

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2016/02822

In the matter between:

FERDINAND VINCENT DU TOIT

PLAINTIFF

and

TANGENI AMUPADHI

1ST DEFENDANT

THE FREE PRESS OF NAMIBIA (PTY) LTD

2ND DEFENDANT

WORDPRESS NAMIBIA (PTY) LTD

3RD DEFENDANT

Neutral citation: *Du Toit v Amupadhi* (HC-MD-CIV-ACT-DEL-2016/02822) [2019]
NAHCMD 216 (1 July 2019).

Coram: OOSTHUIZEN, J

Heard: 5-8 June 2018 and 21 January 2019

Delivered: 1 July 2019

Flynote: Defamation — media —fair comment —reasonable publication.

Summary: Plaintiff, a practising legal practitioner has instituted an action against the editor of The Namibian newspaper and the owner, publisher and distributor of the said newspaper, as well as against the printer of The Namibian. The action relates to an editorial which appeared in The Namibian of 15 July 2016, authored by the editor of that newspaper. The editorial was headed "Shyock Justice for the Greedy". The editorial was prompted by an article which appeared on 12 July 2016 in the same newspaper. The editorial was amongst others of and concerning the plaintiff and his dealings with his erstwhile domestic worker, concerning a house that he bought for her.

Held, that the editorial unfairly commented of and concerning the plaintiff, that plaintiff was one of those professionals who exploited the poor and vulnerable members of the Namibian society in the housing market and is a dubious profiteering character.

Held, that the comment was defamatory, and that the comment could also not be seen as reasonable and responsible.

Held, that the comment of and concerning the plaintiff therefore was not protected under Article 21(1)(a) of the Namibian Constitution as it was not balanced by the provisions of Article 8(1) and 8(2)(b) of the Constitution in the circumstances of the case.

Held, that reasonable readers require and expect justifiable publications and opinion or well researched and well-founded responsible endeavours aimed at providing contextually accurate facts on which the opinion is based.

Held further, that the third defendant, the printer of the Namibian, is not liable towards the plaintiff due to lack of evidence making it responsible for the actions of first and second defendants.

ORDER

In the premises, the court makes the following orders:

[1] First and second defendant shall make a written apology and retraction to the plaintiff, to be published in The Namibian Newspaper and on the world-wide-web with the following content:

“In so far as the editorial in The Namibian newspaper of 15 July 2016 has conveyed that Vincent Ferdinand Du Toit has exploited the poor and vulnerable of the Namibian society and that he is a dubious profiteering character, the editor and The Free Press of Namibia (Pty) Ltd unreservedly apologise and retract their statements and opinion of and concerning Ferdinand Vincent Du Toit.”

[2] This apology and retraction shall be published prominently in The Namibian Newspaper and on the world-wide-web and should therein link to both the apology / retraction and the original editorial of 15 July 2016.

[3] First and second defendants jointly and severally the one paying the other to be absolved, shall pay an amount of N\$100 000 to the plaintiff.

[4] Interest on the amount of N\$100 000 at the rate of 20% per annum from 1 July 2019 to date of final payment.

[5] Costs of suit, inclusive of the costs of one instructing and one instructed counsel.

JUDGMENT

Oosthuizen, J

[1] The plaintiff is a practising legal practitioner.

[2] The first defendant is the editor of "The Namibian" newspaper which is widely distributed in the Republic of Namibia and internationally (including the World-Wide-Web) and widely read by the general public.

[3] The second defendant is a company who owns, publishes and distributes The Namibian Newspaper. The third defendant is the printer of the said newspaper.

[4] On 15 July 2016 an editorial article with the bold-print heading "Shylock Justice for the Greedy" was published in the Namibian newspaper. The editorial article was written by the first defendant and according to the beginning of the editorial prompted by a story which was published in The Namibian on 12 July 2016 under the headline "Worker donates house to boss".

[5] Plaintiff sued the defendants jointly and severally for defaming him and for -

[5.1] A written apology to the plaintiff, to be published in The Namibian Newspaper and on the World Wide Web, and to consist of the wording approved by the plaintiff.

[5.2] A retraction of the article dated 15 July 2016 with the heading Shylock Justice for the Greedy

[5.3] Payment in the amount of **N\$250 000**.

[5.4] Interest on the aforesaid amount of **N\$250 000** at the rate of **20%** per annum from date of judgment to date of final payment.

[5.5] Costs of suit including the costs of one instructing and one instructed counsel, and

[5.6] Further or alternative relief.

[6] **Substance of the claim (from plaintiff's particulars of claim)**

'7. The article generally referred to the sale of immovable property of the poor for debts, the rich benefitting from such sales, the failure of the Namibian justice system and the

extensive involvement of legal practitioners in acts of self-enrichment at the expense of the poor.

8. More specifically the following was stated in the article (of and concerning the plaintiff):

“...Some wisdom is needed to address the unbridled greed of the rich, who seem to enjoy exacting a pound of flesh and profiteering from the poor...”

“...In this instance, a domestic worker Eli Afrikaner “donated” her Katutura house to her employer, a lawyer by the name Ferdinand Vincent du Toit...”

“...Follow the story a little, and it leads to the familiar but morally indefensible practice of professionals who end up owning houses that belonged to some of the most vulnerable citizens. These transactions are done with apparent ease, and at the cheapest cost. But the poorer owners end up on the streets...”

“...Du Toit claims he lent Afrikaner about N\$83 000 to buy the house, which the municipality of Windhoek put on auction in 2007 over a debt of N\$33 000. The house belonged to Rebekka Gamxamus, who is now 63 years old. She put up a fight, but was finally evicted this year. Du Toit claims Afrikaner had to donate the house to him after she in turn failed to honour her debt to him...”

“...Du Toit’s story is perhaps not as dubious...”

“...Too many similar stories go unreported, of lawyers, bankers and other professionals, some who come from poor backgrounds themselves, but have no compunction in taking advantage of the poor and the ignorant in order to expand their property portfolios...”

“...In ‘The Merchant of Venice’, Shylock (the lender) got the desperate Antonio to sign an agreement that he would pay with a pound of his flesh if he defaulted on his loan of 3000 ducats. Antonio failed to pay on time. Shylock refused to accept any late payment, though he was offered two or three times more than the original amount. The court of the Duke of Venice found no way to nullify the contract and save Antonio’s flesh...”

“...With so many professionals – lawyers, doctors, accountants, engineers, journalists – engaging in multimillion and multibillion-dollar deals, schemes and agendas outside their primary employment, their judgement as well as independence is highly compromised...”

“...There are many other ways too to help the poor pay their debt, instead of leaving them exposed to demands for ‘a pound of flesh’ contracts...”

9. The said words of the article, and the context of the article as a whole, are wrongful and defamatory of the plaintiff in that they were intended and were understood by readers of the article to mean that the plaintiff is:

9.1 greedy, selfish, rapacious, avaricious, forceful and money-grubbing;

9.2 profiteering from the poor and vulnerable in society;

9.3 a morally corrupt person alternatively a person of low morals;

9.4 a dubious person with poor morals if any;

9.5 a person without proper moral judgement or fibre;

9.6 unable to conduct his practice in an independent and uncompromised manner; and

9.7 a dishonest person.

10. As a consequence of the defamation as aforesaid, the plaintiff, a professional and a legal practitioner, has been damaged in his reputation and has suffered damages in the amount of N\$ 250,000.’

[7] The defence (from defendants' plea)

‘AD PARAGRAPH 7 THEREOF:

3. The contents are noted.

AD PARAGRAPH 8 THEREOF:

4. The contents thereof are admitted, except that the editorial article was without any of the words or sentences underlined.

AD PARAGRAPH 9 THEREOF:

5. The Defendant denies each and every allegation contained in these paragraphs as if specifically traversed and puts the Plaintiff to the proof thereof. In amplification of the aforesaid denial, it is stated that:

5.1 The words of the article and its context as a whole, are not wrongful and defamatory of the Plaintiff.

5.2 The article was not intended nor could it be understood by the readers of the article to mean that the Plaintiff is of any as alleged by the Plaintiff.

6. It is further pleaded that the article, being the weekly editorial column where the Editor (i.e. the First Defendant) and the senior editorial staff express their opinion on matters of public interest, and:

6.1 was a fair comment or opinion, which comment or opinion was based on facts, which facts are true and were stated in the said editorial article;

6.2. the facts on which the opinion or comment were based, were truly stated in the said editorial article;

6.3 the comment or opinion was fair and reasonable in that it was relevant to the facts involved and on which it was based, and it was a honest and bona fide comment or opinion of the First Defendant;

6.4 the comment or opinion expressed in the editorial article concerned matters of public interest, in particular the issue of poor people and access to affordable housing, the wealthy and wealthier members, often professionals who are expected to be of assistance to the poor, uneducated or less educated members of the society, accessing housing traditionally meant for the poor – often for speculation for profit, and not for shelter – over the poor members of the society, and the desperate shortage of adequate and affordable housing in Namibia, which matters and issues are continuously and pertinently debated in public;

6.5 the comment or opinion was conducted in an exercise of the Defendants' rights to freedom of speech and expression, including the freedom of the media, and therefore protected by Article 21(1)(a) of the Namibian Constitution.

7. The editorial article was therefore not published in any wrongful or unlawful manner.

AD PARAGRAPHS 9 (i.e. SECOND 9) AND 10 THEREOF:

6. Defendant denies each and every allegation contained in these paragraphs as if specifically traversed and puts the Plaintiff to the proof thereof. In amplification thereof, the Defendants avers that for the reasons set out in paragraphs 5 – 6 hereinabove, the Plaintiff's reputation was not damaged and he did not suffer any damages.'

Applicable constitutional law and common law

[8] Chapter 3 of the Namibian Constitution, Article 5, irrevocably dictates that the fundamental rights and freedoms enshrined in chapter 3 shall be respected and upheld by the Executive, Legislature, Judiciary and all organs of Government and its agencies and where applicable to them by all natural and legal persons in Namibia and shall be enforceable by the courts in the manner prescribed.

[9] Article 8(1) dictates that the dignity of all persons shall be inviolable. Article 8(2) dictates that the respect for human dignity shall be guaranteed in any judicial proceeding and that no persons shall be subject to degrading treatment.

[10] Article 10 provides for equality before the law of all persons and prohibits discrimination against any person on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

[11] Article 12 guarantees fair trial rights in the determination of all persons' civil rights and obligations.

[12] Article 18 guarantees and provides for fair and reasonable actions by administrative bodies and officials.

[13] Article 19 endorses the rights of every person to enjoy, practice, profess, maintain and promote any culture language, tradition or religion subject to the Constitution and subject to the condition that such rights do not impinge upon the rights of others or the national interest.

[14] Article 21 deals with fundamental freedoms and Article 21(1)(a) accords the right of freedom of speech and expression to all persons including the press and other media. This right to freedom of speech and expression however shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of freedom of speech and expression, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence (court's underlining).

[15] It is thus clear that Article 21(2) subjected the right to freedom of speech and expression to the law of Namibia in so far as reasonable restrictions, necessary in a democratic society and required in relation to defamation, apply. The law of Namibia is its Constitutional law and its common law which is not repugnant of its Constitutional values.

[16] It is this last condition which the press and media practitioners usually neglect to state when they invoke their Article 21(1)(a) rights, and which the courts must apply when called upon in deciding defamation cases where the inviolable right to dignity of all persons are naturally at stake.

[17] It is necessary to be mindful thereof that Article 131 of the Constitution irrevocably entrenches the fundamental rights and freedoms in Chapter 3. No repeal or amendment which diminishes or detracts the stated fundamental rights and freedoms shall be permissible under the Constitution.

[18] Justices O' Reagan AJA, Chomba AJA and Langa AJA in the case of Trustco Group International v Shikongo¹ have directed the development of Namibia's common law on defamation in developing a defence of reasonable publication in the public interest.

¹ 2010 (2) NR 377 (SC).

[19] The mentioned Justices have in the process of their landmark judgement also discussed the common law on defamation and have extensively referred and discussed Article 21 of the Namibian Constitution.

[20] Justice O' Reagan AJA who wrote the judgment initiated by posing the following question:

'How should the law of defamation give effect both to the right to freedom of speech as entrenched in art 21(1)(a) of the Namibian Constitution and the constitutional precept that the dignity of all persons shall be inviolable as set out in art 8 of the Constitution?'²

[21] Par [34] of the Trustco judgement³ says that a common-law legal system 'is based on the principle that the courts will develop the common law on an incremental basis. Common law is judge-made law and from time to time it needs to be developed to take account of changing circumstances'. Art 66 of the Constitution gives recognition to the fact that Namibia has a common-law legal system.

[22] 'The law of defamation in Namibia is based on the action injuriarum of Roman Law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment;...'⁴

[23] Fair comment requires the underlying facts upon which comment is based to be true or substantially true.⁵

[24] 'Requiring the media to establish the truth or substantial truth of every defamatory statement, given the difficulty of establishing truth in many circumstances, may often result in the media refraining from publishing information they cannot be sure they can prove to be

² Op cit, p 382, par [1].

³ Op cit, p 391 A.

⁴ Op cit, p 388, par [24].

⁵ Op cit, Par [29], p 389 G.

true because of the risk of a successful defamation action against them. As McLachlin CJ observed in a recent case:

“... to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. ... This ... may have a chilling effect on what is published. Information that is reliable and in the public’s interest to know may never see the light of day.”¹⁶

[25] ‘Such a deterrent effect is at odds with the freedom of the media entrenched in section 21(1)(a) of the Constitution and it cannot be justified under section 21(2) as “a reasonable restriction ... necessary in a democratic society”. The approach taken by the South African Appellate Division in *Pakendorf and Others v De Flamingh* is thus in conflict with section 21 of the Namibian Constitution. As a result, the appellants’ argument that the rule in *Pakendorf* was repugnant to the Namibian Constitution must be upheld. The rule in *Pakendorf* did not form part of the common law of Namibia after independence.’¹⁷

[26] ‘There can be little doubt that the law needs development to protect the freedom of speech and the media. Article 21(2) of the Constitution expressly mentions the law of defamation as a part of the law that may limit rights as long as it does so by the imposition of “reasonable restrictions ... necessary in a democratic society”. The express mention of the law of defamation in article 21(2) makes it clear that the Constitution contemplates that the law of defamation must be developed to give effect to the right to freedom of speech, expression and the media.’¹⁸

[27] ‘On the other hand, the development of a defence of reasonable or responsible publication of facts that are in the public interest as proposed by the respondent (and as accepted by the High Court) will provide greater protection to the right of freedom of speech and the media protected in section 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

⁶ Op cit, Par [30], pp 389-390.

⁷ Op cit, Par [31], p 390.

⁸ Op cit, Par [49], p 394

it be published, and that in all the circumstances it was reasonable and responsible to publish it.⁹

[28] '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* was repugnant to the 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.¹⁰

[29] 'In *Bogoshi*, 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. It is not necessary in this case to consider whether a media defendant could avoid liability if a defence of reasonable publication does not succeed by showing that the publication was nevertheless made on the basis of a reasonable mistake. The appellants did not plead or argue such a defence and the question can stand over for another day.¹¹

[30] '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. It is not necessary in this case to decide whether this defence is available only to media defendants. It should be observed that in some jurisdictions, such as South Africa, the defence has so far been limited to media defendants, while in other jurisdictions, such as Canada, the defence is not limited to media defendants.¹²

⁹ Op cit, Par [53], p 395.

¹⁰ Op cit, Par [54], pp 395-396.

¹¹ Op cit, Par [55], p 396.

¹² Op cit, Par [56], p 396.

[31] Does the inviolable constitutional right to dignity of all persons and their right not to be subjected to degrading treatment become second tier to the freedom of speech and expression of the press and other media? Such was never intended and should be carefully guarded against.

[32] In *Free Press of Namibia (Pty) Ltd v Nyandoro*¹³ the Namibian Supreme Court per Mainga JA, par [36]¹⁴ it was said that 'The constitutional dispute between the right to freedom of speech on the one hand and the right to dignity on the other, will remain a vexed issue...' and 'The law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name'.

[33] The right to freedom of speech and expression which is fundamental to a democratic society, however, it is not a paramount value and must be construed in context with the other constitutional values. 'In particular, the values of human dignity, freedom and equality'.¹⁵

[34] In deciding whether published matter is defamatory it should be established what they impute to the readers of an article or comment. How would the article or comment be understood in its context. The article or comment should be given the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once.¹⁶

[35] In *Modiri v Minister of Safety and Security and Others*¹⁷ it was observed that publication of defamatory matter which is untrue or only partly true can never be in the public interest.¹⁸

[36] The defence of fair comment or opinion requires from a defendant to prove that the statement(s) complained of was comment or opinion which was fairly made on facts that were truly stated on matters of public interest.¹⁹

¹³ 2018(2) NR 305(SC).

¹⁴ *Free Press*, op cit, p 325.

¹⁵ *Free Press*, op cit, par [37], p 325 G-H.

¹⁶ *Free Press*, op cit, par [4], p 326.

¹⁷ 2011 (6) SA 370 (SCA) at 379 F.

¹⁸ See also *Free Press*, op cit, par [67], p 337 A-B.

¹⁹ *Crawford v Albu* 1917 AD 102.

The application of the law on the facts of this case.

[37] Plaintiff has attached the whole editorial which was written by the first defendant and published in The Namibian newspaper of 15 July 2016.

[38] The editorial is headed "Shylock Justice for the Greedy" and refers to "A STORY in The Namibian" of 12 July 2016.

[39] The only deduction a reasonable reader, reading the editorial once could make is that the editorial was of and concerning the plaintiff's transactions with his erstwhile domestic worker Eli Afrikaner, who 'donated' her house under compulsion to the plaintiff.

[40] The natural and ordinary meaning which the editorial in this case would have conveyed to the ordinary reasonable reader reading the editorial once, would have been that the plaintiff is a 'Shylock' exacting his pound of flesh from the vulnerable poor members of society; that plaintiff is greedy, selfish, forceful and money-grubbing; profiteering from the poor and vulnerable; morally corrupt, dubious and of low morals; a dishonest person and conducting his practice in a compromised manner.

[41] The editorial was amongst others and in its context as a whole defamatory of the plaintiff.

[42] Defendants and specifically the first defendant as the editor of The Namibian had to show that the editorial and the words and phrases used therein of and concerning the plaintiff were not wrongful and with the effect of defaming the plaintiff.

[43] Defendants pleaded the defences of fair comment and their constitutional right to freedom of speech and expression i.e. reasonable publication in the public interest.

[44] In the editorial the first defendant tenders the following as facts concerning the plaintiff:

[44.1] A story "Worker donates house to boss" was published in The Namibian newspaper of 12 July 2016.

[44.2] A domestic worker, Eli Afrikaner donated her house to her employer, a lawyer by the name of Ferdinand Vincent du Toit.

[44.3] Du Toit claims he lent Afrikaner about N\$83 000 to buy the house, which the municipality of Windhoek put on an auction in 2007 for a debt of N\$33 000.

[44.4] Du Toit claims Afrikaner had to donate the house to him after she in turn failed to honour her debt to him. The "in turn" refer to Rebekka Gamxamus to whom the house belonged earlier.

[44.5] Du Toit story is perhaps not as dubious as the story of Sanna Dukeleni who lost her house in Aimablaagte, Mariental due to a butchery bill of N\$168 in 2004 when a law firm Garbers and Associates got a default judgment against Dukeleni and sold her house for N\$1800 to one of their employees, Melanie Bamberger, who quickly sold it for N\$25 000.

[45] Based on the alleged facts the first defendant then opiniated/commented thereon and compares it with the Shakespearian play "The Merchant of Venice" wherein Shylock (the lender) got the desperate Antonio to sign an agreement that he would pay with a pound of his flesh if he defaulted in repaying his loan of 3000 ducats.

[46] The remainder of the editorial is clearly comment and opinion of and concerning the first defendant (amongst others) which first defendant say was in the public interest because it addressed matters "of public interest, in particular the issue of poor people and access to affordable housing, the wealthy and wealthier members, often professionals who are expected to be of assistance to the poor, uneducated or less educated members of the society, accessing housing traditionally

meant for the poor — often for speculation or profit, and not for shelter — over the poor members of society, and the desperate shortage of adequate and affordable housing in Namibia, which matters and issues are continuously and pertinently debated in public;”²⁰

[47] First defendant commented that the story of Du Toit in *The Namibian* of 12 July 2016 had “us” reaching for the bookshelf dusting off “*The Merchant of Venice*” and that some wisdom is needed to address the unbridled greed of the rich, who seem to enjoy exacting a pound of flesh and profiteering from the poor.

[48] First defendant says that the article “*Worker donates house to boss*” is one that defies logic, but perfectly fits the expression that truth can be stranger than fiction.

[49] Reading the whole editorial and one realizes that Mr Amupadhi was taking advantage of the article of 12 July 2016 to opiate and comment about his topical view on public interest set out in part in par [46].

[50] First defendant must show that the alleged facts concerning Du Toit, plaintiff, was true or substantially true and that his comment thereon was fair and in the public interest.

[51] First defendant testified that he was in possession of the Deed of Donation and the Deed of Transfer when he wrote the editorial.

[52] First defendant referenced to the earlier article in *The Namibian* of 12 July 2016 concerning plaintiff and Eli Afrikaner and Gamxamus. Therein appeared several statements with which plaintiff takes issue. That is —

[52.1] Rebekka Gamxamus house valued for N\$220 000 was auctioned in 2007 for a debt of N\$33 000. According to plaintiff the house in question was only valued for N\$220 000 during 2013. Plaintiff also testified that when the donation by Afrikaner was made to him the municipal valuation available of 2011 was N\$37 000.

²⁰ See par [7] of this judgment where the plea was quoted.

[52.2] Plaintiff said the house had to be donated to him. Plaintiff's issue with that is Afrikaner was not requested or obliged to donate the house. He bought the house for her on auction in 2007, registered it in her name on his costs, and paid the arrear rates and taxes to the municipality which amounted to N \$36 814.44 and other expenses. Plaintiff furthermore testified that all the attempts (up to 2016) to evict Gamxamus from the house at his expense, failed. Afrikaner could never occupy the house or rent it out and derived no benefit from it. According to plaintiff, Afrikaner in 2012, when she retired, decided to give the house back to him because she never paid anything for and concerning it. According to plaintiff further, Afrikaner could not obtain a bond from the bank because she could not qualify in the circumstances being that she did not earn enough to pay rent for other accommodation and paying off the house which generated no income for her due to Gamxamus' continued occupation and further that Afrikaner could only qualify for a loan if she occupied the house. Plaintiff testified that the arrangement with Afrikaner (in 2007) was that she would only pay him what he had expended.

[52.3] The article conveyed that the newspaper could not reach Afrikaner for comment and that plaintiff said that he did not know of her whereabouts because she no longer worked for him. Plaintiff testified that he was never asked by the reporter of The Namibian about Afrikaner's whereabouts and did not say that to the reporter. Plaintiff testified that if he was asked he could have told the reporter that Afrikaner already passed on during May 2016 and that he contributed financially towards her funeral. Plaintiff also testified that he gave Afrikaner N\$25 000 in January 2013 to construct a room for herself at her daughter's house. He and Afrikaner had a good relationship.

[54] Plaintiff testified that when Afrikaner resigned, she was appreciative of his efforts to fund and buy her a house but as she (Afrikaner) was unable to occupy or reside in the house due to the fact that Gamxamus did not vacate it, plaintiff can "have the house back" since he paid for it. Afrikaner was unable to sell or rent the house out also because of Gamxamus' occupation and refused to vacate. Plaintiff testified that the only cost effective way to take the house back was by way of donation by Afrikaner to him and that he consequently drafted the donation

agreement which was signed by Afrikaner on 14 December 2012, when she left her employment with him. The house was thereafter transferred into plaintiff's name on 13 October 2013.

[55] It was thus wrong, so plaintiff testified, that the editorial of first defendant stated that Afrikaner had to donate the house to him after she failed to honour her debt to him. Plaintiff's evidence is that he did not request or required Afrikaner to pay back the N\$ 86 000 to him. Plaintiff took issue with the statement that there was a loan agreement between him and Afrikaner.

[56] Plaintiff testified that Mrs Gamxamus vacated the house during June 2016 where after he leased the house to an employee of his legal firm, Eva Gaingos, for the low amount of N\$ 1000 per month.

[57] By stating in the editorial that plaintiff's story is perhaps not as dubious as the story of Dukeleni in 2004, first defendant clearly imputed that plaintiff's story was dubious.

[58] While accepting that affordable housing for the poor is in the public interest, this court cannot accept and condone contextually wrong comparisons by an editor of a newspaper as responsible and reasonable comment when it is based on unverified hearsay information, gleaned from another newspaper article, without any reasonable attempt of verification on the material available with the subject of reportage. Repetition does not rectify contextually wrong facts.

[59] It is comment on cause that first defendant did not contact plaintiff and did not give plaintiff any opportunity to advance his perspective or to elicit his response on the editorial before publication thereof. It does not avail the first defendant to say that his understanding or opinion concerning plaintiff would not have changed and he would not have changed the wording of his editorial in any event. It aggravated matters.

[60] Evidence by first defendant during 2018, containing additional facts and reasoning not mentioned in the editorial at the time of publication, is of no

appreciable assistance to his defence and to the court. The reasonable reader was favoured with contextually wrong facts on which a defamatory opinion concerning plaintiff was based.

[61] First defendant testified and argued that his opinion in the editorial was fair, honest and bona fide, based on facts that were true and relevant on matters of public interest.

[62] In the circumstances of the case before me, the first and second defendants have unreasonably trampled the plaintiff's constitutional right to dignity and have injured his good name and reputation.

[63] The conclusion concerning the evidence placed before court is that although the court appreciates the evidence and concerns of the first defendant about the issues addressed by him, it was wrong and unfair to piggyback it on the plaintiff's transactions and dealings with his erstwhile employee. Plaintiff just did not fit between the other examples referred to by first defendant. The court accepted the evidence of plaintiff.

[64] This case concerned an individual who practiced as a legal practitioner. Plaintiff is not a member of the Executive or Legislature. He is not a politician or a public servant with any executive or decision making powers. The adagium in *Mthembi-Mahanyele v Mail Guardian Ltd and Another* that²¹

'Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably.'

[65] Reasonable readers require and expect justifiable publications and opinion on well researched and well-founded responsible endeavours aimed at providing

²¹ 2004 (6) SA 329 (SCA), par [65].

contextually accurate facts on which the opinion is based. This threshold was not reached.

[66] The Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media which is applicable to first and second defendants requires from the first defendant, prior to publication, to seek the views of the subject of critical reportage. Thereafter reasonable time should be afforded for a response. In the circumstances of this case, fairness to the plaintiff would have required first defendant not only to speak with and enquire from the plaintiff before publication, but to have supplied the plaintiff in advance with the gist of the opinion concerning plaintiff and to allow and request an input, reaction from plaintiff and to publish same with the opinion in the newspaper. There is no reasonable justification advanced in this case why a defamatory opinion of and concerning the plaintiff should be treated different than the initial writing of an article.

[67] The Namibian newspaper is widely read in Namibia and has a substantive supporter base not only within our country's borders. It is read by all and sundry, ranging from the highest educated and achievers in our society to the less fortunate members in society. It is respected as a substantive newspaper with substantive reporting, and, usually rightfully so. It built its reputation as an independent torch bearer for the oppressed masses of our pre-independence era and continue post-independence to badger-like engage political, human rights and graft issues. From time to time it defended itself in the Namibian courts on defamation claims. This last fact did not tarnish its good reputation, but supported it and the role it plays in the Namibian society. It is true that the bold and the fearless in life sometimes got engaged in battles and does not always win. The Namibian also has many people world-wide amongst its reader base. It is also published on the world-wide-web.

[68] Although not a public figure, the plaintiff is known in Namibia by his clients, the judiciary and in business circles.

[69] The court has considered the historical defamation awards ranging between N\$250 000 to N\$5000 or less. The court has also considered the relief requested by plaintiff that he should approve the wording of the apology and has decided against

it. The court shall not subject the independence of The Namibian newspaper and its editor to the proscription of the plaintiff.

[70] In view of the totality of the relief the court is going to grant the plaintiff, the monetary award shall be N\$100 000 only.

[71] Plaintiff has also claimed against the printer of the newspaper the third defendant. The defendants have clearly put into issue the liability of all three defendants. The court did not hear one shred of evidence why the third defendant in this case must be liable. The court does not know whether the third defendant is a related company to the second defendant. The court only knows that the third defendant, which in law is a separate personae from second defendant, is the printer of The Namibian because it was admitted. On the evidence or lack of it, the third defendant can be nothing more than an independent contractor of second defendant, printing what is supplied by the second defendant in execution of a commercial transaction between it and the second defendant. On that basis the court is not prepared to give customary relief against the third defendant as printer.

[72] In the premises, the court makes the following orders -

[72.1] First and second defendant shall make a written apology and retraction to the plaintiff, to be published in The Namibian Newspaper and on the world-wide-web with the following content:

"In so far as the editorial in The Namibian newspaper of 15 July 2016 has conveyed that Vincent Ferdinand Du Toit has exploited the poor and vulnerable of the Namibian society and that he is a dubious profiteering character, the editor and The Free Press of Namibia (Pty) Ltd unreservedly apologise and retract their statements and opinion of and concerning Ferdinand Vincent Du Toit."

[72.2] This apology and retraction shall be published prominently in The Namibian Newspaper and on the world-wide-web and should therein link to both the apology / retraction and the original editorial of 15 July 2016.

[72.3] First and second defendants jointly and severally the one paying the other to be absolve of, shall pay an amount of N\$100 000 to the plaintiff.

[72.4] Interest on the amount of N\$100 000 at the rate of 20% per annum from 1 July 2019 to date of final payment.

[72.5] Costs of suit, inclusive of the costs of one instructing and one instructed counsel.

GH Oosthuizen
Judge

APPEARANCES:

PLAINTIFF:

A Van Vuuren (Instructed by
Fisher, Quarmby & Pfeifer)
Windhoek

DEFENDANT(S):

N Tjombe
Tjombe Elago Inc.
Windhoek