrelated" to the DCA form (although there is a dispute on the degree to which they, and the tests on which they are based, can be said to be related) in that both are forms which are filled when a test is done to determine a pilot's proficiency to fly the particular aircraft.

[169] The statement in paragraph 15 that the plaintiff told Mr Brammer to copy "the initial recommendation for Mndawe's employment" onto the DCA form is also not correct. Clearly the Check 6 OPC form was a proficiency check containing a recommendation about the next stage of her training and was completed about a month after she had already been employed.

[170] In my view the inaccuracies in paragraphs 14 and 15 are material, in that they provide details of the nature of the falsification required by the plaintiff which details tend to cast the plaintiff in a worse light because the article creates the impression that the information to be transposed is invalid, outdated and unrelated.

[171] The statement in paragraph 18 of the article that Mr Brammer could not be reached for comment is not true as the third defendant testified that she did reach him, but he was only willing to confirm the termination of his contract with Air Namibia. However, this inaccuracy is not material.

[172] I now turn to the most important aspects of the gist of the defamatory statements. The next issue is whether the plaintiff wanted Mr Brammer to "falsify

information on a DCA form to get the necessary certification for the SA citizen to fly Air Namibia's domestic Beechcraft 1900 fleet" (see paragraph 2 of the article). In the context of the article as a whole the more precise purpose and nature of the intended falsification was to create the impression that Ms Mndawe has done the practical flying test after the withdrawal of the validation (see paragraph 14 of the article) as the DCA had "directly" instructed Air Namibia to do (see paragraph 16 of the article). I shall first consider whether it is true that the DCA had given such instructions; whether senior management of Air Namibia had been informed that Ms Mndawe must undergo a practical flying examination (see paragraph 13 of the article); whether the plaintiff was aware of this; and whether he ignored such instructions (see paragraph 16 of the article).

[173] It is common cause that Mr van Niekerk never expressly informed the plaintiff that a retest was required or that Ms Mndawe had to pass a practical flying test before the validation certificate would be re-issued. There is furthermore no evidence by Mr van Niekerk that he expressly informed Air Namibia as such at any time that a test or retest was required. It is also clear from Mr van Niekerk's evidence that the only persons who were told expressly that a retest was required, were Ms Mndawe, Mr Brammer and Mr Boardman. There is no evidence that any of them represented Air Namibia. It is clear from Mr van Niekerk's evidence that when he spoke to Ms Mndawe, he was dealing with her in her private capacity. Mr Brammer was an independent contractor. No clear evidence was given about Mr Boardman's position, but Mr van Niekerk referred to him as an examiner. Mr van Niekerk did mention at one stage that he contacted these two examiners because they worked for Air Namibia, but I did not understand him to say that they were employees, as he had earlier explained that examiners are independent from the aviation operator. There is also evidence that Mr Boardman was an instructor. However, there is no evidence that he was an employee of Air Namibia or, as I said, that he represented Air Namibia.

[174] There is evidence by the third defendant on the issue. The plaintiff's counsel referred her to Mr Brammer's statement in e-mail #6 that he had

contacted Mr van Niekerk and that the latter had immediately insisted that Air Namibia had already been advised that a retest would be required. The following exchanges then occurred between the plaintiff's counsel and the witness (the insertions in square brackets are mine):

> "Did you ask him [i.e. Mr van Niekerk] in what form and shape did he, if he agreed with that, requested Air Namibia, in particular the Plaintiff? --- I asked him whether he had instructed them to have a retest done.
>
> Yes, did you ask him when, how and in what form? --- I do not know, I asked whether Air Namibia knew that a retest was necessary and he told me that he had informed them.
>
> But do you not know, a simple question, so you did not ask him? --- I do not know."

[175] From this exchange it is clear that, according to the third defendant, Mr van Niekerk said to her that he had informed Air Namibia to have a retest done, but she does not know when, how and in what form the instruction was given. However, as I have stated before, in evidence Mr van Niekerk did not state that he had given any express instruction to Air Namibia and he also did not state that he had told the third defendant that he had expressly instructed Air Namibia to have a retest done. Therefore, to the extent that the third defendant's evidence might relate to an express instruction, her evidence is hearsay and cannot be used to prove the truth of its contents.

[176] I pause to note that in paragraph 8.5.2 of the defendants' plea it is alleged that Mr van Niekerk told the third defendant that a validation test was "required" by the DCA. It was not pleaded that he told her that the DCA expressly informed Air Namibia that a test was required.

[177] The statement in paragraph 13 of the article, namely that, "They [referring to senior management of Air Namibia] were apparently again informed that Mndawe ……. must undergo a practical flying examination," is therefore not true. The statement in paragraph 16 of the article to the effect that the plaintiff ignored "the

direct instructions from the DCA to complete a new flying test" is therefore also not true, as both the plaintiff's and Mr van Niekerk's evidence is to the effect that there were no such "direct instructions".

[178] There is a dispute whether Mr van Niekerk informed the plaintiff that no retest was required. The plaintiff testified that he met with Mr van Niekerk specifically to seek clarification about the letter Exh "A" so that he would know what the DCA expected to be done. Mr van Niekerk told him that he had realised that the validation had been issued on the basis of a Check 6 form, which is not the correct form. He wanted the correct form to be submitted, then he would issue the validation. The plaintiff said he specifically asked Mr van Niekerk if a retest was required, to which he replied, in the plaintiff's words, "…no, he just wanted a correctly completed flight test report".

[179] During cross-examination the plaintiff was confronted with the press release (Exh "G") issued by Air Namibia after the report was published. In the release the following was stated regarding the meeting between the plaintiff and Mr van Niekerk:

> "7. Air Namibia approached the DCA, specifically Mr. Graeme van Niekerk, to clarify whether another flight test would be needed or transfer of flight test information from the OPC Check 6 form to the correct DCA required form would suffice, since the entire required test standards are reflected. Air Namibia's understanding, after this meeting with Mr. van Niekerk, was that transfer of flight test information from the one form to another would be acceptable to the authorities if signed by the testing Examiner."

[180] The defendants' counsel was concerned with the use of the word "understanding" which, it was put, conveyed the impression that Mr van Niekerk had not expressly conveyed that no retest was required, whereas the plaintiff's evidence is to the effect that Mr van Niekerk did expressly state that no retest was required. The plaintiff repeated the same version as given in evidence in chief, and said that, as a result of Mr van Niekerk's answer, his understanding was as

set out in the press release and that is why he asked Mr Brammer to transfer the information from the wrong form onto the correct form. In cross-examination he also stated that he asked the DCA "precisely what they meant and they said, you the information, if it is put on the correct form, presented to the DCA, they will reissue the validation."

[181] I pause to note that the press release seemingly conveys that the plaintiff actually asked Mr van Niekerk whether transfer of the information from the one form to the other would suffice, but the plaintiff was not asked to explain what appears to be a contradiction with his evidence, which did not include testimony that he actually posed such a question to Mr van Niekerk. The plaintiff did state, however, that he was partly involved in the drawing up of the press release and that he provided information to the author, but that he did not read the document before it was released. As such he is not responsible for the final wording. In the circumstances I shall assume in favour of the plaintiff that the contradiction, if any, is more apparent than real.

[182] When Mr van Niekerk testified in chief, he denied that he expressly stated that no retest was required. His version was also put to the plaintiff in cross-examination at page 157 of the record where Mr *Corbett* said that Mr van Niekerk's "instructions are that he did never advise you that the practical flight test was not required. He simply advised you to submit the proper form …". When Mr *Namandje* sought clarification of this statement, the word "proper" was substituted by the word "correct". The submission in the plaintiff's heads of argument that the version (as set out in the first sentence quoted above) was never put to the plaintiff is therefore not correct.

[183] During cross-examination Mr van Niekerk stated that the plaintiff came to his office "as a raging bull" (from which I understand him to say that the plaintiff was upset or angry,) and that he complained about the withdrawal of the validation. Mr van Niekerk's testimony continued as follows:

> "I told him fill out the correct form he knows what has to be done. That is what happened.
>
> So you told him to fill up the correct form? --- Yes I told him supply me with the correct documentation and I mean M[r] Nyandoro which is the designated examiner knows what it means like I have said to you many times before.
>
> But I want exactly what, that is exactly what you told him that fill up the correct form. In other words complete the correct form? --- You know I do not directly exactly remember what was said because it was made very clear to him because in any way I did not even know why he was in my office because it had nothing to do with him. It was not his licence that was suspended. It was the lady's licence and the lady was given clear instructions what she had to do. So I do not, I remember it was quite tense. That is all I remember. It was a very tense meeting in my office at the time. I think it was him and Mr Ekandjo.
>
> Why did you only tell him to fill a new form and you did not tell him that? --- I did not tell him directly that.
>
> What directly did you not tell him? --- I told him he knows what has to be done, bring me the correct forms.
>
> Yes I want to know is it also because of the race question why did you not say this lady need further training? --- Why did you shy away from saying that? --- You are now telling me to say things. I never shy away from anything. I did not tell Mr Nyandoro that he only needs to fill out the form.
>
> I have been asking you what you told him. You said it. --- I just told him has to bring me the correct documentation he knows what it is to have it reinstated. But, I had already spoken to Ralph Brammer and to Charles Bo[a]rdman who had examined …[her] and the pilot involved telling them exactly what had to be done."

[184] Later in the record the following exchanges took place after counsel referred Mr van Niekerk to paragraph 8.5.2 of the plea in which it is alleged that he told the third defendant that a validation test was required by the DCA for the reissuing of

the validation (Mr van Niekerk confirmed during evidence in chief that he had told the third defendant what is contained in paragraph 8.5):

> "Now did you scare away from telling him Mr Nyandoro that a retesting is required straightforward when you would tell it to the journalist, to the media? --- No I told that to the pilot.
>
> But clarity was sought you said you said you are admitting Mr Nyandoro came? --- Yes I do not actually recall 100% what went off in the office but it was in place.
>
> The? --- In my office when Mr Nyandoro came there but I made it clear to Mr Nyandoro that the right documentation needs to be put over my desk before I will reissue the validation."

[185] When asked why he did not explicitly tell the plaintiff that a retest was required, he explained that he deals with the pilot and not with the operator (i.e. Air Namibia) because the licence is issued to the pilot and "the operator is the person that employs the pilot. I tell the pilot that is what is required".

[186] Later in cross-examination he stated:

> "Mr Nyandoro came into my office. There was a bit of a heated dispute. I told him to fill out the right forms and bring it back to me. I had already discussed it [with] Brammer, Bo[a]rdman and everybody else. So to me it was a closed book."

[187] He also accused the plaintiff of having approached him in a "very deceiving manner" in the past (but this allegation was not put to the plaintiff in cross-examination) and of not having supplied proper documentation in the past in respect of his own file. The important aspect about this evidence at this stage is that Mr van Niekerk further stated that, because of this alleged past behaviour, he did not listen to the plaintiff "properly" when he came to clarify the matter at his office that day.

[188] To sum up thus far, my understanding of Mr van Niekerk's evidence about the conversation is that it was tense, that the plaintiff was angry or upset, that Mr van Niekerk only indicated that the right documents must be filled in and submitted, that he does not remember exactly what was said and that he did not listen to the plaintiff properly. Furthermore, because he had already discussed privately with the pilot and the examiners what had to be done to have the validation re-issued, the matter was, as he said, "a closed book" to him. From repeated use of this expression during his testimony it is clear that he did not use this expression in its correct sense, i.e. to indicate a person or a subject that is unknown or beyond comprehension, but to convey the idea that the matter was clear to him because he had already made all the arrangements, i.e. it was, to use another of his expressions, "a done deal". It seems to me that, because Mr van Niekerk was satisfied that he had already arranged everything with Ms Mndawe and Messrs Brammer and Boardman, and because he was negatively disposed towards the plaintiff and regarded his involvement in the matter as being without foundation, he was not really concerned with the plaintiff and his enquiries and he did not listen properly to the plaintiff.

[189] The plaintiff, on the other hand, was more emphatic about what was said during the meeting and his understanding of it. The whole purpose of his visit to Mr van Niekerk's office was to obtain clarification about the letter. He wanted to know why the validation certificate was withdrawn, what had to be done to rectify the situation and also whether a retest was required. I think that it is inherently probable that he would have asked questions about these matters. Mr van Niekerk also never denied that such questions were asked. My inclination, therefore, is to lean towards the version of the plaintiff, especially bearing in mind that Mr van Niekerk had difficulty remembering what exactly was said and did not listen properly to the plaintiff.

[190] However, I do not think that it is necessary to make a firm finding about whether Mr van Niekerk actually said "no" to the question about the retest. It seems to me that the circumstances during the meeting were such that the

plaintiff could very easily have formed the *bona fide* impression or understanding that what Mr van Niekerk conveyed was that no retest was required.

[191] Given the fact that Mr van Niekerk actually wanted a retest to be done, I think it probable that he did not have the intention at the meeting to expressly convey that no retest was required, but because of the tense atmosphere the “bit of a heated dispute” during the meeting, his negative attitude towards the plaintiff and because of the fact that he did not listen properly to the plaintiff, it is not improbable that he unwittingly or inadvertently gave an answer conveying to the plaintiff that no retest was required. Alternatively, in the circumstances described by the defendant even a direct question, such as, “Do you require a retest?” or “Must the pilot be retested?”, met by evasive answers, such as, “You fill in the correct form” and “Put the correct documentation on my desk”, could very well give rise to the understanding contended for by the plaintiff, namely that no retest was required.

[192] There are also certain other factors which indicate that Mr van Niekerk, despite some protestations to the contrary, shied away from the topic of the retest by placing the emphasis on the correct forms and not on the correct test. In other words, while he probably did not intentionally state expressly that no test was required, he intentionally did not state that a test was required. He just kept referring to the need for the correct form to be filled in and for the correct documentation to be placed on his desk.

[193] In this regard I take note of the fact that at certain stages in his testimony he indicated to the plaintiff that the correct forms or documentation must be submitted or placed on his desk and at other times he testified that he told the plaintiff “…to fill out the correct form he knows what has to be done”. On one occasion he corrected himself and stated that he did not tell the plaintiff that he “only needs to fill out the right form”, but later he again stated that he told the plaintiff “…to fill out the right forms and bring it (*sic*) back to me.” As indicated before, the plaintiff also testified that it was indicated to him that if the information was put on the correct form and presented to the DCA, i.e. Mr van Niekerk, the

validation would be reissued. By telling the plaintiff to fill in the correct forms Mr van Niekerk clearly could not have meant to indicate or imply that a retest had to be done as the plaintiff could obviously not retest Ms Mndawe. That would have had to be done by an independent designated examiner. The only way in which the plaintiff could "fill out the right forms", have them signed by a Namibian designated examiner as required in the letter (Exh "A"), and then return them to Mr van Niekerk, was by doing what Mr van Niekerk clearly expected him to do, namely to have the information transposed from the wrong form onto the correct form. Seen against the background that there had clearly been a history of cases in which information was being transferred from one form to another, or the same information used for more than one test and pilots being "signed off", as Mr van Niekerk indeed expected would be done in this case, it seems to me that it is indeed very probable that this is also what the plaintiff understood, as he indeed testified. Yet Mr van Niekerk did not expressly tell the plaintiff that a retest was required. The latter then did precisely what Mr van Niekerk expected he would do.

[194] As I said, Mr van Niekerk expected that Air Namibia would request Mr Brammer to transfer the information and to sign Ms Mndawe off. He therefore impressed upon Messrs Brammer and Boardman that if this was done in this case he "would not be happy" because of the serious complaints against the pilot. However, because he did not inform the plaintiff of these complaints and of the true reason why he withdrew the validation certificate, but placed the emphasis throughout on the "wrong form" and the "correct form" (not the "wrong test" and the "correct test"), the plaintiff understood, in effect, that the only problem was that the wrong form had been completed and that it could be solved without a retest by filling in the correct form, having it signed and presenting it to the DCA. It should also be borne in mind that at this stage the plaintiff did not even know that Mr Brammer had in fact not done the validation test. He only found this out when Mr Brammer informed him in e-mail #2 on 4 March 2010 and clarified this in e-mail 4 on 5 March 2010.

[195] What is also relevant in this discussion of the evidence is that under cross-examination Mr van Niekerk's evidence was to the effect that he deliberately chose his words when he wrote the letter, Exh "A". It is clear that the actual reason for the withdrawal of the validation was the two complaints he had received about Ms Mndawe's flying ability. Fearing of being accused of racism, *inter alia*, by the plaintiff, he deliberately did not mention this reason in the letter. In fact, as I understand his evidence, he should actually have cancelled the validation outright without giving an undertaking to re-issue it upon submission of the correct documentation. He testified that he had to write the letter "in a very diplomatic way". The only persons he told "exactly" what had actually to be done, were Ms Mndawe and Messrs Brammer and Boardman. He was satisfied that he had made all the necessary arrangements for an initial test plus a recommendation for further training and then a re-testing after the training. It was a "closed book" and a "done deal". However, he never informed the plaintiff of these arrangements, even though the plaintiff, as the Head of Training and Standards at the pilot's employer, sought clarification and presumably would have been entitled to this information. Bearing in mind the gravity of the complaints against the pilot and the fact that the employer would have to bear the costs of these tests and training, the concealment by Mr van Niekerk is puzzling.

[196] He testified at one stage that his business is with the pilot and not with the operator, therefore he did not disclose that a retest was required, but this reason is not entirely convincing when one considers that the plaintiff specifically sought clarification and asked pertinent, direct questions. On another occasion, to which I referred earlier when I discussed the impression Mr van Niekerk made as a witness, he testified that he could not remember and did not know why he had disclosed all the relevant information to the pilot and Mr Brammer, but not to the plaintiff. Considering the importance to him of this issue at the time, I do not accept that he did not remember and did not know. Furthermore, considering the circumstances of which Mr van Niekerk was aware at the time, it is highly probable that he would, in the normal course, have stated that a retest was required. There had been complaints about the pilot's flying which raised serious

safety concerns; the test which she had undergone did not satisfy Mr van Niekerk; he suspected that Air Namibia and/or the plaintiff would request or place pressure on Mr Brammer to transpose information onto the correct form and “sign her off”; according to the witness Mr Brammer allegedly shared these fears, as is evident form their conversation at about the time the validation certificate was withdrawn; and the plaintiff has specifically approached him for clarification. In the absence of a satisfactory explanation by Mr van Niekerk for his conduct, it is most probable that he refrained from mentioning the need for a retest for the same reasons that he refrained from mentioning the complaints against the pilot and his resultant safety concerns. The only plausible explanation which has any basis in the evidence is that Mr van Niekerk acted in this manner because he feared accusations of racism. I think it very likely that his stance during the meeting in his office was to stick as closely as possible to the “diplomatic” wording of his letter.

[197] As indicated before, according to Mr van Niekerk he only spoke to Mr Brammer once about the matter and this was shortly before or after he wrote the letter Exh “A”, but before he handed it to Ms Mndawe. In e-mail #6 by Mr Brammer to the plaintiff he refers to a telephone conversation he had with Mr van Niekerk on 8 March 2010, but the latter did not confirm this in evidence. As Mr Brammer did not testify, the contents of the e-mail cannot stand as proof of the truth of its contents. In the absence of any cogent reason not to do so, I must therefore accept Mr van Niekerk’s evidence on the point.

[198] There is no indication that Mr Brammer ever informed the plaintiff of the complaints received about Ms Mndawe’s flying or about Mr van Niekerk’s arrangements with him. The only criticism of her flying of which the plaintiff was aware, was contained in her training reports. He regarded the difficulties she experienced as “routine” and commonly experienced by pilots in training. It is clear that both Mr van Niekerk and Mr Brammer kept the plaintiff in the dark.

[199] The plaintiff testified that the only person who informed him that Mr van Niekerk required a retest, was Mr Brammer, who did so in his last e-mail (#6 of 8 March 2010). On all the evidence presented, including Mr van Niekerk’s, the

plaintiff's evidence on this issue must be accepted. After he received this e-mail he made no further request to Mr Brammer to transpose any information and arranged for Ms Mndawe to be tested by another examiner.

[200] Mr *Corbett* referred to e-mail #4 and submitted that the plaintiff's strongest argument to make to Mr Brammer would have been that Mr van Niekerk had given the assurance that no retest was required, yet the plaintiff did not mentioned in the e-mail. There is some merit in this submission. However, the plaintiff was not confronted with this point in cross-examination. He might have been able to give a satisfactory explanation, especially in the context of the references he made in the e-mail to the competence and expertise of the DCA and his belief that the latter is a "competent authority which works on regulations based on the country's laws". The Court therefore does not feel comfortable to make the finding that counsel requested me to make, namely that the plaintiff's failure to raise the said argument is "damning evidence of the falsity of …[his] evidence in regard to the conversation which took place between …[him] and Mr van Niekerk in relation to this issue"; and further, that a negative finding should be made against the plaintiff's credibility on this issue.

[201] I next proceed to consider there was an implied instruction or requirement communicated by Mr van Niekerk to have the pilot retested. It is common cause that Mr van Niekerk's letter (Exh "A") does not expressly state that a retest is required. The plaintiff testified that the DCA normally states exactly what is required, i.e. if it wanted a retest, it would say so expressly. This testimony was not disputed on behalf of the defendants during cross-examination. In my view it is inherently more probable that an authority like the DCA would not leave such matters to implication.

[202] However, the second and third defendants testified that the requirement that the correct form signed by a Namibian designated examiner must be submitted implies that a retest must be done. The third defendant testified that it was explained to her that they [Air Nam] would automatically know that a retest was necessary.

[203] Furthermore, in response to the plaintiff's version that if the DCA wants a retest it would say so expressly, the following testimony by Mr van Niekerk was recorded:

> "Well we do not directly put it in because the person, the people who are responsible for this like Mr … [Nyandoro] would obviously know that the one form is not compatible with the others and therefore a full flight check would have to be done to comply legally with all the required exercises and specially as a designated examiner should know that."
>
> So you say he would know as a designated examiner? --- Yes he would know that."

[204] When he was again asked whether the DCA would clearly indicate in writing that a retest is required, the following was recorded,

> "No I would not, the letter that I wrote clearly states that a reissue (*sic*) as soon as you submit the correct Namibian practical flight test form signed by [a] Namibian designated examiner and a designated examiner would not sign that other form based on a check 6 form, he definitely would not do that.
>
> So what will the implication be if any? --- It would implicate that a flight check had to be done, a complete flight check as Exhibit P, all those exercises will have to be filled out."

[205] From these answers it seems to me that Mr van Niekerk, instead of answering what the DCA generally does, was giving answers influenced by the specific facts of this case and was concerned with the manner in which he drafted the letter in this particular case. As he stated elsewhere in his testimony, he chose his words carefully, which militates against him following the usual wording used by the DCA. In a case where the pilot is in possession of the correct from signed by a designated examiner, but mistakenly submits another, incorrect test form, a request to submit the correct form duly signed would clearly not result automatically in a retest, because the pilot would merely correct the mistake by handing in the original correct form. This makes nonsense of the point that a request to present the forms would automatically convey that a retest is required.

[206] Mr van Niekerk also stated that the words used in the last paragraph of the letter, namely "Your Namibian Validation will be re-issued as soon as you submit

the correct Official Namibian Commercial Practical Flight Test form signed by a Namibian Designated Examiner" are "basically … saying that you would have to go and do a check rate again to get this", i.e. implying that she would have to be checked again by doing the practical flight test. If it implication was indeed so very clear I do not understand why he found it necessary to especially telephone the designated examiner to impress upon him that a retest was required. Also, if it was so very clear that the plaintiff as a designated examiner would have known that a full flight check had to be done, Mr Brammer might as well have said so in the letter and, more crucially, when the plaintiff approached him for clarification. There would have been no need for Mr van Niekerk to word paragraph 3 of the letter "diplomatically" and no need to refrain from stating clearly to the plaintiff that he expected a new full flight check and that he would not be happy if information is transposed, thereby also providing some support to Mr Brammer, who had already, according to Mr van Niekerk, expressed concerns that the plaintiff would place pressure on him to merely sign the DCA form. The point is that Mr van Niekerk knew that no practical flight test forms had been completed and that the pilot would not be able to present such forms, whether completed before the validation was withdrawn or after. By asking for these forms, but without stating expressly stating that a new test had to be done and by arranging, unbeknown to the plaintiff, for Mr Brammer not to transpose the information but to do a retest, he would be able to avoid accusations of racism, but would effectively obtain a current test done after the validation had been withdrawn. However, the plaintiff was not aware of what he was seeking to accomplish and of the complaints against the pilot or that a validation test had not been done. He was made to understand that only the wrong form had been completed and when he sought clarification, that no retest was required, but that filling in of the correct forms (i.e. transfer of the results) and submission thereof would suffice.

[207] In any event, it seems to me that even if one could say that the request to submit the correct forms in this particular case implied that a retest would be required, the plaintiff sought clarification and on his understanding of what was conveyed to him and his *bona fide* belief that he was acting lawfully in compliance

with the authorisation of the regulator, he had no intention to falsify any information to deceive the DCA that a retest had been done. Indeed, the defendants' counsel at one stage put it to the plaintiff in this way, "Well you did not appreciate that it was illegal, I think that is the main issue." A person who "did not appreciate that it was illegal" clearly did not have the intent to falsify information in order to deceive in the sense set out when the meaning of the word "falsify" was discussed.

[208] The plaintiff's e-mails do not disclose any intention on his part to deceive the DCA into believing that a retest had taken place after the withdrawal of the validation certificate. The plaintiff's evidence is clear that his intention was that Mr Brammer should transpose the information onto the DCA form to reflect the *status quo* as on 19 September 2009.

[209] Mr *Corbett* in the defendants' heads of argument submitted that the plaintiff suggested that the date of completion of the DCA form should be 10 February 2010, but there is no evidence to this effect. In oral argument counsel agreed that the plaintiff's evidence was that the information should be transposed with no changes, in other words, the form would have indicated that the test was done on 19 September 1990. There is no evidence to the contrary. The effect is that the article is not true in as much as it conveys that the effect of the plaintiff's conduct would have been to create the false impression that the retest had been done after the withdrawal of the validation certificate as instructed by the DCA. From the evidence given by the defendants it is evident that by the time they entered the witness box, they had also accepted this to be the case although they did not state so expressly. I come to this conclusion because they did not persist that the article was true in the respect set out above in this paragraph. Furthermore, when asked in which respects there had been pressure to falsify, they did not refer to an attempt to create the impression that a retest had been done after the validation was withdrawn.

[210] I now turn to a consideration whether the plaintiff wanted the plaintiff to "falsify information". In e-mails #1 and #2 the plaintiff merely requests Mr

Brammer to “transfer the flight test information” from the one form to the other. The third defendant acknowledged in evidence that no dishonest intent on the part of the plaintiff is suggested in these two e-mails, a statement with which I agree. (She did add, however, that the dishonest intent is to be gathered from the [further] progression of e-mails.) In e-mail #5 the plaintiff explains on what basis he is requesting Mr Brammer to “transfer the information”. Clearly, on the face of it, the e-mail correspondence itself does not convey at all that the plaintiff ever instructed Mr Brammer to falsify any information.

[211] The defendants’ counsel submitted as follows in paragraph 29 of their heads of argument with reference to the Check 6 OPC form and the DCA form:

> “The fact that the two forms of examination do not equate, is central to the allegation made in the article that in effect to require of the examiner, Mr Brammer, to transpose information from the OPC form onto the practical flight test form, amounted to a falsification of information.”

(I pause to note that the submission does not correctly reflect what is stated in the article. The article does not state that the request to transpose information “in effect ……. amounted to a falsification of information.” It states as a fact that what the plaintiff pressurized Mr Brammer to do was to falsify information.)

[212] Counsel expanded upon the above submission by contending, *inter alia*, that if Mr Brammer have transposed the information, the false impression would have been created that when he tested the pilot, he had the DCA form in front of him, whilst in reality he had the Check 6 OPC form in front of him. I do not think that this is necessarily so. The plaintiff, for instance, testified that it is possible to fill in a test form afterwards from notes which the examiner keeps. He also indicated that the tolerances and standards applied are well known to experienced examiners and that he always uses them, in other words, he does not need to DCA form to indicate what tolerances and standards apply. This might very well also be the case with other experienced examiners, especially an examiner like Mr Brammer who does examinations fulltime for a living. In any event, even if it could be said that the false impression contended for would be created, it would,

in my view, not be material. The important thing is whether the pilot was tested as the particular form requires and whether the result recorded is true.

[213] Mr *Corbett* submitted that the mere placing of the date of 19 September 2009 on the form and signing next to it would be a backdating of the form which in itself amounts to falsification in that it would be false to convey the impression that the form was signed on 19 September 2009. I do not agree with this submission. To backdate a document is to make it effective from an earlier date. Whether this would amount to a falsification would depend, *inter alia*, on the underlying intention of the signatory. For instance, if flying test results of 10 March 2010 were entered onto a DCA form, which is backdated to 19 September 2010 and signed to give the impression that they were effective on 19 September 2010, this would be a falsification.

[214] When responding to questions put to the plaintiff during cross-examination, it was clear that the plaintiff did not consider his request to Mr Brammer to be backdating practical flying test results. He testified in this regard:

> "No, backdating would mean that someone fills in a form and post-dates it and this is not what I required Ralph Brammer, the instructor, to do. I simply wanted him to transfer the information on the wrong form that he had filled on the correct form, including the detail and everything that was there and not to add or subtract anything."
>
> "So did you require him to change the content of the information? --- Not at all."

[215] From this evidence it would appear that the plaintiff is confusing the terms "backdate" and "postdate." However, what is clear is that he did not want Mr Brammer to alter any information, or as he testified "add or subtract anything." He also testified at a certain stage that he did not discuss the issue of the signature with Mr Brammer.

[216] It is convenient to consider at this stage the evidence about the comparison between the two tests and the forms. The plaintiff stated in evidence in chief that

the items on the Check 6 OPC form were the same items as were required to be tested by the DCA form. He also pointed out that the Check 6 form of Air Namibia is approved by the DCA for operator proficiency checks.

[217] In cross-examination there were question were posed about the similarity between the SA flying test forms and the DCA form (Exh “P”) to which the plaintiff at times indicated that they were the same. However, it soon became clear that what he meant was that the items to be tested were essentially the same, but that the one form was not the mirror image of the other. Indeed this is most glaringly obvious even at a cursory glance. He tried to explain what he meant by saying the items are the same is that they cover the same matters to be tested.

[218] He also made it clear that the form from which he requested Mr Brammer to transpose the information was actually the Check 6 OPC form which was available. Although he also indicated in his evidence that the SA flying test forms completed by Mr Brammer could also potentially have been used as a source of information, it seems that these forms were not available at the time because he obtained a faxed copy only after the article had appeared. Although he indicated that the contents of the Check 6 OPC and the DCA form are the same, it became clear that what he meant is that it is the same items that are covered and that certain of the ratings are not described in the same words, but are the equivalent of one another. He explained that if the standard in the SA flying tests and the Check 6 OPC were satisfactory, as they were in this case, the standard set in the practical flying test would have been reached. He also stated that if the pilot had failed some of the items in the earlier tests it would have been “complicated to transfer any information”. I understood him to mean that it would not have been possible to fill in the DCA form to the satisfaction of the DCA to obtain the reissue of the validation as the required standard would not have been met.

[219] When referred to certain “tolerances” and instructions or guidelines given to the examiner on Exh “P” which do not appear on the Check 6 OPC form, the plaintiff explained that these comprised the testing standards, that these are well

known to designated examiners and that he applied these whenever he did checks. I understood him to in effect indicate that these are the norm.

[220] Mr van Niekerk stated that the OPC Check 6 form is used internally (by Air Namibia) as a proficiency check, whereas the DCA form is also used for the issuing of a pilot's licence and therefore it has more detailed requirements. He stated that some of the items required to be tested by the DCA form were the same as, or similar, or related to the items on the Check 6 OPC form, but some required more detailed information. In respect of, e.g. item 15 on Exh "P" and item 4 on Exh "N" he was asked whether there was a difference to which he answered, "On paper yes, practically it depends. As I say, they are related but they are not direct." In some respects, he said, there were material differences.

[221] He agreed with the plaintiff's testimony that some items were not applicable at all to large aircraft of the type for which Ms Mndawe would require validation and that it would not be necessary to test her on these items. Just like the plaintiff, he described the form as "generic", as it is designed to cater for different kinds of licences and many types of aircraft, from small to large. From this it is clear that, although the DCA form is much longer than the Check 6 OPC form, it is not necessary to complete all the available blank spaces. He stated that he was not familiar with the Check 6 OPC form. It seems that this was the reason why at times he had difficulty to compare it with Exh "P". He also took issue with the fact that the OPC Check 6 form did not require the examiner to record the duration of the test, unlike Exh "P", and that it might only have taken half an hour, whereas the full flight test would take at least one to one and a half hours. He expressed the view that one cannot really by looking at the completed form determine accurately how efficient the person is. He also stated that the two forms were designed for different purposes.

[222] He expressed the view that if information from the Check 6 OPC form were to be transposed to the DCA form, "not even quarter of it would be filled out and I would not accept it." Mr van Niekerk was very careful in that he testified that if there is a transposing of information from the Check 6 OPC form to the DCA form

it would be falsification to complete the form because there are some items on the latter which are not on the former. He further explained that the falsification would take place because the Check 6 OPC form would not have included all the checks required by Exh "P", that there would be "big holes", i.e. parts of the form that would not be completed and that one would have to "artificially" fill them in order to complete the form.

[223] Mr van Niekerk agreed with the plaintiff's testimony that the examiner is required to keep notes about the tests he did, but said that the examiner would not keep such fine details so as to enable him to supplement the information on the Check 6 OPC form as the examiner would have write "pages and pages" of notes and "none of the examiners do that". He did not explain on what basis was able to testify about the contents of examiners' notes. In my view it is inherently unlikely that he would have inside knowledge about the extent of such detail and to be able to imply that Mr Brammer would also not have had sufficient notes.

[224] He was asked to comment on the following sentence in e-mail #5 by the plaintiff to Mr Brammer: "On the check 6 form your recommendations were **"Recommended for line training"** which implies you were satisfied with the standard, the standard which equals that required for a practical flight test". He replied that "obviously" the plaintiff was "under a misconception that it is the same", i.e. that being recommended for line training on a Check 6 form is the same standard as the practical flight test required for the issue of a validation certificate.

[225] Commenting on the following two sentences, namely, "This is the basis upon which I am requesting you to transfer the information on the test form I provided. It is very costly for Air Namibia to repeat a test that was conducted satisfactorily and which the authorities are ready to recognize", he said, "Well the authorities are definitely not willing to recognise that form that is why the validation was suspended." In this regard his answer does not fit in with the rest of his evidence, which is to the effect that the true reason why he suspended the validation was because of the complaints, not because of the fact that the wrong form was used.

[226] Mr *Corbett* submitted that the plaintiff was a particularly poor witness under cross-examination with regard to the comparison between the two forms, especially in regard to the differences between them. He submitted that the plaintiff was most evasive and very reluctant to admit what were obvious differences between the two examinations and their purposes. He further submitted that the plaintiff's explanations were self-serving, contradicted the documentary evidence and revealed the extent to which he was prepared to distort the truth in claiming that there was no difference between the two examinations and the forms. Counsel referred to p96 of the record and stated that the plaintiff asserted that the two examinations were the same. However, the record indicates that the plaintiff was being cross-examined on the SA examination in terms of the SACARS and the practical flying test in terms of the NAMCARS and that he stated that the items to be tested are the same.

[227] I do not agree with counsel's submission that the plaintiff was most evasive and very reluctant as he described. The cross-examination indicates that with respect to several items that appear on Exh "P" the plaintiff readily admitted that they do not appear on the Check 6 OPC form. In several cases his assertion that an item on Exh "P" was the same as or related to an item on the other form was accepted without any objection. I must say, though, that in one or two instances the connection appeared to be somewhat tenuous and that the plaintiff's explanation at times seemed improbable.

[228] Mr Corbett submitted that the evidence of Mr van Niekerk on the subject should be preferred as it was clear and unequivocal. In my view Mr van Niekerk gave useful evidence in certain respects and I take into consideration his considerable years of flying experience, as well as the fact that one of his tasks is to approve or refuse validation applications based on the DCA form. However, he indicated that he was not familiar with the Check 6 OPC form and therefore he had difficulty at times in comparing it with the DCA form. He is also not an examiner and does not have experience of having tested pilots according to this form and also not according to the DCA form. On the other hand the plaintiff does

know both forms well and has experience in testing pilots according to both. I think he would probably be better able to assess the extent to which one item coincides with another and the extent to which an experienced examiner would be able to transpose information without compromising its credibility. However, I think the plaintiff tended in certain instances to exaggerate the similarities which reflects negatively upon the value of his testimony in this regard.

[229] There is another relevant consideration. It seems to me that, when one compares the two forms in light of the evidence given by the plaintiff and Mr van Niekerk on the particular subject, such a comparison by persons knowledgeable in the field of aviation examination would probably yield different opinions reasonably held on the degree of similarity and difference between them and the extent to which they overlap. This is something about which there could reasonably be some debate. This much was evident from the evidence given by the plaintiff and Mr van Niekerk and from the contents of the two forms. The plaintiff, for instance, referred to certain ratings which would be the equivalent of one another and not identical in name. Mr van Niekerk referred to certain items which appear to be different on paper, but stated that “practically it depends”, which indicates that the differences may be more apparent than real.

[230] The plaintiff testified that the ticks which Mr Brammer made on the form in the various columns indicate that the pilot’s performance was satisfactory and that she was proficient in regard to the aspect tested. It is further clear that part of the OPC Check 6 form does require an assessment to be made on various aspects of flying according to a grading code from which it is reasonable to assume indicates certain levels of proficiency. As the test is required by law and the Check 6 OPC form has been approved by the DCA (this evidence by the plaintiff was not disputed) and the aim is to regularly check the proficiency of the pilot, it follows that there must be a certain standard in terms of which the level of proficiency is considered acceptable or unacceptable. The inherent probabilities are that an experienced examiner like Mr Brammer would be able to a greater or lesser extent to transpose the information recorded on the Check 6 OPC form to the

DCA form in a manner which is commensurate with the requirements of the DCA form without affecting the accuracy of the assessment or the result relating to that information.

[231] Mr *Corbett* further submitted that to require of Mr Brammer to transpose information amounted to a requirement to falsify information because the two forms in question were not the same and did not require in all respects the same tests to be done or the same extent of detail to be provided when the results are recorded. He added that by transposing information from the Check 6 form Mr Brammer would have falsely indicated to the reader that the more extensive examination on a broader range of topics and more detailed specified items had been undertaken, whilst this had not been done. It would also, so the submission continued, falsely have indicated that the examiner had at the time of the test, considered whether, as required by the DCA form, the pilot had passed or failed various of the detailed items, whilst those considerations did not apply in the case of the Check 6 form.

[232] Mr van Niekerk himself stated on at least two occasions that a transposing of information from the Check 6 form to the DCA form would have meant that only some of the items on the DCA form would have been completely filled in. He never stated that this would have amounted to falsification and I think he was correct to refrain from describing it as such. The reason is that it is common cause that there are certain items which are the same or similar enough that a Check 6 OPC would have been sufficient to adequately test the required item. He further stated that there would necessarily have been “big holes” in parts of the form, meaning that some parts would not have been filled in because the required information would have been lacking and that he would not have accepted a DCA form filled in in this way because it would be incomplete. He furthermore clearly stated that if those “holes” had been filled in, it would have amounted to falsification. I agree with him if a filling in of the “holes” meant that information was fabricated. The point simply is this: the plaintiff never asked Mr Brammer to make up information to fill any such “holes”. He did state in evidence that, if

necessary, Mr Brammer would also have been able to consult his contemporaneous notes made during the all various tests he conducted in respect of Ms Mndawe on 19 September 2009 (which notes he was obliged by law to retain for a period of three years from that date), to fill in the DCA form. He did not suggest this to Mr Brammer in the e-mail correspondence. However, this was not necessary because the issue did not arise between them as Mr Brammer never objected to transposing the information on the basis that it would amount to falsification or that the forms were too different. Rather, his objection was that Ms Mndawe was in his view not eligible on 19 September 2009 for either the validation test or the initial Namibian pilot's licence test. (However, the evidence shows she in fact was eligible, as she had passed the Namibian air law examination and Mr van Niekerk confirmed that she had a SA pilot licence. He further confirmed the plaintiff's evidence that the examiner could have "killed two birds with one stone" by doing the South African and the Namibian tests at the same time, even if the South African licence had to be renewed or endorsed with a particular type-rating before the application for the Namibian validation was submitted).

[233] In spite thereof that the plaintiff was not a satisfactory witness in all respects about the degree of similarity between the two forms and although he probably expected that a transfer of information would adequately cover all the required items in the DCA form because the pilot had in already reached the required standard in the earlier tests, the fact of the matter ultimately remains that until the last e-mail by the plaintiff there is no evidence that the plaintiff ever asked or instructed Mr Brammer to make up any information that would amount to a falsification or to artificially fill in any "holes". There is no use in speculating to what extent Mr Brammer would have been able and/or willing to fill in the necessary items on the DCA form had he agreed to transpose the information and about what might have happened had there been some "holes" left which could not be completed. The fact is that this stage had not been reached.

[234] Mr *Corbett* relied especially on email #5 in which the plaintiff states “On the check 6 form your recommendations were “**Recommended for line** training” which implies you were satisfied with the standard, the standard which equals what is required for a practical flight test. This is the basis upon which I am requesting you to transfer the information on the test form provided. It is very costly for Air Namibia to repeat the test that was conducted satisfactorily and which the authorities are ready to recognize. We are talking about Namibian taxpayer’s (*sic*) scarce financial resources.” In the defendants’ heads of argument he submitted that “this is where the request to falsify comes in” and that because the examination in respect of the Check 6 form “does not equate or equal the examination required for the practical flying test, it is “absolutely incontrovertible that what the plaintiff is suggesting is …. to falsify the practical flying test form….”.

[235] In this email the plaintiff expresses the view that the final recommendation in the Check 6 form, namely “Recommended for line training” implies that Mr Brammer was satisfied that a certain standard has been met, i.e. that the pilot was proficient enough to fly the actual aircraft, the Beech 1900, in further training as a co-pilot. He expresses the view that this standard is equal to the standard required for validation by the practical flying test. Mr van Niekerk commented about this expressed view that the plaintiff was “obviously …… under a misconception”. However, Mr Brammer did not dispute the view expressed by the plaintiff.

[236] Another consideration which should be borne in mind is the fact that the plaintiff put his requests in writing, as he said, “to have proof”. If the plaintiff indeed had in mind that information had to be falsified and exerted pressure on an unwilling Mr Brammer to execute the falsification to mislead the DCA it is very unlikely that he would have done so in writing to provide proof thereof.

[237] Furthermore, the plaintiff copied e-mails #3 and #5 to Mr van Niekerk (and Mr Brammer also copied e-mail #4 to Mr van Niekerk). He explained that he did so in the interests of transparency and because he had discussed the matter with Mr van Niekerk. He also copied in Ms Namases, Mr Ekandjo and at times the

"Fleet Captain Domestic". I find it very unlikely that the plaintiff would have copied e-mails to other persons expressing requests to falsify information to deceive the DCA. It is even more unlikely that he would have done so to the very official of the DCA with whom he had clarified the withdrawal of the validation. The same unlikelihood applies when one bears in mind that this DCA official is the very person who withdrew the validation certificate, who would be considering the application to have the validation certificate re-issued and who would have had to sign on the falsely completed DCA form to signify his approval or refusal of the flying test results. What is more, everyone involved, including Mr van Niekerk, knew very well that there was no DCA form actually completed on 19 September 2009. Clearly it would have been an entirely futile attempt at deceiving him. In fact, Mr van Niekerk stated in evidence that if such completed form dated 19 September 2009 had been placed before him in respect of the particular pilot, he would not have been deceived. That this would have been the case is so glaringly obvious as to tend to rule out the very likelihood that a person with the experience, education and intelligence of the plaintiff would attempt to deceive him in this utterly inept manner.

[238] Another relevant fact is that in e-mail #5 the plaintiff explains the basis upon which he is seeking the transfer of the information from the one form to the other and then adds thereto, "It is very costly for Air Namibia to repeat a test that was conducted satisfactorily and which the authorities are ready to recognise. We are talking about Namibian taxpayer's scarce financial resources." Here the plaintiff is responding to Mr Brammer's suggestion in e-mail #4 "that F/O Mndawe, now that she has a valid SA licence, does her validation test for a Nam validation or licence." In the context the plaintiff is stating, in other words, that the Check 6 test was conducted satisfactorily (because the pilot was recommended for line training) and that the DCA is ready to recognise this test, therefore it would be unnecessary and costly to spend already scarce taxpayer's money to repeat the test. Again, I think it very improbable that the plaintiff would send Mr van Niekerk such an e-mail in which he deliberately distorts the actual position, which is that

the tests are not sufficiently similar, that the authorities are not ready to recognise the Check 6 test for purposes of validation and that a new test is required.

[239] Having considered all the relevant aspects, I conclude that, even if the plaintiff were incorrect or even not credible in all respects in his views about the degree of similarity between the tests, the plaintiff had nothing to hide at the time he wrote the e-mails and was acting in good faith.

[240] The point was made on behalf of the defendants that even if Mr van Niekerk had accepted the DCA form backdated to 19 September 2009 and re-issued the validation, third parties or other persons who might later read the pilot's file would be deceived into thinking that the DCA form was actually completed on 19 September 2009 because they would not be aware of the true facts and that therein falsification would lie. In my view this argument loses sight of the meaning of the word "falsify" as already discussed earlier in this judgment. The plaintiff did not have any intention to falsify information or to collude with anyone to falsify information and to deceive any person. He accepted in good faith that Mr van Niekerk, representing the DCA, would accept the correct form filled in and signed off on the basis of the information contained in the wrong form.

[241] Considered objectively the defendants have not, in my view proved that the defamatory statements are true in so far as they make imputations that the plaintiff was involved in falsification of information or in any attempts to move Mr Brammer thereto. In this regard I have kept in mind what was stated in *Johnson v Rand Daily Mail Ltd* (*supra*) at 205:

> "In cases where a man is charged with fraud or dishonesty or where criminal acts are attributed to him, the Court no doubt will exact from the defendant strict proof of every charge."

[242] Having found this it seems to me that the allegations of the plaintiff exerting pressure and persistent pressure lose their defamatory sting when considered without allegations that the pressure was related to wrongdoing of the kind described. However, should I be wrong in my finding set out in the previous

paragraph, I think for completeness' sake I should also deal with the question of whether there was "pressure" or "persistent pressure" upon Mr Brammer.

[243] The third defendant stated that the unnamed source and Mr van Niekerk had informed her that the plaintiff had pressurised Mr Brammer. Mr van Niekerk, on the other hand, denied at one stage during cross-examination that he was a source of any information. He stated that the third defendant had told him that she had spoken to Mr Brammer, who had stated to her that the plaintiff was pressurising him. Mr van Niekerk testified that in response he merely had stated to the third defendant that he had expected the plaintiff to do so. However, the third defendant's evidence is in a further respect quite the opposite, because she said that the only conversation she had with Mr Brammer was one in which he merely confirmed that he had "resigned". Mr van Niekerk's evidence is not satisfactory on this issue, because he contradicted himself in the witness box. On (at least) two occasions, once during evidence in chief and once during cross-examination, he confirmed that he had informed the third defendant as is alleged in paragraph 8.5.3 of the defendants' plea, namely that "a designated examiner …. had been put under pressure to sign the necessary DCA form."

[244] I have difficulty in deciding whether to accept the evidence of Mr van Niekerk or that of the third defendant on this point because there are contradictions by both. The third defendant's evidence differs somewhat from what she wrote in the article, where she stated that Mr Brammer could not be reached for comment. If I accept the third defendant's version of what Mr Brammer stated to her, it would mean that he told her a lie, because Mr van Niekerk did not know, nor was it even reported to him that the plaintiff had put Mr Brammer under pressure to sign the DCA form. He also had not read the e-mails between them. It is more probable that he would have stated that he expected the plaintiff to have done so than that he would have lied to the third defendant. It was not suggested that the third defendant made a mistake about what Mr van Niekerk had stated to her. On the other hand, I understood the third defendant to testify that she was not able to interview Mr Brammer, therefore she could not

have told Mr van Niekerk that she had spoken to Mr Brammer and reported what he stated, unless she was actually referring to the e-mail correspondence. Having considered the matter, I am unable to resolve it, which means that the defendants' case is unsatisfactory in this respect.

[245] However, even if I accept the third defendant's version of what was said between her and Mr van Niekerk, it would not assist the defendants in proving the truth of the statements about the plaintiff pressurising Mr Brammer. The reason is that the only source of her information who testified, namely Mr van Niekerk, did not have first-hand knowledge of such pressure (if any) because he was not a witness to such pressure. In any event, according to his evidence, the only person who said anything about pressure was Mr Brammer who spoke to him before the plaintiff began contacting Mr Brammer. Mr Brammer therefore could not convey, and, according to Mr van Niekerk, did not convey, that the plaintiff had put him under pressure to sign the form.

[246] The defendants also rely heavily on the e-mails which passed between the plaintiff and Mr Brammer. Indeed, their counsel submitted that this correspondence is critical and forms the crux of their defence that the first two paragraphs are the truth, alternatively, substantially the truth.

[247] The defendants' case is that the progression of telephone conversations and e-mails indicate that there was persistent pressure exerted by the plaintiff on Mr Brammer. It is indeed clear from the e-mails that the plaintiff repeated his request that information be transposed on several occasions. In this sense one might reasonably describe him as being "persistent". I do not however perceive his repeated requests to be "pressure". The impression I have is rather that he sought to persuade or convince Mr Brammer to comply with his requests and that they had different views about the matter. The plaintiff referred to this as a "debate" between two professionals. When the plaintiff commented in cross-examination about Mr Brammer's notification in his last email of his decision that he would not be able to complete the DCA form, he stated "Very much

appreciated, that was his position and he was at liberty to take his position." This conveys acceptance and respect for Mr Brammer's decision.

[248] I pause to note that this evidence does not sit very well with the plaintiff's other evidence that he gave Mr Brammer an instruction as his "senior" and that he was entitled to give a lawful instruction to Mr Brammer who was his "subordinate". This latter evidence also does not fit in with the plaintiff's evidence that Mr Brammer was an independent contractor. It is not quite clear whether the plaintiff meant that he as representative of the employer in the relationship could give instructions to the independent contractor or whether he was referring to himself being the "senior" in experience and rank as a pilot, examiner and instructor in the sense that he was, as he stated in another context, "an extension of the DCA." This matter was not really clarified. However, I think what is relevant is that the furthest the plaintiff was prepared to agree to the idea that he applied pressure was by stating that he gave Mr Brammer a lawful based instruction based upon what he understood was acceptable to the DCA.

[249] The third defendant relied on the fact that there were two telephonic conversations as well [in which the requests were also made]. There is evidence by the plaintiff about the first conversation. He stated that he requested Mr Brammer to transpose the information from the one form to the other, but that Mr Brammer declined to do so because Ms Mndawe did not have a South African pilot's licence at the time of the test. There is no evidence about what transpired during the second conversation.

[250] In all four the e-mails by the plaintiff he uses the salutation "Hello Ralph" and ends with, "Kind regards", which conveys an amicable tone. Throughout the exchanges are polite. E-mail #1 refers to the telephone conversation and says, "I am kindly requesting you to transfer…….", and ends off with, "you cooperation will be greatly appreciated." There is nothing in content or tone of this email which indicates any pressure being applied.

[251] In e-mail #3 the plaintiff again states “My request to you is the transfer of ….”. Mr *Corbett* submitted that the last sentence, “Lets respect their [the DCA’s] their expertise and competency and stick to our duties and responsibilities”, is a veiled threat and suggests that Mr Brammer as an examiner is subservient to the plaintiff and must simply carry out his instructions. I do not agree that there is any threat, veiled or otherwise, or that the suggested meaning is conveyed. The words are rather in the nature of a call or suggestion that both he and Mr Brammer conduct themselves in a certain way which would convey a certain deference to the DCA and implies nothing threatening.

[252] There is nothing in e-mail #5 to indicate pressure. It should be noted that this e-mail is a reply to e-mail #4 in which Mr Brammer set out his views and ended with the following amicable invitation: “If my understanding of the relevant parts of the law or my duties are incorrect, I will gladly accept clarification and correction and do what is required.” In the reply the plaintiff clearly takes up this invitation by explaining more fully and motivating the basis upon which he is making his request.

[253] In his e-mail #6 before he gave notice of the termination of his contract with Air Namibia, Mr Brammer stated: “The issue at hand has led to many unfair insinuations levelled at me and I believe that I have no place in such a hostile environment”. It should be noted that Mr Brammer did not state that the plaintiff made any unfair insinuations against him. The plaintiff responded to, *inter alia*, this statement by stating in E-mail #7: “It is unfortunate that you found my request ‘hostile’,” and later “However, be assured from my side that it was never the intention to make this place a ‘hostile environment’.” The plaintiff explained in cross-examination that he had no idea what Mr Brammer meant by a “hostile environment”, but that he decided to answer in the way he did “in case” Mr Brammer was meaning to say that he found the plaintiff’s request “hostile”. He further explained that by the last sentence “This matter has also given us an insight in the kind of people we are dealing with”, he was referring to the fact that Mr van Niekerk had stated one thing to him regarding the need for a retest, while

he, according to Mr Brammer's e-mail, had stated exactly the opposite to Mr Brammer. (I pause to note that he did not, contrary to what the defendants' counsel stated in their heads of argument, explain this to mean that there was racism in the system. In so far as it may be relevant, the plaintiff expressly testified that he did not consider Mr van Niekerk to be racist.)

[254] To conclude, the overall impression of the e-mail correspondence by the plaintiff is not one of persistent pressure being applied. This impression is also consistent with the plaintiff's evidence that he did not persistently or otherwise, place Mr Brammer under pressure, except to the extent that he gave him an "instruction". In the absence of any evidence by Mr Brammer, his e-mails cannot afford evidence of pressure exerted by the plaintiff.

[255] No argument was addressed to me on whether the description that "persistent pressure" was applied might have been an exaggeration and I do not express any view about it.

[256] While on this point I that note that the defendants did not present any admissible evidence to prove the truth of the allegation that Mr Brammer's termination was as a result of pressure by the plaintiff to falsify information. Even from the e-mail correspondence on which they rely it is by no means clear that Mr Brammer gave notice of the termination of his contract because of anything the plaintiff had done. Mr Brammer never said so. He merely said that the "issue at hand has led to many unfair insinuations levelled at me and I believe I have no pace in such a hostile environment", which does not indicate that pressure to falsify information played any role. He also did not state that the plaintiff made any unfair insinuations or created a hostile environment. It should also be noted that he closed his last e-mail inviting the plaintiff to "feel free to call or email" him to discuss the matter or should the plaintiff have any duties for him, which does not, on the face of it, convey that the plaintiff was directly responsible for him giving notice.

Fair comment

[257] Mr *Corbett* made no submissions regarding this defence but did not expressly abandon it. In so far as it may be necessary, I shall briefly deal with it.

[258] The plea alleges that "insofar as the report contained allegations of the nature of a comment, the comment concerned matter of public interest and was fairly and reasonably made in the circumstances and based upon facts which are essentially the truth.

[259] The first difficulty is that the defendants gave no indication which of the allegations are in the nature of comment. The test whether words constitute assertions of fact or expressions of opinion is how the reasonable reader would regard them (*Marais v Richard and others* 1981 (1) SA 1157 (A) at 1168G-H). There are no words in the first two paragraphs which are obviously couched in terms which would indicate to the reasonable that they constitute comment.

[260] A further difficulty is that the comment should be based on facts which are true or substantially true (*Trustco Group International v Shikongo* (*supra*) at p389 fn 16, referring to *Crawford v Albu* 1917 AD 102 at 114; *Marais v Richard* (*supra*) at 1167)). The main "facts" which contain the gist of the article have been shown to be untrue.

[261] The third difficulty is that the general rule is that the facts upon which the comment is based should be placed before the reader (unless they may properly be incorporated by reference or implication (*Johnson v Beckett* 1992 (1) SA 762 (A) at p774G-5B; p780I-J)). The defendants rely mostly on the e-mail correspondence between the plaintiff and Mr Brammer, but this correspondence is not contained in the article.

[262] In conclusion, without an indication or argument by the defendants as to what is comment and what is fact, it is impossible to properly assess the cogency of this defence against all the above-mentioned legal requirements. In the premises I hold that the defence has not been established.

<u>Qualified privilege</u>

[263] The defendants rely in the alternative on the defence of qualified privilege. In their plea the following allegations are made:

"7.

7.1 Irregularities with regard to the issuing of commercial pilots licences or their validation is a matter of high public interest.

7.2 The public had the right to be informed and the media had the corresponding right or duty to keep the public informed of allegations of any irregularity and/or unlawful conduct in connection with the issuing of commercial pilots licences or their validation, especially in respect of pilots of the national airline, Air Namibia (Pty) Ltd. These rights and duties arise at common law and from Article 21(1)(a) of the Constitution.

7.3 The statements of which the plaintiff complains were part of the fair and substantially accurate report by the third defendant and the newspaper in question of such a matter.

7.4 The defendants accordingly deny that the publication of the statements concerning the plaintiff complained of were wrongful."

[264] Mr *Corbett* pointed to the evidence given by the second defendant and Mr van Niekerk and submitted that the matter of irregularities in regard to the issuing of commercial pilot licences or their validation is a matter of high public interest. He further submitted that the public had a right to be informed and the newspaper had the right and duty to keep the public informed of any irregularity or unlawful conduct in connection with the issuing of commercial pilot licences or their validation (as in the case of Ms Mndawe), especially in respect of pilots of the national airline.

[265] The defendants' counsel submitted without further pertinent elaboration that the rights and duties on which the defendants rely arise at common law and also from Article 21(1)(a) of the Namibian Constitution, which states that all persons shall have the right to freedom of speech and expression, which includes freedom of the press and other media.

[266] As far as the common law is concerned, the matter was dealt with in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A). The Appellate Division stated (at 777H-778E):

> "At common law there is no general 'newspaper privilege'. …….. [A]ny notion that for the purposes of claiming justification in respect of defamation the press occupies 'a special position', so far from being recognised by our law, is entirely alien to it. Some 80 years ago Lord Shaw, in delivering the judgment of the *Privy Council in Arnold v The King-Emperor* 30 TLR 462 ([1914] AC 644 (PC)) remarked (at 468):
>
> > 'The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.'
>
> The above-quoted remarks, so I consider, accurately reflect the position in our modern South African law. In regard to the immunity which the defence of qualified privilege accords to statements published in discharge of a duty or the exercise of a right, the matter is summarised thus in Joubert (ed) *The Law of South Africa* vol 7 para 249 at 209:
>
> > 'The duty or right may be legal, moral or social. The test of whether such a duty or right exists in a particular case is objective: did the circumstances in the eyes of a reasonable man create a duty or a right which entitled the defendant to speak. Thus there is a legal duty to furnish information in connection with the investigation of a crime; and statements about the creditors of a company may be made in a report on its claim for insurance. One public official may be obliged to make a defamatory statement to another in the course of his official duty. Members of public bodies may have a social duty or right to make defamatory statements to other members at meetings of these bodies. A former employer has a right to inform a prospective employer about the character of an employee, and inquiries as to creditworthiness may in appropriate circumstances be answered. A member of a church may have a moral duty to speak about the morality of a minister of the church to the elders of the church, and a close relative may make a

> statement to a young woman about the character of a suitor. The statement must be published in the discharge of the duty or exercise of the right in the sense that the statement must be relevant or germane and reasonably appropriate to the discharge of the duty or exercise of the right.
>
> The statement will not be published in the discharge of the duty or the exercise of the right if it is published to a person who has no similar duty or interest in receiving it. . . .'

[267] The Court continued (at 778G-H):

> "Publication in the press involves dissemination to the world at large. Although Courts are in general disinclined to recognise between a newspaper and its readers a community of interest sufficient to sustain the defence of qualified privilege, there are a few well-recognised exceptions to the general rule. One exception involves a public answer by a defendant in refutation of a public charge."

[268] After a review of numerous authorities the Court extracted a number of broad propositions which it set out as follows (at 780E-781D)(the underlining is mine):

> "*(a)* <u>At common law there is no general 'media privilege'; and there is no defence of 'fair information on a matter of public interest'. A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his assertions to the world.</u>
>
> *(b)* <u>The common law does not recognise a duty-interest relationship between a newspaper and its readers sufficient to support qualified privilege. Publication in the media is publication to the world; not everyone can be regarded as having a sufficient interest in the subject-matter. To this rule there are limited exceptions, such as replies to public attacks, and publication in 'crisis' cases, where speedy national warnings are necessary to avert possible disaster.</u>

(c) Although all privilege is based on the publication in question being 'in the public interest', there is a palpable difference between that which is interesting to the public and what is in the public interest to be known.

(d) A newspaper publication is not the subject of qualified privilege merely because it gives the public information concerning a matter in which the public is interested. Qualified privilege requires publication pursuant to a duty, whether legal, moral or social, and the existence on the part of its readers of a corresponding interest or right to receive the defamatory communication. This reciprocity is essential. It connotes a common legitimate interest which is more than idle curiosity in the affairs of others.

(e) The test of the existence of a duty to publish is an objective one, based on the standards of the community concerned: would the great mass of right-minded persons in the position of the defamer have considered, in all the circumstances, that it was their duty to make the communication? The test is the common convenience and welfare of society.

(f) One function of a newspaper is to provide its readers with fair and accurate reports of proceedings, parliamentary, judicial and otherwise. Another function of a newspaper is to provide its readers with news of current events and gossip.

(g) The commercial incentive to increase circulation figures renders newspapers prone to the error of confusing what is in the public interest with the newspaper’s private economic interest.

(h) In deciding whether a defamatory publication attracts qualified privilege the status of the matter communicated (ie its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not intended to be exhaustive) are: does the matter emanate from an official and identified source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on

> reasoned conclusions, after the weighing and sifting of evidence, or is it no more than an *ex parte* statement or mere hearsay?"

[269] The *Neethling v Du Preez; Neethling v The Weekly Mail (supra)* case sets out the common law and was decided before the advent of a constitutional dispensation in South Africa. As can be seen from the further quotation from the case (at 791D-784I) a few paragraphs below in my judgment, the Appellate Division judgment emphasized, *inter alia*, the cautious approach taken by the courts in common law systems when considering whether a situation of qualified privilege exists between a newspaper and its readers. What is very clear is that the general rule at common law is that, because publication to its readers is in effect, publication to the world, the nature of the relationship between a newspaper and its readers is not one which is considered to have the attribute of reciprocity of a duty to inform, on the one side, and an interest to be informed on the other, the reason being that every reader cannot be regarded as having a sufficient interest in what is published. Therefore this relationship does not, generally, give rise to a situation where the defence of qualified privilege can be successfully relied upon.

[270] This general rule is subject to a few well-recognized exceptions, although these, as well as the established grounds for claiming privilege do not constitute a *numerus clausus*. Where public policy so demands, a court would be entitled to recognise new situations in which a defendant's conduct in publishing defamatory matter is lawful (see also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) 590C-E). Mr *Corbett* referred to the following passage in *Borgin v De Villiers* 1980 (3) SA 556 (A) at 577D-G as setting out the general test for the establishment of a situation where qualified privilege applies:

> "The particular category of privilege which, in the light of the above finding, would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it (see *De Waal v Ziervogel* 1938 AD 112 at 121 - 3). The test is an

> objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be a lawful one. (See generally *De Waal v Ziervogel* (*supra* at 122 - 3); *Benson v Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A) at 426D - F; *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* (*supra* at 402 - 3.)"

(See also *Afshani v Vaatz* (*supra*))

[271] In Namibia the Supreme Court has not authoritatively pronounced itself on the defence of qualified privilege by the media in the context of the Namibian Constitution. However, in *Trustco Group International Ltd v Shikongo (supra)* the Supreme Court did say the following when considering the question whether the common law rule that the media are strictly liable for defamation even in the absence of an intention to injure is in line with the Namibian Constitution (at 389D-G):

> "[28] Freedom of speech is thus central to a vibrant and stable democracy. The media play a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in art 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians. In performing this task, however, the media need to be aware of their own power, and the obligation to wield that power responsibly and with integrity.
>
> [29] The effect of imposing strict liability on the press and mass media for any defamatory statement would mean that the only recognised defences available to the media when it is established that they have published a defamatory statement would be truth in the public interest; fair comment and in appropriate and rare circumstances, qualified privilege. The defence of fair

> comment itself requires the underlying facts upon which the comment is based to be true or substantially true….."

Although the remark in relation to qualified privilege is *obiter*, it does reflect a continued adherence to the common law position.

[272] In *Neethling v Du Preez; Neethling v The Weekly Mail* (*supra*) the Court proceeded to consider with approval various *dicta* from which the various decisions on which propositions (a) – (h) quoted above are based. The following extract from the judgment is insightful in the context of the case before me and I therefore quote extensively from the judgment as follows (at 781D-784I)(the underlining throughout is mine):

> "*Blackshaw v Lord and Another* [1985] 2 All ER 311 (CA) ([1983] 3 WLR 283) deals with the question whether the public at large has a legitimate interest in the publication of what is mere inference by a journalist. The judgment of Stephenson LJ contains (at 327*a-j*) the following succinct statements of the circumstances in which a newspaper report in England is entitled to protection at common law:
>
> > 'The question here is, assuming Mr Lord recorded Mr Smith's conversation with him fairly and accurately, did Mr Lord (and his newspaper) publish his report of that conversation in pursuance of a duty, legal, social or moral, to persons who had a corresponding duty or interest to receive it? That, in my respectful opinion, correct summary of the relevant authorities is taken from the Report of the Faulks Committee 47 para 184(a), repeated in *Duncan and Neill* 98 para 14.01. I cannot extract from any of those authorities any relaxation of the requirements incorporated in that question. No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he has exercised reasonable care. That needed statutory enactment which the Faulks Committee refused to recommend (see pp 53-5 paras 211-15). "Fair information on a matter of public interest" is not enough without a duty to publish it . . . Public interest and public benefit are necessary (cf s 7(3) of the 1952 Act), but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.

> The subject-matter must be of public interest; its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients, in this case the readers of the Daily Telegraph. Where damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them (see eg *Cox v Feeney* (1863) 4 F & F 13, 176 ER 445, *Perera v Peiris* [1949] AC 1 and *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 961), provided the public interest is wide enough (*Chapman v Lord Ellesmere* [1932] 2 KB 431, [1932] All ER Rep 221). But where damaging allegations or charges have been made and are still under investigation (*Purcell v Sowler* (1877) 2 CPD 215), or have been authoritatively refuted (*Adam v Ward* (1915) 31 TLR 299; affd [1917] AC 308, [1916-17] All ER Rep 157), there can be no duty to report them to the public.
>
> In this case, as counsel for the plaintiff points out, there is, when Mr Lord types his article, no allegation against the plaintiff which has been made good . . . He may have been under a duty to inform the public of the £52m loss, but not to attribute blame to the plaintiff or to communicate information about his resignation, even if it was of public interest. The general topic of the waste of taxpayers' money was, counsel for the plaintiff concedes, a matter in which the public, including the readers of the Daily Telegraph's first edition, had a legitimate interest and which the press were under a duty to publish but they had no legitimate interest in Mr Lord's particular inferences and guesses, or even in Mr Smith's and the defendants had certainly no duty to publish what counsel for the plaintiff unkindly called "half-baked" rumours about the plaintiff at that stage of Mr Lord's investigations.
>
> There may be extreme cases where the urgency of communicating a warning is so great, or the source of the information is so reliable, that publication of suspicion or speculation is justified; for example, where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drugs; but there is nothing of that sort here. So Mr Lord took the risk of the defamatory matter, which he derived from what he said were Mr Smith's statements and assumptions turning out untrue.'

The matter of qualified privilege in relation to the liability of a broadcaster as a publisher of defamatory matter was one of the issues considered by the Federal Court of Australia (Smithers, Neaves and Pincus JJ) in *Australian*

Broadcasting Corporation v Comalco Ltd 68 ALR (1986) 259. In rejecting a 'public debate' argument raised on behalf of the appellant Neaves J in the course of his judgment endorsed the approach adopted by Stephenson LJ in *Blackshaw v Lord and Another (supra)*. At 328 Neaves J said:

> 'The appellant's submissions involve the proposition that it is sufficient to constitute an occasion one of qualified privilege if it be shown that what is published can properly be characterised as the public discussion of matters germane to a general subject-matter which can itself be classified as one of great public interest or concern.
>
> In my opinion, the authorities do not support the proposition for which the appellant contends. I respectfully adopt what was said by Stephenson LJ in *Blackshaw v Lord (supra)*. . . .'

Pincus J made the following observations at 340:

> '. . . (A) thorough review of the authorities . . . suggests that only in unusual circumstances will defamation emanating from neither an official nor quasi-official source come under the cloak of privilege on the broad ground being discussed. Most of the cases in which the defendant's claim has succeeded have involved publications of material from a person or body connected with government, or with some institution having responsibility for the administration of an aspect of community affairs. Perhaps the most important examples are the decisions of the Privy Council in *Perera v Peiris (supra)* and that of the House of Lords in *Adam v Ward* [1917] AC 309 . . . The nature of the source is the best practical guide to the likely result, at least where the material is published at large. . . .'

At 342 the same learned Judge remarked:

> 'Despite a number of judicial denials that the categories are closed, it seems clear that the law has proceeded in this area with great caution and in such a way that the balance of authority is clearly against the existence of the privilege claimed by the appellant. Courts have evinced a strong reluctance to hold that the broad principle above supports the existence of a duty to publish any material not coming from or associated with an "authoritative" source, particularly where the defamatory material is disclosed to the public at large. We were referred to no case in England or Australia in which there was held to be such a duty to publish such material to the public at large, in the public interest: it was not suggested that any of the established specific categories of common law privilege applied.'

In *Smith's Newspapers Ltd v Becker* [1932-3] 47 CLR the plaintiff practised medicine in South Australia where he was not registered so to practise. A newspaper article attacked the plaintiff, describing him as a person with a discreditable past who treated his patients in an incompetent manner, and whose treatment had in some cases resulted in the death of the patient. The newspaper sought unsuccessfully to rely on qualified privilege. In the course of his judgment (at 304) Evatt J said:

> 'There was no community of interest between the defendants and the general body of their readers which gave rise to any occasion for the communication to them of the imputations against the plaintiff. Communications of genuinely entertained opinions and suspicions to the proper State or professional authorities, by the defendants or any other person, might have given rise to an entirely different situation. . . .'

In *Doyle v Economist Newspaper* [1980] NILR 171 the defendant published an article concerning the appointment of the plaintiff as a county court judge, implying that the appointment had not been made on merit. The freelance journalist, Miss Holland, who wrote the article, testified that it was based on interviews with senior members of the Bar and other eminent persons, but she declined to name her sources. It was held that although the quality of the county court bench was a matter in which the public had an interest there was no duty on the defendant to pass on to the general public views expressed in private discussions by unnamed persons, which views were untested for reliability or motive. In ruling against the defendant Murray J (at 179E-180A) tested the matter in the following way:

> 'Put the matter the other way round. If Miss Holland had decided not to publish those views since they were, in effect, anonymous and untested for reliability or motive, who could possibly have said (with reason) that she was guilty of a breach of some recognisable duty? Moreover, if I approach the matter in the terms used by Pearson J in *Webb's* case, I unhesitantly come to the conclusion that while the subject-matter of the words complained of, viz the integrity and quality of the county court bench, was undoubtedly a matter in which the public had an interest, the status of the material received by Miss Holland and passed on to the public was certainly not such as to attract privilege to its publication. As regards some of the other matters dealt with in the words complained of, Miss Holland said her

> unidentified source was a judge at the highest level. In my view this makes not the slightest difference: the material in question was still in effect from an anonymous source and was not tested or probed in any way by any independent authority.' "

[273] In the light of the various authorities quoted above, I now turn to a consideration of the defence of qualified privilege as raised by the defendants on the facts and circumstances of this case. My view is that the general topic of irregularities and/or unlawful conduct with regard to the issuing of commercial pilot licences or their validation in respect of pilots employed by the national airline, especially where there are serious implications for air safety, was a matter in which the public, including the readers of the newspaper, had a legitimate interest to be informed and the defendants had a duty to publish. To this extent I am in agreement with the submissions made on behalf of the defendants on this particular issue. I also do not understand the plaintiff to place this in issue.

[274] The further submission was made that the defamatory statements made in paragraphs 1 and 2 of the article were part of the fair and substantially accurate report by the third defendant and the newspaper in regard to these matters. This submission was made on the basis that the defamatory statements were the truth or substantially the truth. I have already stated why I hold that they were not so. However, defamatory statements do not need to be true or substantially true to attract privilege (*Afshani v Vaatz* (*supra*) para [34] at p52G-H and the cases cited there).

[275] The question which next arises whether there was a duty to publish the statement that the plaintiff placed a designated examiner under persistent pressure to falsify information (with the focus on the underlined words) to force the DCA into re-issuing an incompetent pilot with a validation to fly aircraft of the national airline on its domestic routes. I did not understand Mr *Corbett* to argue, and correctly so, that the statements in the article concerning the issue that the pilot did not have a South African licence (the one matter on which the second and third defendants conceded that errors were made in the article) and that the plaintiff sought to pressurize Mr Brammer to transfer information from an

“unrelated” form (the second matter on which the second defendant conceded that an error was made) attract privilege.

[276] As indicated in proposition *(h)* set out in *Neethling v Du Preez; Neethling v The Weekly Mail* (*supra*) at 781C and in the authorities quoted (at 781D-784I), the status of the matter communicated, namely its source and intrinsic quality, is of critical importance.

[277] I have already indicated that the e-mail correspondence (even the e-mails by Mr Brammer) does not disclose any attempt by the plaintiff to falsify information.

[278] The only other identified source of information, Mr van Niekerk, also did not state to the third defendant that the plaintiff pressurized an examiner to falsify information.

[279] The only allegation in the plea which is expressly concerned with falsification of information is paragraph 8.2.8, the contents of which is attributed to an unnamed source. The paragraph reads: ‘the completion of a DCA form without such a test would create a false impression and it would have been incorrect for Brammer to have done so and would have amounted to falsification of information”. When the third defendant testified she was asked by the defendants’ counsel to state from where the information contained in this allegation came, she stated: “From the source and from Mr van Niekerk and again that was summarized in the e-mails.” She did not explain why paragraph 8.5 does not state anything about falsification of information. While the plea alleges that Mr van Niekerk *“inter alia”* informed the third defendant of what was stated in paragraph 8.5, I am not willing to accept that Mr van Niekerk said something about information being falsified which was not deemed important enough to include in the paragraph 8.5. Such an omission is highly unlikely precisely because of the crucial importance of such information. By coming to this conclusion this I do not mean to cast aspersions on the credibility of the third defendant. Paragraph 8.2.8 consists of consist of essentially three allegations. I

am willing to accept that the first and the last allegation were conveyed to her by the unnamed source and that the second allegation fits in with what both the source and Mr van Niekerk had informed her (cf. paragraphs 8.2.8 and 8.5.5).

[280] It seems to me that the third defendant interpreted the information given to her by Mr van Niekerk and the e-mail correspondence in the light of what the unnamed source had stated and concluded that what the plaintiff had done was to attempt to place Mr Brammer under pressure to falsify information. Alternatively she merely adopted the view of the unnamed source. She then stated it as a fact without indicating that it was her conclusion or interpretation or that it was the view of the unnamed source. In the end it turned out to be wrong.

[281] Can it be said that she was under a duty to publish her interpretation or the view of the unnamed source as a fact? I do not think so. There was no need to do so in the public interest. The statement does not fall within any of the recognized exceptions. It also does not, in my view, pass the test set out in *Borgin* v *De Villiers (supra)* and *Afshani v Vaatz (supra)*. The relevant statutory authority, the DCA, was aware of the matter and besides, the plaintiff's attempts had failed. At most there might have been a duty to repeat what Mr van Niekerk had told her as he is the official entrusted by law with the issue of pilots' licences and validations. In my view the circumstances are such that the defamatory statements in their context did not attract privilege to their publication. In as much as the unnamed source referred to in paragraph 8.2 of the plea informed her that "the completion of a DCA form without a test would create a false impression and it would have been incorrect for Brammer to have done so and would have amounted to falsification of information", this does not change my view, because "the material in question was still in effect from an anonymous source and was not tested or probed in any way by any independent authority" (see *Doyle v Economist Newspaper* [1980] NILR 171 as quoted with approval in *Neethling v Du Preez; Neethling v The Weekly Mail* (*supra*). It follows that the defence of qualified privilege is not upheld.

<u>Reasonable publication in the public interest</u>

[282] This is the last alternative defence on which the defendants rely. In *Trustco Group International Ltd v Shikongo (supra)* the Supreme Court considered the development of a defence of reasonable or responsible publication of facts that are in the public interest and said (at p395F – p396D) that this -

> "….. will provide greater protection to the right of freedom of speech and the media protected in art 21 without placing the constitutional precept of human dignity at risk. The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.
>
> [54] It is clear that this defence goes to unlawfulness so that a defendant who successfully establishes that publication was reasonable and in the public interest, will not have published a defamatory statement wrongfully or unlawfully. A further question arises, however, given the conclusion reached earlier that the principle of strict liability established in *Pakendorf* [*Pakendorf and Others v De Flamingh* 1982 (3) SA 146 (A)] was repugnant to the [Namibian] Constitution. That question is what the fault requirement is in defamation actions against the mass media. The original principle of the common-law is that the fault requirement in the *actio injuriarum* is intentional harm not negligence, although there are exceptions to this rule. Distributors of defamatory material are liable if it is shown that they acted negligently.
>
> [55] In *Bogoshi*, [*National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA)] the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach is consistent with the establishment of a defence of reasonable publication and should be adopted. ……..
>
> [56] 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. ….."
>
> (the insertions in square brackets are mine)

[283] As indicated before, I agree with Mr *Corbett* that there can be no doubt that the issues raised in the article are in the public interest. It clearly was in the public interest to report on irregular and fraudulent conduct by a senior manager of the national airline to obtain official permission for a foreign pilot to fly its aircraft.

[284] The next question to determine is whether the publication of the statements in the article was reasonable, in spite thereof that the defendants cannot prove the gist of the defamatory statements to be true. In *Trustco Group International Ltd v Shikongo (supra)* the Supreme Court set out the approach to be followed in the following manner (399G-300G):

> "[75] In considering whether the publication of an article 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. During the trial, the appellants tendered three codes of conduct relating to journalistic practice in evidence in the High Court: the Code of Ethics of the Society of Professional Journalists; *The Star* (a Johannesburg daily) newspaper Code of Ethics; and the *Mail & Guardian* (a South African weekly) Code of Ethics. Codes such as these provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article.
>
> [76] The Code of Ethics of the Society of Professional Journalists states that:
>
> 'Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:
>
> — test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
>
> — diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.

— identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.

— always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.

— make certain that headlines, news teases and promotional material, photos . . . and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

. . .

— avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.

. . .

— avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. . . .'

[77] Of course, courts should not hold journalists to a standard of perfection. Judges must take account of the pressured circumstances in which journalists work and not expect more than is reasonable of them. At the same time, courts must not be too willing to forgive manifest breaches of good journalistic practice. Good practice enhances the quality and accuracy of reporting, as well as protecting the legitimate interests of those who are the subject matter of reporting. There is no constitutional interest in poor quality or inaccurate reporting so codes of ethics that promote accuracy affirm the right to freedom of speech and freedom of the media. They also serve to protect the legitimate interests of those who are the subject of reports."

[285] At this stage it is necessary to set out in more detail the evidence given by the second and third defendants in relation to the defence of reasonable publication in the public interest.

The second defendant's evidence

[286] Throughout her testimony the second defendant repeatedly stated that the plaintiff was given an adequate opportunity to put his side of the story and he did not exercise that right.

[287] The second defendant stated that the plaintiff had three options when the third defendant contacted him for comment. Firstly, as he was an accountable manager of top management he could have said to the third defendant that he wanted more time to revert to her on the issues she raised. Secondly, he could have indicated that he was not empowered to speak to her on the said issues and referred her to the Head of Human Resources at Air Namibia. Thirdly, he could have set up a meeting with the third defendant to talk off the record for her to decide if she wanted to continue with the story. She stated that the last would have been the preferable option for the plaintiff, but he chose the option to "block the reporter in question, refer her to the HR person." At a later stage she also stated that the plaintiff "chose to push that [i.e. the questions about Ms Mndawe] over to HR".

[288] She did acknowledge, because Air Namibia had been much in the public eye because of various earlier negative news reports, that "there is obviously a fairly natural reticence to everybody going on record on various issues", but was critical throughout her testimony of Air Namibia's policy that all media communications should be dealt with via the human resources department.

[289] On several occasions she criticized the practice followed by many persons and organisations approached by the media for interviews or comments of insisting that reporters put their questions in writing, to be answered in writing (as occurred in this case), instead of engaging orally with the reporter in an interview where a conversation could take place which would provide the opportunity for follow-up questions to answers and for clarification to take place.

[290] The second defendant stated testified that when one communicates in writing with a person other than the person with whom one actually wants to

communicate, the content of the written material is “so much more different”. She agreed that it was fair to presume that the questions would have been of a more general nature because they were posed to the human resources department and not to the plaintiff in person. However, she also said that the third defendant could herself best answer to her abilities to craft her questions and on the issue of whether they were indeed posed in a more general way (a statement with which I agree). However, the second defendant did agree that first paragraph in the third defendant’s e-mail (Exh “B”) to which Air Namibia was requested to comment is general and because Air Namibia is a corporate entity the paragraph in question could refer to anybody in the organisation. I also agree with this view. The second defendant however defended the third defendant by stating that the questions raised by the third defendant were aimed at obtaining clarity from Air Namibia and then said, “I do not think they can be held against her in that she is honestly trying to find answers.” In my view the issue is not whether the third defendant was *bona fide*, but whether she acted reasonably in framing the questions as she did.

[291] In her view the response by Air Namibia to the third defendant’s questions was a general response to very specific questions and not very helpful to the reporter. She further stated that the response appeared to be “deliberately vague” and did not encourage further questioning. She stated that the last line in Air Namibia’s response to the question about a review board having been recommended (i.e. “Unfortunately, Air Namibia is not in the habit of disclosing training details of employees.”), “…is clearly closing the door on a reporter making any further enquiries.” I pause to note that the plaintiff did not draft this part of the response but provided information to the drafter.

[292] She acknowledged that the plaintiff was the person at the centre of the story, but appeared to qualify this at a later stage by pointing out that the person central to the story was the plaintiff representing Air Namibia. She stated that if he had requested to meet with the third defendant for an interview the next day or so, there probably would not have been an objection from the newspaper’s side.

[293] The second defendant confirmed the allegations made in paragraph 8.14 of the defendants' plea, which states that the third defendant "acted reasonably and without negligence and in good faith". In regard to this she testified that the third defendant "…. was really diligent about reporting about this story, even more so because it was unfamiliar terrain in the sense that it was an area which requires fairly specialized and technical knowledge and I do remember she was quite agitated about actually getting her facts right and trying to establish as widely as possible the credibility and the validity of the information that she had received. So I do believe that she did everything possible to put together a thorough and balanced and fair report." She also stated at a later stage that the third defendant did all that she could to put out a thorough report and that she, the second defendant, was "very comfortable with that." At another stage she stated that there was nothing further that the third defendant could have done.

[294] She further confirmed the allegations made in paragraph 8.15 of plea, which states that the first and second defendants relied upon the third defendant having acted reasonably and without negligence and in good faith in publishing the statements complained of in the report.

[295] The second defendant alluded to some "technical inaccuracies" (i.e. the error about Ms Mndawe not having a SA licence, etc., and the error about the "unrelated" form), which she said are not pertinent to this case and which were not "substantial errors of fact". I have already dealt with this issue and stated why I do not agree with this view. She also said that these inaccuracies were not pointed out by the plaintiff prior to or after the publication. I pause to note that in regard to the SA licence the plaintiff could not have done so prior to the publication because the third defendant did not mention this issue to the plaintiff or in her e-mail to Air Namibia. As to pointing it out after publication, the third defendant testified that he did point this out to her when he visited her at the office and that he also showed her a copy of the SA licence. Furthermore, the response by Air Namibia (Exh "C") did state that the pilot had been issued with a SA licence on 19 September 2009

(the date is incorrect, it was actually 29 September 2009) which was prior to the issue of the Namibian validation on 24 November 2009.

[296] When Mr *Namandje* suggested to the witness in cross-examination that the third defendant could have obtained background information about technical matters from an official source such as the DCA, the second defendant suggested that a journalist does not have as much time as a court of law has to examine the matter and further blamed the plaintiff by saying "had Mr Nyandoro been more forthcoming in speaking to the journalist, he could have corrected any of these misperceptions or technicalities that have arisen."

[297] When the plaintiff's counsel put it to her that the third defendant gave no indication that she would be stating in the article that the plaintiff persistently put pressure on Mr Brammer to falsify information, she answered: …."it is a pity that he had not been forthcoming at the time she asked the questions and not to come after the fact and bring his qualifications. We did not question his qualifications." When counsel asked how the plaintiff could be forthcoming if nobody suggested to him that he is forcing anybody to falsify, the second defendant replied, "But if he had let the reporter continue with the questions and had not referred it to HR that may have come up in the course of the questioning."

[298] Referring to the matter of a journalist having to put questions in writing she stated: "…..I will continue to insist that this is not the ideal way for a journalist to pose questions on an important subject and had the officials been more forthcoming they would have had the chance to put their case and not only after the article had gone to print." (Although she uses the plural, it can be taken that she meant to refer to the plaintiff).

[299] The third defendant agreed that the questions posed by the third defendant do not specifically address the allegation that the plaintiff placed pressure on Mr Brammer to falsify information, but added that "it might be implicit." When it was put to her that both Air Namibia and the plaintiff were not forewarned that allegations of falsification would be made, the second defendant again blamed the

plaintiff, implying that questions around this allegation would have arisen in oral conversation had he given an interview.

The third defendant's evidence

[300] The third defendant testified about the sequence and manner in which the information on which the article was based was provided to her. She also testified about the steps she took prior to publication. The undisclosed source provided her with the information set out in paragraph 8.2 of the plea. The third defendant confirmed the information provided by the undisclosed source regarding Mr Mndawe's training and employment at SA Express by obtaining information from that employer's public relations department, which information is reflected in paragraph 8 of the article.

[301] According to the third defendant she received the first information leading to the story about a week, i.e. the Thursday or the Friday (4 or 5 March 2009) before publication on 11 March 2010. She was also provided with the e-mail correspondence exchanged between the plaintiff and Mr Brammer. The first e-mail by the plaintiff was sent on Thursday 4 March 2010. Mr Brammer gave notice of the termination of his contract in e-mail #6 on 8 March 2010 at 9:48pm. The response by the plaintiff in e-mail #7, which was the last e-mail, was sent on 9 March 2010 at 9:42am. Evidence was not specifically led on this, but there is an indication on Exh "K" that the e-mails were forwarded to the third defendant on 10 March 2010 at 8:32am.

[302] The third defendant tried to interview Mr Brammer, but he refused while only confirming that he had "resigned." There is no evidence on the date and time that she contacted Mr Brammer, but by the time she did, she already knew that he had "resigned". This the undisclosed source could only have conveyed to her at the earliest after Mr Brammer's e-mail #6 was sent. I therefore conclude that this contact occurred on 10 March 2010.

[303] The third defendant was at times not sure when she contacted Mr van Niekerk, but thought it might have been on 10 March 2010, the day before

publication. She was sure that the contact took place shortly after she received the e-mail correspondence and before she telephoned the plaintiff during that morning. Based on the date and time reflected on Exh “K” it must have been on 10 March 2010 after 8:32am.

[304] She explained that she contacted the DCA as it is the regulating authority of civil aviation in Namibia. She further said that the e-mail correspondence also clearly showed that the DCA was involved in the matter and their comment would be vital to enable her to continue with the story. She further confirmed that Mr van Niekerk told her what is stated in paragraph 8.5 of the plea. (I have already discussed this issue earlier.) He also said to her that the plaintiff had come to see him to obtain clarification about the withdrawal of Ms Mndawe’s validation. She informed him about the e-mail correspondence, but he indicated that he had not read it.

[305] Thereafter she contacted the plaintiff. At the time she was also investigating allegations about another pilot. She told the plaintiff who she was and that she was investigating a story about two pilots, whom she mentioned by name. She mentioned that there were allegations that procedures and regulations were not being followed with Ms Mndawe, in particular, to obtain the validation for her flying in Namibia. She had the impression that the plaintiff did not want to speak to her because he immediately told her to contact their corporate communications officer, Ms Namases. She therefore contacted the latter’s office and was advised to put her questions in writing.

[306] During cross-examination when she had to explain why she did not orally inform the plaintiff of the specific allegations against him, she stated for the first time that she did indicate to the plaintiff “who was trying to do what”, i.e. that she indicated that specifically he was the wrongdoer, but that she did not do so in the e-mail, because “I assume Mr Nyandoro knows.” However, a few questions later she said that she could not recall exactly what she said to the plaintiff and then conceded that the plaintiff was not alerted that there were allegations specifically against him and she further agreed that such allegations were not discussed. As I

understand it, her final position was that she orally indicated to the plaintiff was she stated in the e-mail, i.e. she acknowledged that she did not indicate to the plaintiff that he was the person implicated in the procedures and regulations not being followed.

[307] The third defendant's attitude was that she was not reckless or negligent in failing to pose more specific questions and that her questions contained the crux of the story. She said she would have posed the same questions to the plaintiff had she been able to interview him personally and that further questions would probably have come up during the conversation.

[308] She further indicated that she had enough time to investigate the story, to collect all the evidence and had obtained Air Namibia's official response. In her view she was very diligent and thorough and gave every person involved a chance to express their comments.

[309] When asked by the defendants' counsel what her duties as a journalist were towards the plaintiff prior to publishing the article, she replied, "It is one of the key roles in any story when it is this type of story investigation, that you give everyone the right to reply, to look at the allegations, to look at the facts and to give their version of the events. So I contacted everyone who could confirm the content of the e-mail[s] and I contacted Mr Nyandoro."

[310] She stated that, based on the e-mail correspondence between them, she had a very clear understanding at the time of what the plaintiff's and Mr Brammer's respective positions were on the matter of the completion of the DCA form.

Assessment of the evidence

[311] In my view the third defendant acted properly by attempting to interview Mr Brammer, by approaching Mr van Niekerk of the DCA for comment and by following up information with SA Express. She also acted properly by contacting the plaintiff and Air Namibia to obtain their comments. However, she did not in all

instances do what is reasonable to verify certain information and to avoid errors, of which some were material, in the article. For instance, she testified that she approached “everyone” mentioned and involved for comment. However, as the plaintiff’s counsel pointed out, she omitted to approach Ms Mndawe for any comment. The defendants’ counsel acknowledged during the trial that Ms Mndawe was another central figure in the article. This omission did not play much of a role in relation to the plaintiff’s complaint about the article, except in respect of the issue of the SA licence. Nevertheless, it seems to me that the omission is relevant in that it serves as another example (apart from her conduct in relation to the plaintiff) of an unreasonable failure as a journalist to appreciate or to properly consider the rights and interests of all who were clearly caught up in the sweep of the story.

[312] The defendants conceded in testimony that the allegations about Ms Mndawe not having a valid SA licence and that her validation was withdrawn because of this, etc. were incorrect. The third defendant at one stage stated that it was a “misunderstanding”, but did not explain how it arose. At another stage she said that it was a “writing error” but did not explain this further either. I do not agree with her description. A writing error is like a slip of the tongue or a wrong word being used or written inadvertently. The alleged problem with the SA licence forms part of the narrative of the story and is elaborated upon in a way which does not indicate inadvertence. The error is repeated three times at different stages of the article, which also does not support the notion of a “writing error.”

[313] The second defendant described it as a technical issue or technicality which is not material. I also do not agree with this view. For the reasons I have already given earlier the error is material as it contributes to the negative picture drawn of the plaintiff attempting to falsify information to give the false impression that an incompetent pilot who should not have been issued a validation in the first place because she did not have a valid SA licence, has subsequently passed a retest to obtain a reissue of the validation, provided she obtains a valid SA licence.

[314] I agree with the point made on behalf of the plaintiff that it would have been very easy to verify whether Ms Mndawe had a valid SA licence when she applied for validation and to find out what the reason was for the withdrawal of the validation and what the requirements were for the validation to be reissued. In the absence of a proper and satisfactory explanation by the third defendant it is clear that she did not exercise the necessary care to avoid the errors in relation to the SA licence.

[315] The stance taken by the defendants was that the questions which the third defendant posed to the plaintiff when she telephoned him and which she later repeated in her e-mail to Ms Namases were clearly indicating that Air Namibia was trying to do something irregular in regard to the practical flying test and as the plaintiff was the Head of Training and Standards, he should have been alerted to the fact that there would be serious allegations made against him. In view hereof they regarded Air Namibia's response, i.e. the plaintiff's response, in Exh "C" as inadequate. The third defendant referred especially to the second paragraph of the e-mail as not being addressed in Air Namibia's response.

[316] The plaintiff, on the other hand, testified that he found the first paragraph in the third defendant's e-mail vague and that he also had the impression that the person who formulated the e-mail was not *au fait* with the aviation industry. He said that what he understood from it "in terms of response was to apprise the journalist of the operations in terms of aviation." In regard to the question about Air Namibia trying to use old and invalid information to "force" the DCA to issue the validation, he stated, "That in fact gave me the impression of someone who did not understand the procedure in aviation and did not even understand what my responsibility and the responsibility of the DCA and that of the instructor were." He further explained that each of them has their "own authority, duties and responsibility", implying, *inter alia*, that Air Namibia could not "force" the DCA. He explained further during cross-examination that he understood that the words "bypassing proper procedures" in the first paragraph was a reference to the second paragraph which indicated that Ms Mndawe was not undergoing the flight

test requested by the DCA. In light hereof he was of the view that the response he helped formulate in Exh "C" covered the first two paragraphs of the third defendant's e-mail adequately as a composite answer and that the response explains "both those parts of the questions."

[317] The plaintiff also stated that he was not alarmed by the third defendant's e-mail because he was in contact with the DCA, "…everything was transparent, the DCA is in the picture, so the journalist does not understand aviation, but I am talking to the policeman of aviation [i.e. Mr van Niekerk] who is giving me the interpretation of his letter", and later, "The most important thing is, I am in the clear with the regulator, I do not need to be in the clear with the newspaper. The safety of the public, the custody of the safety of the passengers or the flying public is not in the hands of the newspapers, it is within me and him [i.e. the regulator]."

[318] The plaintiff further stated that the third defendant should have informed him of the specific allegations she would be making against him in the article to give him an opportunity to respond and that he would have responded by giving much more detail and explanation, like he later did after publication had occurred. He said her questions were general and the response was general.

[319] I agree with the defendants that Air Namibia's comment to the second paragraph of the third defendant's e-mail does appear to be rather obscure and that the plaintiff could have formulated a clearer response. In spite of what the plaintiff said about his understanding of the first paragraph, he did not "apprise the journalist of the operations in terms of aviation." I do accept as probable his evidence that he was not really alarmed by the questions posed because he knew that he had obtained, what he thought was clarification from the regulator and that his conscience was clear. Furthermore, he was still unaware at the time of the third defendant's e-mail that there had been complaints about the pilot. However, I do think that in his answer during testimony he displayed a rather cavalier approach to the legitimate interest the newspaper had in enquiring about the issue. Nevertheless, I agree with the plaintiff's complaint and Mr *Namandje's* submission that the third defendant should have clearly indicated in the e-mail the

specific allegations that the plaintiff put persistent pressure on a designated examiner of the DCA to falsify information and to set out in more detail what the attempt at falsification entailed, in other words, to cover to a greater extent the specific and far more serious allegations made in the article.

[320] As I have stated before, especially the second defendant was very critical of Air Namibia's policy to require that communications with the media be handled via the human resources department and blamed the plaintiff in that he "chose to block" the third defendant by referring her to that department. She expressed the view that a member of senior management, like the plaintiff, would have been able to answer the reporter's questions adequately and probably better than working via this department.

[321] Whatever might be the merits and demerits of Air Namibia's policy and of the second defendant's criticism, these matters are not the issue here, because it is not the employer who is suing the defendants, but the plaintiff in his personal capacity. The fact that the plaintiff was a senior manager at the time does not make any difference as he, generally speaking remained bound to the policy as an employee. It therefore cannot be said that he "chose to block" the third defendant. In my view the plaintiff should not be blamed for the fact that he referred the third defendant to the designated spokesperson for the airline. He was acting properly in accordance with the rules or instructions of his employer. At the time there was no indication that he was to be named as the alleged wrongdoer at the heart of the third defendant's investigation and that his integrity and reputation as a person and as an examiner, instructor and a professional pilot would be at stake.

[322] The defendants, especially the second defendant, were also critical about the practice followed by Air Namibia and many others of requiring the media to put their questions in writing and of then answering them in writing. They both expressed the view that this practice does not allow for a conversation to happen between the interviewer and interviewee. They both pointed to the fact that during an oral conversation or interview follow-up questions can be asked, clarification

sought and obtained, etc. The second defendant was of the view that the errors which she admitted were made might not have been made and that the plaintiff would probably in the end have been “a happier man” if an oral process had been followed.

[323] The plaintiff expressed very similar views, but these were based on the assumption that the third defendant would have disclosed the allegations she was to make against him in the article. As she did not do so, but made statements about Air Namibia and directed her requests for comment at Air Namibia’s conduct, he acted in terms of Air Namibia’s media policy and referred her to the department responsible for corporate communications. As I have stated before, I do not think he can be blamed for doing so.

[324] During his testimony the plaintiff in fact criticized the third defendant for not having a “conversation” with him about the specific allegations against him which she later made in the article and expressed the view that a responsible journalist would have done so. I do not think it is necessarily a sign of responsible journalism to have done so orally as opposed to having done so in writing. I do think, though, that whichever method was used, the third defendant should, as a responsible journalist, have indicated to the plaintiff that he was the alleged wrongdoer within Air Namibia and what the specific allegations against him were. In this case she should have done so both when she called him and when she wrote the e-mail.

[325] From the third defendant’s testimony it is evident that she had experience of using both the oral and the written process of approaching persons for comments and answers to questions. Having had experience of the problems inherent in or likely to arise from the written process, I think it may be expected of her to have drafted the e-mail more carefully and to the point. Instead, she adopted the same approach throughout – she indicated in her testimony that what she stated orally to the plaintiff, she also stated in writing in the e-mail.

[326] As indicated before, the third defendant acknowledged that she gave no indication in the telephone conversation with the plaintiff and in the e-mail to Air Namibia that she would be making allegations of persistent pressure by him to have Mr Brammer falsify information to deceive the DCA into thinking that Ms Mndawe had been retested. She did not provide an adequate explanation for failing to orally inform him.

[327] She testified that the questions contained in the e-mail should have alerted the plaintiff because she had first phoned him; because the questions clearly showed that there "was a huge problem of irregularities in his department at his feet"; and because the plaintiff knew that Mr Brammer had "resigned" just shortly before because of this issue. When plaintiff's counsel confronted the third defendant asking why she did not refer specifically to the plaintiff when she e-mailed her questions and requests for comments to Ms Namases, she stated that the plaintiff knew the questions were aimed at him and at another stage she also indicated that it was common knowledge that the questions would have been referred to him.

[328] In my view the above mentioned reasons provided by the third defendant indicate that, in the absence of specific allegations against the plaintiff of falsification, she unreasonably left too much to assumption. Amongst other things, in her mind she had already decided that there was "a huge problem of irregularities in his department" without first obtaining the plaintiff's side of the story. Furthermore, as I have indicated before, it is *ex facie* the e-mail correspondence between the plaintiff and Mr Brammer not clear that the latter actually resigned because of irregularities, or pressure to falsify information.

[329] She further stated as a fact that the plaintiff "knew" that the questions were aimed at him and she relied on "common knowledge that the questions would be referred to him." As it happened in this matter, the e-mail was indeed referred to the plaintiff as the Head of Training and Standards to assist in drafting a response. However, as a general rule I do not think that a journalist should rely on the

assumption that e-mailed questions, in the absence of specific allegations against a person, would indeed be referred to that specific individual for comment.

[330] During her evidence the second defendant at one stage expressed the view (for certain reasons which I do not intend setting out here) that Air Namibia actually does not have such a closed policy on communicating with outsiders, "… which presumably also means the media…" and that "…as a very senior person he is surely equipped to speak on behalf of Air Namibia in a matter that concerns him and ….. his reputation. That he would not address that is a pity it was not done at the time is what I am saying."

[331] This might be so, but the point is that the plaintiff's employer chose this policy and he was, generally speaking, bound to follow it. If there had been a clear indication in the questions that he was going to be mentioned by name and that very serious allegations of dishonesty would be made against him which would reflect adversely upon him, not only in his capacity as an employee, but also personally and professionally, he could have persuaded his employer to answer the questions to his satisfaction with his reputation in mind; or he could have obtained permission from his employer to answer them in his personal capacity; or he could have taken other legal steps even without his employer's permission to provide his comments or version of the matter to the reporter in order to protect his reputation.

[332] Journalists should be alive to the fact that, although an employee, when contacted by the media in his or her capacity as an employee, is generally bound to deal with questions or requests for comment in the manner directed by his or her employer, the employee may, in certain cases where he/she is specifically to be named in the media report, have a right or interest as a person in his or her private or professional capacity to answer or comment regarding specific allegations, especially where these involve wrongdoing such as corruption or dishonesty by the employee.

[333] It is evident that the second defendant was indeed aware of the distinction at times because she indirectly referred to it when she stated, "…. as a very senior person he is surely equipped to speak on behalf of Air Namibia in a matter that concerns him and ….. his reputation" and in the following exchange between the defendants' counsel and herself:

> "And if Mr Nyandoro had been open in speaking to Ms Smith and clarifying issues, in whose interest would that be in your view? --- Well I think it would have been in the interest of the wider public but also Mr Nyandoro himself. I am not saying that the story does not have the facts it needs to go to print, but possibly Mr Nyandoro would have been a happier person today in that he would have felt his side of the story was more properly presented than it had been going through the HR person at Air Namibia."

[334] The second defendant also referred to the fact that the plaintiff, in spite of the fact that he testified that he was not entitled to speak to the reporter on behalf of the airline, did take the initiative to speak to the newspaper about his career and his background after the article was published, and that it would have been preferable for him to have done this prior to publication when the third defendant initially approached him.

[335] It is to my mind clear that prior to publication, the plaintiff, not being alerted to the specific allegations against him, acted in his capacity as an employee of Air Namibia. However, when he approached the third defendant after publication, he was acting, at least partly, in his own interest as he then knew what the allegations were and considered himself to have been unjustifiably defamed. He personally wanted an apology and to avoid further defamation.

[336] It did not emerge clearly from the evidence that the third defendant kept this distinction in mind. For example, the general way in which the third defendant framed the questions she posed to the plaintiff during the telephone call and in the subsequent e-mail to Ms Namases, including the references to Air Namibia, the corporate entity, without any specific allegations of wrongdoing against the

plaintiff, does not convey an appreciation of this distinction and did not alert the plaintiff that his personal and professional reputation would be at stake.

[337] The third defendant testified that she had enough time to investigate the story, to collect the evidence and to obtain "Air Namibia's official response". This testimony also tends to convey that the focus was on Air Namibia and that she failed to consider the plaintiff's personal interest.

[338] She testified that when she sent Exh "B" to Ms Namases she was hoping to obtain the plaintiff's "complete version of his side of the story", i.e. that he would comment on the crux of the matter, namely on why he was asking that information be transferred to the DCA form. However, during cross-examination she agreed that the crux of the story was that the plaintiff persistently put pressure on Mr Brammer to falsify information to create the impression that the pilot had been retested (to obtain a re-issue of the validation). If this is so, I do not understand why she did not pose questions about the crux of the story. While her story was about Air Namibia as well, she intended naming the plaintiff in the article as is clear from the hopes she entertained about obtaining the plaintiff's "complete version of his side of the story". In view of the most serious and specific allegations she was intending to make about the plaintiff I again record my agreement with Mr *Namandje's* submission that the third defendant should have clearly indicated in the e-mail the specific allegations that the plaintiff put persistent pressure on a designated examiner of the DCA to falsify information and to set out in more detail what the attempt at falsification entailed, in other words, to cover to a greater extent the specific and far more serious allegations made in the article.

[339] I do not understand the defendants to have any quarrel with the following ethical standard of professional journalism namely, "Journalists should be honest, fair and courageous in gathering, reporting and interpreting information" (quoted in *Trustco Group International v Shikongo* (*supra*) para. [76]). When one considers whether it was fair towards the plaintiff not to give him a chance to respond to the very serious and specific allegations made against him in the article, the answer is

clearly, “No”. The defendants also did not prove adherence in this particular case to another ethical standard, the gist of which they accept, namely to “diligently seek out the subjects of news stories to give them the opportunity to respond to allegations of wrongdoing” (see *Trustco Group International v Shikongo* (*supra*) para.[76]).

[340] In coming to these conclusions I have taken heed of the Supreme Court’s qualifying statements in para. [77] of *Trustco Group International v Shikongo* (*supra*) and have sought to balance the competing interests of journalist and subject. I agree with the second defendant that a journalist does not have as much time as a court to gather, interpret and weigh information and to make the assessments required. However, in this matter the third defendant stated that she had enough time to do her work and it was clear from the defendants’ testimony that the deadline she referred to in the e-mail to Ms Namases was merely the usual daily deadline and not really imposing a firm limit on the third defendant to publish the article at all.

[341] I have also considered the point made by the second defendant that the subject matter of the article was outside the third defendant’s field of expertise and that she might more easily have made mistakes concerning “technical” details. On the one hand this point does have merit and should be borne in mind when assessing the reasonableness or otherwise of the publication. On the other hand, when a journalist is writing about a technical subject or a subject which is not within his/her sphere of knowledge, it is reasonable to require more care to ensure that the details are correct. The same applies to the interpretation given to the information gathered and to statements of fact made by the journalist about the subject matter. I think that the third defendant should have taken more care in establishing whether her understanding of the detail of the subject matter was correct as she could easily have done by consulting identified sources of expertise, such as Mr van Niekerk.

[342] During cross-examination the third defendant testified rather categorically that the procedure is not to first write the story and then obtain comment, but that

the story is written after all the comments and information have been gathered. If this is the general rule, it is fraught with potential danger, because it is likely that the need for further clarification, verification or comment would often arise only while the story is being written or even after its completion. It is then that the process of writing naturally tends to bring into clearer focus, for instance, those issues of which the author is actually unsure, or those issues which the author has perhaps overlooked or wrongly assumed. In this context I accept that journalists often work under pressure of time and do not always have the benefit of weighing every word. However, where serious allegations of wrongdoing involving dishonesty and fraud are attributed to a person in a news report, especially in a professional capacity, care should be taken throughout the process before publication. This includes, where necessary, obtaining further comment, clarification, confirmation or verification even during or after preparing the report. It does seem to me that, a reasonable journalist, having written the report, would have realized that she had not been diligent in to give the person at the centre of the story, namely the plaintiff, a fair chance to provide his side of the story she had written.

[343] There is a further relevant consideration. There is no evidence that the third defendant considered the inherent improbability that the plaintiff would send copies of his e-mails, from which his attempts at falsification and distortion of the truth would be all too apparent, to the very person who, according to the article, had told him that a retest was required. The fact that he did send his e-mails to Mr van Niekerk should have alerted her to the inherent improbability that he was up to wrongdoing and deceit. She should therefore have taken greater care to verify what the undisclosed source had told her and what her own interpretations and conclusions were, especially when she learnt that Mr van Niekerk had never seen the e-mails. (Cf. the approach taken in *Tuhafeni Hangula v Trustco Newspapers (Pty) Ltd* (I 4081/2011) [2012] NAHCMD 77 (26 November 2012) at paras. [47] – [48])

[344] The cumulative effect of the shortcomings in the manner in which the third defendant went about investigating the story and reported on it, is that the publication of the defamatory paragraphs of the article is rendered unreasonable. These include the statements in the article that the DCA had given direct instructions to Air Namibia that a retest had to be done; and that the plaintiff placed persistent pressure on Mr Brammer to falsify information to give the impression that a retest had been done and that the plaintiff insisted that the DCA was willing to accept outdated practical flying test results in place of a retest.

[345] I also proceed to consider whether there was reasonable publication of the other errors which are material in relation to the defamatory statements which I earlier discussed when I dealt with the defence of truth for the public benefit. The errors that relate to the allegation that Ms Mndawe did not have a valid SA pilot licence when she applied for validation and that this was the reason why the validation was withdrawn, etc., and the errors regarding to the nature and purpose of the Check 6 OPC form were errors which could easily have been avoided if the third defendant had posed the most basic questions, if not to the plaintiff, then at least to Mr van Niekerk or, in the case of the SA flying licence, to Ms Mndawe or the SACAA.

[346] The untruth about the review board contained in paragraph 11 was published on the basis of information obtained from an undisclosed source and a document not tendered in evidence. The statement about the review board in the article is quite different from what was stated in the question posed in the third defendant's e-mail to Air Namibia. I do not think that by asking whether it is true that a review board procedure to consider the pilot's capabilities has been by-passed, the plaintiff ought to have realized that what she meant was to say that a recommendation that a review board should be convened to review the pilot's performance was not followed or executed for unknown reasons. To the extent that the plaintiff participated in the response on this issue I do not think that it was evasive or vague. If the third defendant had asked the question as pertinently as she put it in the article, the plaintiff might very well merely have denied that such a

recommendation had been made as he did during his testimony. In the circumstances I do not think that the publication of the allegations about the review board as they appear in the article was reasonable.

[347] The third defendant testified that the undisclosed source informed her that Mr Brammer declined to do what the plaintiff had pressurized him to do and preferred to resign. In my view the third defendant too readily found evidence in the e-mail correspondence of what the unnamed source told her. She could easily have posed the question to the plaintiff, namely whether it was true that Mr Brammer “resigned” because of this reason to obtain his view of the matter. Furthermore, in the absence of further explanation by Mr Brammer of the reason for his decision, she should have been more careful to ascribe it directly to the plaintiff’s alleged conduct, especially because upon a proper reading of the e-mail in question, Mr Brammer never stated that he was “resigning” because of the reason attributed to his conduct in the article.

[348] Counsel for the plaintiff submitted that overall the third defendant was reckless in the manner in which she went about preparing the article for publication. It seems to me that the third defendant’s mind might very well have been influenced by the first reports she received, that her objectivity became clouded and that she too readily found confirmation for these reports in the e-mail correspondence. She stated at one stage that she understood the e-mail correspondence perfectly. I cannot but help to think that she over estimated her understanding of the correspondence and that she did not sufficiently digest its details. I have the impression that by the time she contacted the plaintiff, she had already largely made up her mind that he was guilty of serious wrongdoing. Yet she had not yet obtained his side of the story. As indicated before, she also did not properly consider and take into account the personal and professional interest of the plaintiff when she posed her questions to Air Namibia and to him in his capacity as employee of Air Namibia and therefore did not give him a fair opportunity to answer to or comment upon serious allegations of wrongdoing against him. In all these respects she acted unreasonably and therefore

negligently. Although some of the various unreasonable errors and omissions already described are more serious and obvious than others, I do not think that the degree of negligence displayed was of such a particularly high degree that it would fit the description of recklessness, i.e. gross negligence.

[349] Having concluded that none of the material allegations were reasonably published, the last defence also fails. As the defendants have not established any of their defences, they acted wrongfully in publishing the article concerning the plaintiff.

Quantum

[350] The plaintiff testified that the effect of the article was devastating and that it caused him and his family emotional stress for a long time. He stated that, as the article appeared online, it is read all over the world. He emphasised that he has 30 years' experience in the aviation industry and that, as he is well known, not just in this country but "all over the world", he received e-mails from acquaintances and persons in the aviation industry enquiring about the allegations in the article. As he flew the President and other VIPs, he had to provide explanations up to the highest levels of authority about the allegations. He pointed to the fact that online research done via Google picks up his name and the newspaper report. As visiting VIP's and foreign Presidential delegations do their research online about pilots available to fly them when they visit Namibia, he has encountered queries about his integrity based on the newspaper report. He mentioned a Chinese delegation as a specific example. Some persons understand the basis of what he termed, "this malicious report", but others do not. He described himself as being lucky to have an understanding employer at the time, but feared encountering difficulty in future to find other employment because of the allegations in the report.

[351] As to his reputation at the time the article was published I accept that, if he was considered to be suitable to fly the President of Namibia and high ranking international visitors to Namibia, that he had a good reputation as a pilot. The

senior position he occupied at Air Namibia with specific responsibility as the head of training and standards, which is a position in respect of which the occupant must be approved by the DCA; and the fact that he was at the time a designated examiner of the DCA and a Grade 1 instructor are *prima facie* further indications of his good reputation.

[352] The plaintiff did not call witnesses who gave first hand evidence about queries they made or e-mails they sent to the plaintiff after the article was published. To this extent the evidence about such matters is hearsay. No objections were raised against this evidence and it was not really contested. It nevertheless remains inadmissible in so far as it was presented to prove the truth of the contents, which appears to be why it was presented. Nevertheless, I accept that it is not always easy to prove by calling witnesses that a party's reputation has been damaged and that an assessment must usually be made based on the probabilities inherent in the particular facts and circumstances of the case, especially the personal circumstances of the party defamed and the nature and seriousness of the defamation.

[353] It was suggested on behalf of the defendants that the plaintiff's reputation did not really suffer as he remained with Air Namibia for some time, continued to fly the President and was able to obtain other employment when he resigned. In these respects the plaintiff was fortunate indeed. Nevertheless, I accept on a balance of probabilities that the plaintiff, by virtue of the length and nature of his experience as a senior pilot, examiner, instructor and senior manager, is well known in aviation circles. I further take into consideration that the article was published both in the newspaper itself and in its online version and was therefore probably widely read and that, in the nature of things, the plaintiff's personal and professional reputation was damaged. In view of the serious allegations of dishonesty in relation to a professional matter which has negative implications in relation to air safety, the damage is inherently likely to have been significant. I also bear in mind that his future career might very well be negatively affected, in spite of the fact that his claim in this matter has succeeded to some extent.

[354] The plaintiff's claim is for damages in the amount of N$500 000. Mr *Namandje* stood by the plaintiff's heads of argument on quantum. Therein he persisted that this amount is fair and reasonable and should be awarded. He submitted that it is aggravating that the defendants did not apologize or publish a retraction, although they came to know one day after the publication that the article contained several inaccuracies.

[355] I do not think that the explanation given by the plaintiff to the third defendant after publication was such that it was reasonable to expect a wholesale apology or retraction of all the allegations made in the article merely on the basis of his explanation. I think it would have been reasonable for the defendants to first follow up certain aspects of his version. However, I do think that in those respects in which he provided them with documentary proof, rectification could have been made, e.g. on the issue of Ms Mndawe's SA licence and the reasons for the withdrawal of the validation as set out in Exh "A". I also think that it would have been reasonable to at least publish his version. I bear these factors in mind in favour of the plaintiff's claim.

[356] The plaintiff's counsel submitted that the defendants' counsel made unfounded allegations during cross-examination of the plaintiff that the latter cut corners in relation to various matters in the context of his work or profession, while it was the defendants' witness, Mr van Niekerk, who admitted that he had cut corners in certain aspects of his work. Counsel further submitted that this conduct constitutes an aggravating feature. I do not agree with this submission. Witnesses sometimes have to withstand robust cross-examination while the cross-examiner's suggestions do not always sit well with them. The suggestions of cutting corners in this case were within permissible limits in the context in which they were made and the plaintiff had ample opportunity to deny them, which he did. I also do not think it is appropriate to place Mr van Niekerk's frank (and appropriate) admission (which, as I have indicated before, reflects positively upon his credibility) into the scale when considering the context in which it was made and when weighing the factors relevant to the determination of the amount of

damages which the defendants must pay. The fact that he is not a party to the litigation and was called both as an expert in his official capacity as a witness to certain events, further militates against accepting learned counsel's submission.

[357] Mr *Corbett* submitted that the amount claimed is completely out of kilter with the awards usually made by our Courts in comparable cases. A recent survey of awards in some such cases was done in the *Trustco Group International v Shikongo* case (*supra*) (at p403 para. [92] – p404 para. [94]) and confirms that counsel's submission is indeed correct. Furthermore, in the latter case the plaintiff's counsel moved for an award of N$500 000 and was awarded N$175 000 by the High Court, but this amount was reduced on appeal to N$100 000 for serious defamation. I note further that in the case of *Tuhafeni Hangula v Trustco Newspapers (Pty) Ltd* (*supra*), the plaintiff claimed N$500 000, but an award of $50 000 was made where serious defamatory allegations involving the imputation of palpably illegal and corrupt conduct on the part of the deputy head of prisons were made in a report published prominently on the front page of a newspaper under a banner headline acknowledged to be unfair (see para [56] of the judgment). The defendants' counsel submitted that any award made should not exceed $N60 000.

[358] Placing a monetary value on damage that has been caused to a person's reputation is always a difficult task. However, taking into consideration the damaging effect which the article published on the internet is likely to have on the reputation of an aviation instructor, examiner and commercial pilot who flies internationally and whose livelihood depends, *inter alia*, on his reputation, it seems to me that an award of N$80 000 would, in all the circumstances of this case, be appropriate and in line with similar cases in this jurisdiction.

[359] For these reasons, judgment was granted for the plaintiff against the defendants, jointly and severally, for payment of N$80 000, plus interest at the rate of 20% per annum form date of judgment until date of payment, plus costs of suit.

K van Niekerk, Judge

APPEARANCE FOR THE PARTIES

For the plaintiff: Mr S Namandje

of Sisa Namandje & Co Inc

For the defendants: Mr A W Corbett

Instr. by LorentzAngula Inc