



REPORTABLE

CASE NO: SA 32/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FREE PRESS OF NAMIBIA (PTY) LTD

First Appellant

GWEN LISTER

Second Appellant

JANA-MARI SMITH

Third Appellant

and

ALOIS NYANDORO

Respondent

Coram: MAINGA JA, HOFF JA and CHOMBA AJA

Heard: 26 October 2017

Delivered: 1 March 2018

Summary: The appellants were the defendants in an action for damages for defamation, the respondent had brought in the amount of N\$500 000,00 plus interest at the rate of 20% per annum from the date of judgment to date of payment plus cost of suit. The trial court awarded damages to the respondent in the amount of N\$80 000,00 with interest at the rate of 20% per annum from date of judgment to date of payment plus costs of suit. Appellants appealed against the

whole judgment and the respondent has cross-appealed against the quantum order, seeking an increase in the award to an amount of N\$150 000,00.

The first appellant is the company that publishes “The Namibian Newspaper”, the second appellant the editor then and the third appellant the author of the article which is the source of the defamation action. The article alleged that the respondent the Head of training and standards at Air Namibia put pressure on Ralph Brammer, a flight instructor and examiner accredited to the Directorate of Civil Aviation (DCA), to falsify information on a DCA form to get the necessary certification for the South African citizen (Mndawe) to fly Air Namibia’s domestic Beechcraft 1900 fleet and that the persistent pressure led to the sudden resignation of the flight instructor at the national airline. The article further amongst other things alleged that the DCA initially granted Mndawe the papers necessary to fly in Namibia but the validation certificate was withdrawn when the DCA was notified that Mndawe was not in possession of a valid South African pilot’s licence; that Mndawe’s flying skills were sub-standard and that she would be required to undergo additional practical flight examinations before she would be permitted to fly in Namibia; the respondent instructed Brammer to transfer information from an unrelated form to the DCA form, which would have created the impression that Mndawe had completed the required practical flight test as requested by the DCA; that respondent insisted that the practical flight examination could be skipped and told Brammer to copy the initial recommendations for Mndawe’s employment to the DCA form; that respondent insisted that the DCA was willing to accept the outdated and invalid practical flying test results; that had Brammer agreed with the request from respondent, it would have been deemed highly illegal and it would not have been approved by the DCA.

On appeal the appellants bore the onus to establish a defence which excluded either wrongfulness or intent. Appellants contended that they believed that the publication of the article was of high public interest and understood the publication to be protected by the right to freedom of speech (Art 21(1)(a)). In publishing the article the appellants took into account that investigative journalism plays a vital role in holding public figures and public institutions accountable and in conformity

with acceptable standards. Appellants further contended that the appeal also concerns striking the correct balance between the often conflicting rights of freedom of expression and freedom of the press, on the one hand, and the rights of the individual to the protection of his or her unimpaired reputation or good name, and the right to privacy and dignity by the Namibian Constitution and that the matter should be determined having in mind the constitutional framework and protections embodied in Art 21(1)(a) and the competing rights of the individual to dignity. The appellants denied that the article was defamatory, wrongful or published with intention to defame the respondent and pleaded further in the alternative raising four defences, namely, truth in the public benefit, fair comment, qualified privilege and reasonable publication.

Held, that the right to freedom of speech versus the right to dignity is a vexed issue in our jurisdiction and in democracies like ours; the right of freedom of expression in a democracy cannot be overstated; accordingly, the media need to be aware that their task of disseminating information in the public realm must be done responsibly with integrity.

Held, further, that in order to establish whether the article complained of is defamatory, the test is objective. 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.

Held, further, that on the question as to whether the article was defamatory that the first two paragraphs of the article, an ordinary reader would have gained the impression that the respondent was corrupt.

Held, further, that paragraphs 14, 15 and 17 would have informed the reader as to the nature of the falsification required by the respondent, casting him in a worse light as the said paragraphs create the impression that the information Brammer was required to transpose was invalid, outdated and unrelated to the practical flying test.

Held, further, that paragraphs 6 to 13 of the article the corruption of the respondent would have been understood to be seriously aggravated in that the respondent used or attempted to have used his position to obtain a licence for a person who has no licence to fly and/or whose flying skills are sub-standard or non-existent.

Held, further, that the request by the respondent to Brammer to transpose the information from the one document to the other did not amount to falsification, for the reason that the respondent copied in his supervisor and Van Niekerk of the DCA, which negatives any intent on the part of the respondent to intend on falsifying information and also from all communication between the respondent and Brammer, no request existed to add or to subtract from the information to be transposed.

Held further that the respondent's repeated requests to transpose the information did not amount to pressure or persistent pressure.

Held, further, that the trial court was correct in holding that the article was defamatory of the respondent.

Held, further, that almost every paragraph of the article was inaccurate, the article is therefore substantially untrue, accordingly the defences of public benefit and truth and qualified privilege cannot succeed.

Held, further, that in *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) at 376B-E, para 12, it was held that if a defamatory statement is found to be substantially untrue, the law does not regard its publication as justified.

Held, further, regarding the defence of reasonableness, that in *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 391E it was held 'that in order to raise this defence, the appellants must establish that the publication was in the public interest, and that, even though they cannot prove the truth of the facts in the publication, it was nevertheless in the public interest to publish'.

Held, further, that the issue of irregularities in issuing pilots' licences is in the public interest and will always be.

Held, further, that in *Government of the Republic of South Africa v Sunday Times Newspaper and another* 1995 (2) SA 221(T) at 227I-228A it was held that it is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration.

Held, further, that in *Trustco Group International* at 399H and 400E-F it was held that 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; 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 enhanced the quality and accuracy of reporting, as well as protecting the legitimate interests of those who were the subject matter of reporting; there was 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, as well as serving to protect the legitimate interests of those who were the subject of reports.

Held, further, that while the appellants' plea elaborate in sufficient detail the steps the third appellant took prior to publication of the article, which steps the third appellant also confirmed in her testimony, but the third appellant's attempts did not amount to or the third appellant did not in all instances do what is reasonable to verify certain information to avoid errors in the article, for example, the investigation was triggered by Mndawe's flying skills, particularly whether she had a pilot's licence, but third appellant failed to contact her.

Held, further, that regarding quantum in *Dikoko v Mokhatla* 2006 (6) 235 (CC) at paras 93-95, it was held that the assessment of sentimental damages properly

reside within the province of the trial court; an appellate court will only interfere when the trial court has misdirected itself in the sense that it has awarded high or low damages on the wrong principle or when in the opinion of the appellate court the award is so unreasonable as to be grossly out of proportion to the injury inflicted.

Held, further, that in determining whether the award of damages by the trial court should be interfered with, the question is whether the N\$80 000,00 under the circumstances is grossly disproportionate to the injury suffered as a result of the defamation; what is always material to an award is the extent to which the harm that was caused was mitigated by the defendant; the appellants were alerted to the inaccuracies in the article and were called on to retract and/or apologise but they chose not to do so; monetary award for harm of the nature suffered by the respondent is not capable of being determined by an empirical measure; awards made in other cases might provide a measure of guidance of a generalised form.

Held, further, that the trial court considered awards made in other cases in this jurisdiction; the reasons by the trial court granting the award are sound; the award is consistent with other awards; it is not grossly disproportionate to the injury suffered.

Held, further, that the appeal fails and the cross-appeal by the respondent seeking to increase the award also fails.

Held, further, that on the question of costs, notwithstanding the fact the cross-appeal also failed, the respondent should be entitled to full costs, as the cross-appeal did not take the parties' time; while the dispute between the parties is a vexed one the issues on appeal were more defined and costs of one counsel should be appropriate.

The decision of the trial court confirmed on appeal.

MAINGA JA (HOFF JA and CHOMBA AJ concurring):

Introduction

[1] The appellants were the defendants in an action for damages for defamation, which the respondent (plaintiff in the court *a quo*) had brought in the High Court (Main Division). Judgment was given for respondent by Van Niekerk J in the amount of N\$80 000,00, interest on at the rate of 20% per annum from the date of judgment until date of payment, plus costs of suit. Appellants now appeal. Respondent also cross-appeals against the quantum order only seeking an increase in the award to an amount of N\$150 000,00.

[2] The alleged defamatory statement was published in a daily newspaper 'The Namibian'. The article was written by Ms Jana-Mari Smith (Smith) (the third appellant); Ms Gwen Lister (Lister) (the second appellant) was the editor of the newspaper and Free Press of Namibia (Pty) Ltd (the first appellant) is the company that publishes 'The Namibian Newspaper'.

[3] The article complained of in its entirety excluding the numbering which was added on by the trial court for ease of reference reads as follows:

"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, and ignore the direct instructions from the DCA to complete a new flying test results, 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".

Pleadings

[4] In paras 6 and 7 of the plaintiff's (respondent's) particulars of claim it is alleged that the article above had the following meaning:

"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.

[5] The respondent further alleged that the statements made in the article concerning the respondent were made with the intention to defame the respondent and injure his reputation. As a consequence respondent suffered injury to his feelings and dignity and suffered damages in the amount of N\$500 000,00.

[6] The appellants admitted that the article was published in The Namibian Newspaper on 11 March 2010, and that first appellant were the publishers and that the second and third appellants were the editor and writer of the article

respectively, that the article stated the allegations contained in subparas 6.1 to 6.5 of the particulars of claim but denied subparas 6.6 and 6.7 concerning the plaintiff. The appellants further admitted the meanings contended for in subparas 7.3 and 7.5 and that the article stated that the respondent 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. The further meanings contended for in para 7 of the particulars of claim were denied.

[7] Appellants denied that the article was defamatory, wrongful or published with intention to defame the respondent and pleaded further in the alternative raising four defences:

The defence of truth in the public benefit

7.1 That, insofar as it contained statements of fact, these were essentially the truth and the publication thereof was in the public interest.

The defence of fair comment

7.2 Insofar as the report contained allegations of the nature of the comment, the comment concerned matters of public interest and was fairly and reasonably made.

The defence of qualified privilege

7.3 In the circumstances and based upon facts which are essentially the truth, that the irregularities regarding the issuing of commercial pilots licenses or

their validation is a matter of high public interest - 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 concerning the issuing of commercial pilots licenses or their validation - and the statement of which the respondent complains of were part of the fair and substantially accurate report by the third appellant and the newspaper.

The defence of reasonable publication

7.4 That upon 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 appellant was referred to and contacted a source concerning the said pilot and the source informed the third appellant that the commercial pilot licence validation of 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 ("GRN"), that an incorrect form to effect the validation was incorrect and inappropriate, the DCA required a correct form to be utilised and the DCA required Mndawe would need to be tested for the validation to be issued, that Captain Ralph Brammer ("Brammer") a designated examiner, accredited with the DCA, had informed the respondent, the Head of Training and Standards of Air Namibia, that Mndawe would need to undergo a test for her validation to be re-issued, more so for the complaints and questions raised concerning Mndawe's flying skills and ability, that the respondent pressurised Brammer to complete the DCA form without Mndawe undergoing a test, citing the cost

of the test as justification, that Brammer declined to do so, and gave 30 days' notice of resignation, as the completion of the DCA form without a test would have created a false impression and incorrect and would have amounted to falsification of information and that Mndawe preciously worked for SA Express and had been grounded and given a desk job for the reason of lack of flying skills.

The third appellant was provided with emails that were exchanged between the respondent and Brammer on certain of the above issues, which served to confirm certain of the above issues disclosed by the source.

The third appellant contacted the DCA and spoke to the licencing officer Mr Graeme van Niekerk ("Van Niekerk"), who confirmed certain of the issues above, particularly he informed the third appellant that a certain designated examiner accredited to the DCA had been put under pressure to sign the DCA form and that it would have been highly illegal to have permitted a validation, purely on the strength of completing the DCA form without a test.

The third appellant endeavored to contact the respondent on the above allegations, on 10 March 2010, but respondent informed her to contact Ms Theo Namases (Namases) at Air Namibia for comment on the allegations. The third appellant contacted Namases, who requested her to put her query in writing, which third appellant did by way of email to which Namases responded on the same day (10 March 2010).

The third appellant telephonically contacted SA Express Airline about Mndawe and she was informed that Mndawe did not pass her type conversion training required by the Airline and that she had been redeployed to a desk job.

Third appellant attempted to contact Brammer, but could not secure his comment on the allegations, as he did not want to become involved in questionable practices and procedures used to employ people at Air Namibia. Third appellant however obtained confirmation of the termination of Brammer's contract with Air Namibia.

The third appellant thereafter prepared her report on 10 March 2010, which was then published in the newspaper on 11 March 2010. In the circumstances, third appellant acted reasonably and without negligence and in good faith in writing and publishing the statements complained of in the article.

[8] Crucial to this judgment are the documents the appellants relies on for publishing the article, their plea and defences which were vital integral part of the evidence, namely, the questions which the third appellant directed to Namases of Air Namibia, before the publication of the alleged defamatory article and Namases' response thereto, the emails that exchanged between the respondent and Brammer, regarding the transposition of the flight test information from the check 6 OPC form (wrong form) to the Namibian Commercial Practical Flight Test Form or

DCA form (correct form), and the letter from Van Niekerk of the DCA withdrawing the validation certificate, which was allegedly issued erroneously to Mndawe. It is best to refer to them in full, the emails as received and numbered by the court below, with minor changes.

[9] The letter or questions directed to Ms Namases by the third appellant:

“Dear Ms Namases,

As per our telephonic questions, kindly note that my deadline for this story is at 16h00.

The questions are as (sic) following:

In regard to a South African citizen, Cibile Mndawe, I have been informed that Air Namiba 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 would have decided whether Mndawe’s capabilities as a pilot are good enough to qualify for a pilot position?”

[10] Ms Namases’ response to the questions above:

“RESPONSE TO MEDIA

By Ms. Theo N. Namases

GM: Human Resources

1. F/O MNDawe

- 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.”

[11] The emails that exchanged between the respondent and Brammer:

11.1 E-mail #1 (Exh “H”): E-mail from [respondent] to Mr Brammer dated Thursday 4 March 2010

“Hello Ralph,

As per our 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”

11.2 E-mail #2 (Exh “H”): E-mail from Mr Brammer to [respondent] dated Thursday 4 March 2010

Hello Alois,

Yes, the Nam DCA test 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 (Check6).

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"

11.3 E-mail #3 (Exh "I"): E-mail by [respondent] 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”

11.4 E-mail #4 (Exh “J”): E-mail from Mr Brammer to [respondent] 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 form 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 Nam DCA 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”

11.5 E-mail #5 (Exh “J”): E-mail by [respondent] 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”

- 11.6 E-mail #6 (Exh “K”): E-mail by Mr Brammer to [respondent] 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”

11.7 E-mail #7 (Exh “K”): E-mail by [respondent] 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 “hostile environment”.

This matter has also given us an insight in the kind of people we are dealing with.

Kind regards,

Alois”

[12] The letter from the Director of Civil Aviation Mr Graeme van Niekerk withdrawing Ms Mndawe’s Namibian Foreign licence validation certificate.

“Enquiries: Graeme van Niekerk

Tel: (061) 702245

Cell: 0811473553

Our Ref: val withdrawal

27 January 2010

Ms Mndawe

Windhoek

Dear Madam

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 been withdrawn.

The licensing office made an error in issuing the document to you as not the correct **Official Namibian Commercial Practical Flight Test form** was submitted.

The 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.

Yours faithfully

Signed

DIRECTOR OF CIVIL AVIATION"

[13] After the article was published, Air Namibia responded to the article in the form of a press release which read as follows:

"RESPONSE TO MEDIA REPORT

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 incorrect form used as the basis for issuance of the validation certificate. (Letter available)
6. The DCA letter states that 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 validation 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 evidenced 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.

[14] Additional to the media response above, the respondent telephonically contacted the third appellant on 11 March 2010 and arranged for a meeting at the newspaper's offices on or about 12 March 2010. At the said meeting, respondent disputed the allegations in the newspaper and showed proof of what should be the correct version, which included the emails exchanged between respondent and Brammer. On third appellant's evidence, respondent showed her a copy of Mndawe's SA pilot's licence. Respondent even showed third appellant his qualifications, as for an inexplicable reason he had understood that the third appellant intended writing another article and having it published alleging that respondent was not qualified.

[15] On 23 March 2010, respondent's legal practitioners of record addressed a letter of demand to the second appellant. The letter stated that the allegations that respondent exerted persistent pressure on 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 respondent. A demand of N\$500 000,00 in damages was made payable within 20 days, failing which, summons would be issued. The letter also suggested that the second appellant publishes an unconditional apology featuring prominently on the front page of the newspaper and on its online version, for purposes of mitigating damages suffered by the respondent.

[16] The appellants admitted receiving the letter of demand, but declined a retraction and apology on the grounds set out in the appellants' plea. The

appellants also declined Air Namibia's media response, which the company had issued in a form of a press release after the article was published.

The High Court proceedings

[17] In the court below, the trial came before Van Niekerk J. The respondent testified on his own behalf. The appellants led three witnesses, namely, the editor of the newspaper, then Gwen Lister, the author of the article, Smith and the Director of Civil Aviation (DCA) Graeme van Niekerk.

[18] The appellants in essence held on to their denials. Lister, the editor of the newspaper then and director of the first appellant testifying, amongst other things, that the ethos of the newspaper was to report accurately and objectively in regard to matters of public interest; that the Namibian Newspaper was not a tabloid newspaper, but a serious newspaper which saw as one of its roles that of acting as a watchdog over the use of public funds and encouraging the maintenance of appropriate standards in the public and private sector in Namibia and that in her 36 year tenure with the newspaper no successful defamation case was brought against the newspaper. She further testified that the newspaper subscribes to the applicable journalism code of ethics, committed to investigative journalism, thus the newspaper was aware of the balance that needed to be achieved between the public interest and the public's right to know, against the individual's right to privacy. According to her a public figure or a person in a public office, including persons holding senior positions in parastatals, the newspaper is entitled to hold such persons and institutions to standards of integrity, efficiency and transparency.

She emphasised that the issues raised in the article were serious issues, which raised the issue of airline safety standards in respect of Namibia's National Airline and that the case should be determined in that context.

[19] Jana-Mari Smith, amongst other things, corroborated the evidence of the second appellant on the ethos of the newspaper and that she applied the newspaper's governing principles when she wrote the article. She testified that she received a report that there were issues concerning a pilot, in the employ of Air Namibia, who hailed from South Africa and her competence as a pilot. She was referred to and contacted a first source concerning the said pilot who spoke generally on the matter and she was referred to a second source who gave her the allegations in the appellants' plea. She secured the email correspondences between the respondent and Brammer from an undisclosed source. She contacted the public relations department of SA Express to enquire on Mndawe's employment experience with that company. She spoke to Van Niekerk and tried to interview Brammer, who declined to be involved, but confirmed his resignation. She testified that Van Niekerk told her that the respondent came to see him to obtain clarification about the withdrawal of the validation certificate of Mndawe. She did not see Van Niekerk's letter withdrawing Mndawe's validation certificate. She only saw the letter when the respondent visited her at the newspaper's offices after publication.

[20] She testified that she called the respondent and identified herself. She informed the respondent that she was investigating a story about two pilots, whom she mentioned by name and she informed the respondent that there were allegations that procedures and regulations were not observed in regard to

Mndawe, in particular to get the validation for her flying in Namibia. She confirmed the respondent's version that he referred her to contact Air Namibia's Corporate Communications officer Namases, which she did. Namases advised her to put her questions in writing which she did and received a reply thereto.

[21] She acknowledged that the allegations in the newspaper about Mndawe's SA pilot's licence were based on error, which she realized after the publication and that it was based on a misunderstanding or it was a "writing error." She corroborated the respondent's evidence that he called her on 11 March 2010 and asked to meet her at the newspaper's offices the next day or so. At that meeting, respondent denied pressurising anyone or asking for falsification. The witness added that respondent said "everything he is saying now." That I understand to mean the respondent's evidence in chief. Respondent gave her Mndawe's SA licence and told her that the allegations about Mndawe's SA licence were wrong and he showed her Van Niekerk's letter withdrawing Mndawe's validation licence. Respondent informed her that he had done nothing illegal and for the first time he said he was considering suing the newspaper, except if the newspaper retracted and apologized very prominently on the front page. The third appellant and the news editor who was called in, offered to do a follow-up story in which respondent's version would be reported, which respondent declined as he only wanted an apology. In cross-examination she agreed that it was in the public interest to have informed the public about the error(s) she made in the article. She could not remember whether she approached the news editor to request for a rectification, but she testified that since respondent threatened to sue the newspaper, it was decided to wait and see the developments. She testified that

she based the statements in the article about “pressure” and “persistent pressure” exerted by the respondent on what the sources and Van Niekerk had told her. She also interpreted the email correspondences between respondent and Brammer to mean that way. She also agreed that there was no dishonest intent suggested in emails numbered 1 and 2 on the part of the respondent, but added that the pretense that a retest had been done she gathered from the emails. Van Niekerk told her what is alleged by appellants in paragraph 8.5 of their plea, ie. a designated examiner accredited to the DCA had been put under pressure to sign the DCA form, which would have been highly illegal. She gave evidence on the various defences raised by the appellants, particularly that of reasonable publication.

[22] The relevant evidence of Van Niekerk is that he was then the chief of Personnel Licences at the DCA. His task was to issue licences to all who required such documents in the aviation industry. He received complaints of the flying capabilities of Mndawe. He went into her file and discovered that the validation certificate issued to her was issued erroneously, as Brammer who had tested her had completed a wrong form - what was required was the DCA form. He attributed the error to the understaffing of his office and he was overloaded with work, he did not check Mndawe’s file properly and signed the validation certificate believing that all was in order. He wrote a letter to Mndawe withdrawing her validation certificate. Either prior or just after he had written the letter he contacted Brammer informing him that he received complaints from pilots flying with Mndawe that she was not up to standard and that she required further training and that Air Namibia would contact Brammer to do another check (“retest”) with Mndawe and he should do a

full flight check and if he found her to be deficient he would then have to recommend her for training.

[23] He was specifically asked to explain what he meant in para 3 of his letter withdrawing Mndawe's validation certificate which is to this effect:

"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."

[24] Given this answer the trial court remarked:

"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."

[25] Counsel referred the witness to how respondent understood that paragraph of the letter and that all that was required was that Mndawe submits the correct form, to which he responded:

"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."

[26] In fact he specifically denied that he told the respondent that a flight retest was not required, To the witness' answer the trial court remarked:

"I pause to note that the witness never informed the plaintiff [respondent] 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."

[27] He testified that he did not read the email correspondences between the respondent and Brammer copied to him by the respondent. His explanation was that during that time he received between 100 – 200 emails per day and that, that was overwhelming and he would only select the important ones to read. To this evidence the trial court remarked as follows:

"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.'

[28] The witness was asked to comment on the sentence in the email marked # 6 from Brammer to the respondent to the effect:

“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.’

‘Yes 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.’”

[29] He confirmed that he told the third appellant what the appellants allege in para 8.5 of their plea, namely, Mndawe’s validation had been withdrawn, a retest was required by DCA for Mndawe for the re-issuing of the validation certificate, a designated examiner accredited to the DCA had been put under pressure to sign the DCA form to seek the re-issue of the validation of Mndawe’s licence without a test, Mndawe would appear not to meet the standards of a commercial pilot and that there had been complaints concerning her ability, it would be highly illegal to have permitted a validation purely on the strength of completing the DCA form,

without a test. When he was confronted in cross-examination as on what basis he had told the third appellant that a designated examiner accredited to the DCA had been put under pressure, his reply was that he was not the source of that information, but that third appellant told him that she had spoken to Brammer and that, that was what the latter had said. He further added that he responded to the third appellant that he suspected that putting pressure on Brammer would happen. He further said that when he spoke to Brammer before the validation certificate was withdrawn, Brammer said, “they are going to force me, to put me under pressure to sign the paper”. He further said in that conversation with Brammer, he told Brammer that “they (will) tell him to transfer the information”. He continued, he (Brammer) said, but then Nyandoro will put me under pressure and all sorts of nonsense. “I (Van Niekerk) said no test is required”. He testified further that Mndawe and the respondent knew very clearly that a full check was required, not on OPC 6, because they took a chance by sending it. Many times they get away with “it”. This prompted the trial court to remark that, ‘it indicates that the use of the OPC check 6 form for validation was not unusual.’ Hence he ‘took steps to indicate to Brammer and Boardman that he would not be satisfied with such a procedure [in the case of Mndawe] because of the serious complaints about the pilot’s flying abilities.’

[30] The witness confirmed that Mndawe had a valid SA licence to fly the B 1900 and that it was an error when the article stated that the validation licence was cancelled because she did not have such a licence. He further said he was not the source of that information and that applications for validations from Air Namibia or individual pilots to the DCA are either granted or rejected by the DCA and the DCA

is never forced by Air Namibia and/or its pilots to grant the application as the third appellant had alleged in her correspondence to Namases. He admitted that the letter withdrawing Mndawe's validation certificate was the official position of the DCA on the reasons for the withdrawal, but added that he actually deals mostly with the pilots in person and has little to do with Air Namibia. This evidence is consistent with the respondent's testimony that the pilot applies for a validation certificate in his/her personal capacity and the issuing of the licence is a matter for the individual pilot and the DCA. He further said that after he had written the letter withdrawing Mndawe's certificate, he called her in and handed her the letter. He informed her about the complaints about her he had received, and the incorrect check 6 form, that he spoke to Brammer, she can no longer use the certificate, she will have to re-do the "check rate" and that she would have to undergo more training as there were problems regarding her flying abilities.

[31] The trial court records that the evidence took a rather surprising twist when in cross-examination he further testified that he had to write the (Mndawe) letter in a "very diplomatic way" because he being white, he would have been blamed for racism if he "just was crude about it", ie, if he had stated in the letter 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 had to inform her verbally the real reasons for the withdrawal of the validation certificate. Paragraph 3 of that letter was "basically . . . saying that you would have to go and do a check rate again to get this", implying a fresh practical flying test. He further testified that if it was not for the complaints he received on Mndawe, he would have done nothing about it or waited until the validation was to be renewed and that he withdrew the

validation certificate because of the complaints. He further said that those who have no knowledge about aviation would think that the letter “obviously” required a transfer of information, but that the respondent would know exactly what it meant, that a practical test was required.

[32] He further explained that falsification would have taken place, because the check 6 OPC form would not have included all the checks required in the DCA form and one would have to improvise, in his own words to “artificially” fill the parts of the form which would have remained uncompleted as the DCA form had more requirements than the check 6 form. He however conceded, that if the flight test report (DCA form) to which the information from the check 6 OPC form would have been transposed and bore the same date as the date on the check 6 OPC form (19 September 2009) he would not have been deceived, because he knew the background that the DCA form had not been completed on 19 September 2009, the date the check test was done with Mndawe, but he added in re-examination that someone lacking that background would have been misled.

[33] It was necessary to summarise the salient features of the appellants’ evidence, particularly that of their witness Van Niekerk, who was one of the information sources, in more detail, to reflect what he told the third appellant. It is possible that he might have misled the third appellant or passed on factually incorrect information.

[34] The court below rejected appellants’ defences holding that the newspaper article contained several inaccuracies, that the transposal of information from what

came to be known during the trial as the “wrong form” to the “correct form” did not amount to falsification and that the respondent had no intention to falsify any information to deceive the DCA that a retest had been done and therefore the allegations in the article on that score were untruthful. The court below further held that the defence of fair comment had not been established as the appellants had not shown which allegations are in the nature of a fair comment. In regard to qualified privilege, the court below found that the defamatory statements in their context did not attract privilege to their publication as there was no duty upon the appellants to publish the allegations, ‘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’, as that information was from an anonymous source and was not tested or proved in any way by an independent authority. As for the defence of reasonable publication in the public interest, the court found that the issues raised in the article were in the public interest, but it held that on the evidence there were shortcomings in the investigation and reporting of the article and the publication of the defamatory portions of the article renders the same unreasonable. Consequently, the court below awarded damages of N\$80 000,00 in favour of the respondent.

Appellants’ arguments on appeal

[35] In this court, appellants appear to have abandoned the defence of fair comment, but hold on to the other three, truth and public benefit being the main defence, qualified privilege and reasonable publication, being defences in the alternative. In his introductory remarks, counsel for the appellants remarked that the courts in this jurisdiction continue to wrestle with art 21 of the Constitution on

the one hand and art 8 on the other. He contended that the appeal concerns the publication of an article by the newspaper, which it believed to be of high public interest, relating to flying standards within the National Airline industry and passenger safety with that airline. The appellants understood the publication to be protected by the right to freedom of speech (art 21(1)(a)). In publishing the article, the appellants took into account that investigative journalism plays a vital role in holding public figures and public institutions accountable and in conformity with acceptable standards, so it was contended. Counsel further contended that the appeal also concerns striking the correct balance between the often conflicting rights of freedom of expression and freedom of the press, on the one hand, and the rights of the individual to the protection of his or her unimpaired reputation or good name, and the right to privacy and dignity by the Namibian Constitution and that the matter should be determined having in mind the constitutional framework and protections embodied in art 21(1)(a) and the competing right of the individual to dignity.

[36] 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 not only in this jurisdiction but in many other democratic societies like ours. In *Trustco Group International v Shikongo* 2010 (2) NR 377 (SC) at 391E, O'Regan observed that, 'this is a question that has been confronted by courts the world over in the last few decades.' The subject of free speech is a wide and rumbling one, *Kauesa v Minsiter of Home Affairs and others* 1995 NR 175 NMSC at 182E. The law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name. See *Khumalo and others v Holomisa* 2002 (5) SA 401 at

418A. In *Argus Printing and Publishing Co Ltd and others v Esselen's Estate* 1994 (2) SA 1(A) at 25B-E Corbett CJ said:

'I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word "unlawfully" for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory.'

[37] In the *Khumalo* matter at 417 in para 24, O'Regan J referred with approval to Corbett CJ's observations above and went on to say, 'in a democratic society, . . . the mass media play a role of undeniable importance' and that 'the constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16', the equivalent of art 21(1)(a) of the Namibian Constitution. In para 25, the learned judge continued to say, 'however, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our constitution. In particular, the values of human dignity, freedom and equality.'

[38] I associate myself with the above sentiments. In fact while art 21(1)(a) guarantees to all persons the right to freedom of speech and expression which

includes, freedom of the press and other media, sub art 2 provides that the fundamental freedoms referred to in sub art (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub article, 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.

[39] The importance of the right of freedom of expression in a democracy cannot be overstated. It has been acknowledged in this court and the High Court. See *Kauesa* at 187A-D; *Trustco Group International v Shikongo* 2010 (2) NR 377 at 388H-389A-E; *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd* 2009 (1) NR 65 (HC) at 75A-J. In *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and another; Nasilowski and others v Minister of Justice and others* 1998 NR 96 (HC) the full bench at 99E-100B stated:

‘The need to jealously protect the right to freedom of speech and expression and the value thereof in a democratic society has been stated and restated over many decades in many jurisdictions all over the world, Those values have recently been echoed by the Supreme Court in *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC); 1996 (4) SA 965 (NmS), when it quoted the moving speech of Justice Brandeis reported in *Witney v California* 274 US 375-6 (1927) and applied it to the democratic and social values which Namibians cherish and have died for.’

[40] In performing the task of disseminating information and ideas and any other task, the media needs to be aware of their own power, and the obligation to wield that power responsibly and with integrity. See *Trustco Group* at 389E.

Was the article defamatory of the respondent?

[41] This brings me to the inquiry before this court, whether the article was defamatory. In determining whether the article in question is defamatory, Nugent JA in *Tsedu and others v Lekota and another* 2009 (4) SA 372 (SCA) at 377C had the following to say:

‘[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:

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.’

See also *Shikongo v Trustco Group International Ltd and others* 2009 (1) NR 363 (HC) at 387B; *Afshani v Vaatz* 2006 (1) NR 35 (HC) at 45B-E.

[42] The appellants admit the publication of the article, that the article intended to convey that the respondent had abused his position as a senior manager of Air Namibia to pressure Brammer to falsify information and that he had used his influence for an improper purpose, on that basis, it is further conceded that what is stated in the publication is defamatory, per se of the respondent's character.

[43] Counsel contends that the court below found that the reasonable reader would have understood that the respondent was a corrupt manager who was prepared to falsify information to obtain a licence for the South African pilot thereby placing passengers in mortal danger when flying and accordingly it held that what was stated in the article was per se defamatory. This finding, so counsel argued, gives rise to two presumptions which are essentially unrelated in character, namely, first, the presumption of intent to injure, which relates to the appellant's subjective state of mind and secondly, the presumption of wrongfulness which, by contrast relates to a combination of an objective fact on the one hand and considerations of legal and public policy on the other hand (see *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) at 376B-E, para 12) and that, therefore the appellants attracted the onus to establish a defence, which excluded either wrongfulness or intent.

[44] The article headed 'Air Namibia "by passes" pilot licensing rules' commences with the first two paragraphs which the respondent testified gave rise

to the defamation action. The first paragraph in bold letters informs the reader that ‘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.’ In the second paragraph the instructor is named as Ralph Brammer, designated to the DCA as an examiner and that he tendered his resignation the week of 10 March 2011 after persistent pressure from the Head of Training and Standards at Air Namibia, Alois Nyandoro (the respondent) to falsify information on a DCA form to get the necessary certification for the South African 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.

[45] I have no doubt from these paragraphs, an ordinary reader would have gained the impression that the respondent was corrupt.

[46] In the last six paragraphs of the article which the court below conveniently marked 14 to 19, the article continues in this form.

“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".

[47] Paragraphs 14, 15 and 17 would inform the reader as to the nature of the falsification required by the respondent, casting him, as the court below correctly stated, in a worse light as these paragraphs creates the impression that the information Brammer was required to transpose was invalid, outdated and unrelated to the practical flying test.

[48] The paragraphs which the court below conveniently marked 6 to 13, the article informs the reader in para 6 that Mndawe was initially granted a validation certificate, but was withdrawn when it was learnt that she had no valid South African pilot's licence, a strict requirement when applying for a Namibian licence. Paragraph 7 states that the DCA was informed or heard that Mndawe's flying skills

were sub-standard and she would need additional training before she would be allowed to fly in Namibia. Paragraph 8 states that Mndawe, when she worked for South African Express, failed her conversion training required and she was re-deployed to a desk job. Paragraphs 9 and 10 is a repetition of paras 6 and 7. Paragraph 10 states that internally, (I reckon) Air Namibia, a recommendation was made that a review board should be convened to evaluate Mndawe's performance in order to decide whether she should undergo further training or be dismissed. Paragraph 12 states that for unknown reasons, the Board was not held (constituted), but senior management of Air Namibia approached the DCA to seek an explanation why Mndawe's validation certificate was withdrawn. Paragraph 13 states '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.'

[49] In these paragraphs the corruption of the respondent would have been understood to be seriously aggravated in that the respondent used or attempted to have used his position to obtain a licence for a person who has no licence to fly and/or, whose flying skills are sub-standard or non-existent.

[50] I will find no reason to disturb the finding of the court below that the article was defamatory of the respondent.

Did the appellants rebut the presumption of either wrongfulness or intent

[51] The court below found that the sting of the defamation, in the context of the article as a whole, is that Brammer resigned from Air Namibia, because the

respondent had applied persistent pressure on him to falsify information, thereby to deceive the DCA into believing that Mndawe, an incompetent, unqualified and unlicensed pilot had been retested in March 2010 as instructed by the DCA, in order that the DCA would reissue her with permission to fly Air Namibia B1900 aeroplanes in Namibia.

[52] The assertion in the very first paragraph that suggests that Brammer was an employee or resigned from the National Airline is not true. The evidence led was that Brammer is an independent flight instructor who was accredited to the DCA contracted with Air Namibia. He gave 30 days notice terminating his contract with Air Namibia. Also untruthful in that paragraph is the assertion that the South African pilot was to get a local flying licence. Mndawe received a validation certificate which was withdrawn when complaints were received about her flying skills. Paragraph 3 is not true – Air Namibia did not apply for a validation certificate for Mndawe. The evidence is that the individual pilot who sought a validation certificate applied for the certificate. The assertion in paragraph 6 that Mndawe did not have a South African pilot's licence is not true also, she had one and Van Niekerk testified that he was not the source of that information. Paragraph 8 was stale information, ie. Mndawe eventually acquired the licence to fly. Paragraph 9 like 6 is not true, the evidence was that the validation certificate was withdrawn, because Brammer used a wrong form instead of the DCA form when he retested Mndawe and/or that the validation certificate was withdrawn when complaints were received about Mndawe's flying skills. Paragraphs 11, 12 and 13 are not true. The respondent testified that there was no decision taken that Mndawe should undergo further training as at the time she was still on line training. The respondent and

one captain Ekandjo approached Van Niekerk to seek clarification about the status of Mndawe's validation certificate. The respondent testified that they were informed, just like the letter written to Mndawe, about what the validation certificate had stated, that they are required to submit the 'correct form' (the form). Van Niekerk denied this version but in cross-examination by counsel for the respondent on that very same issue the following transpired:

'Okay page 12 I want to refer you to the one down the e-mail that is written by Mr Ralph Brammer. It says "Following your e-mail below and two phone conversations today one with yourself and the second with DCA I would like to inform you that I would not be able to complete the form as you requested. Mr Van Niekerk, DCA, who has been copied by you on the previous e-mail was well aware of the situation and immediately insisted that Air Namibia had already been advised that a re-test will be required. Not during March, no not March, during January, February and March when the validation of Mndawe was cancelled did you speak to Mr Nyandoro also to clarify? . . . Yes he came to my office one day as a raging bull. He was complaining about this. 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 Mr 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 you fill up the correct form. In other words he 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 you did not say this lady need further training. Why did you shy away from saying that? --- Y 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 he 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 Bordman who had examined him and the pilot involved telling them exactly what had to be done.

You know what is clear now no wonder, no wonder when he testified and said he came to you to seek clarification and the only thing you said is all what is required is the information, the correct form to be completed and signed not a retest.'

[53] What is clear from this confrontation in cross-examination is that Van Niekerk never told the respondent directly that Mndawe was required to undergo a retest. Paragraph 14, the second sentence which starts with the word "to transfer" to the end of the sentence is not true as the check 6 OPC form and the DCA form were related, except that the DCA form has more requirements than the other form and some requirements would have been left blank if information was transposed from check 6 OPC form to the DCA form. Paragraph 15 is also not correct, as Brammer was not told to copy the initial recommendations for Mndawe's employment onto the DCA form. The sentence in para 18 that Brammer could not

be reached for comment is not true as the third appellant contacted Brammer, but he was unwilling to be involved.

[54] The article is littered with inaccuracies, some not material to the sting of the defamation. The sting of the defamatory article hinges on the first two paragraphs, which raises the question whether the respondent put pressure on Brammer to falsify any information on the DCA form to get Mndawe a South African citizen to fly Air Namibia's domestic Beech Craft 1900 fleet. The court below found that the transposal of information from the OPC form to the DCA form did not amount to falsification. Counsel for the appellants argues that the fact that the two forms of examination (check 6 OPC form and the Practical Flying Test or DCA form) do not equate, is central to the allegation made in the article that in effect to require of the examiner, Brammer, to transpose information from the OPC form onto the practical flight test form, amounts to a falsification of information. I do not agree, the court below was correct to hold that the transposition of information from the one document to the other did not amount to falsification. In the email correspondences between the respondent and Brammer, the respondent was conveying to Brammer what was contained in the letter written to Mndawe withdrawing the validation certificate and what Van Niekerk personally informed him. When Brammer would not heed to his requests, in their further communications, he copied in Van Niekerk and Captain Ekandjo. He could not have copied in Van Niekerk, if he wanted Brammer to falsify any information. The evidence is very clear that Van Niekerk did not inform the respondent that Mndawe needed a retest. That information was given to the two examiners, namely, Brammer and Boardman. Argument is made that the transposition of the

information to the practical flying test form would have created the impression that Mndawe was examined on the practical flying test form and that the transposition of information to the practical flying test form would have created a false impression that the examination and the completion of the form occurred in February 2010 and yet they were done on 19 September 2009. This argument has no merit and it ignores the respondent's email marked # 3 where he said, ' . . . 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. Let's respect their expertise and competency and stick to our duties and responsibilities.'

[55] What the respondent was conveying to Brammer, not knowing that Brammer was informed that Mndawe has to be retested, is that, they do as Van Niekerk has said, i.e. submit the correct form and whatever problems Brammer had regarding the transposition of information to the DCA, would be the regulator's problem. Counsel argued that on the issue of the two forms and the material differences between them, respondent was a poor witness when he was cross-examined on them and that the court erred when it preferred the evidence of the respondent over that of Van Niekerk. Counsel further submitted that the statement that respondent required Brammer to falsify information on the DCA form is the truth, or at least substantially the truth. Whether there was a marked difference in the two forms, the evidence is that the respondent requested Brammer to transpose information from the OPC form, word for word, to the DCA form. What he did not ask him is to add or subtract from that information and on that score the court was correct to prefer the respondent's word to that of Van Niekerk.

[56] What remains to be determined is whether the respondent's repeated requests to transpose the information did amount to pressure or persistent pressure. The court below held that the requests did not. I agree. Counsel argued that the court below erred in that regard and submitted that the respondent's communication to Brammer to the effect that, 'Let's respect their expertise and competency and stick to our duties and responsibilities' is a veiled threat. I have already stated what the respondent intended to convey in the email. Counsel made reference to the respondent's evidence when he visited Van Niekerk at the DCA to enquire on the status of Mndawe's validation certificate and at that meeting, Van Niekerk had expressly advised him that Mndawe was not required to undertake a practical flight test, but he argued that should the respondent have been truthful in his evidence, one would have expected that Van Niekerk's assurance would have been the strongest argument he should have made to Brammer and that this is damning evidence of the falsity of the respondent's evidence or his evidence is false in that regard. It is difficult to fathom how the respondent lied on this point, as Van Niekerk himself admitted that he did not inform the respondent directly that Mndawe needed a retest. In cross-examination, in the extract I referred to in para [52] above, Van Niekerk testified that 'I told him fill out the correct form' The respondent did not directly inform Brammer that Van Niekerk only requires the submission of the correct form, but in the email marked # 3 he says it in many words and that is why he copied in Van Niekerk. In the email marked # 6, Brammer indicated that Van Niekerk was aware that a retest of Mndawe would be required and that Air Namibia was informed and gave 30 days notice to terminate his contract with Air Namibia. In response, amongst other things the respondent stated, 'I tried to make the matter as transparent as possible

by keeping all stakeholders copied in on all communication This matter has also given us an insight in the kind of people we are dealing with.’ In the last sentence he was referring to Van Niekerk, who on the validation certificate of Mndawe gave conflicting information. It was common cause that Air Namibia was not informed about Mndawe’s retest. Van Niekerk testified that he deals with individual pilots and not with Air Namibia.

[57] Counsel for the appellants relies on the respondent’s email marked # 6 for a submission that this is where the request to falsify comes in. In that communication, the respondent amongst other things said, ‘on the check 6 form your recommendations were “recommended for line training” which implies that you were satisfied with the standard, the standard which equals that required for a practical flight test. . . ‘. It is very costly for Air Namibia to repeat the test that was conducted satisfactorily and which the authorities are ready to recognise. . . .’ The argument has no merit, the respondent is telling Brammer on the word of Van Niekerk that the licence regulator is prepared to accept the test he conducted, he must just transpose the information to the DCA form. Van Niekerk in his testimony agreed that the recommendation for line training is equal to that required for a practical flight test and that it was killing two birds with one stone. He further went on to say that if it was not for the complaints against Mndawe of her flying abilities, he would have waited until after the expiry of six months when Mndawe’s validation certificate would have been renewed. The impression I get from the evidence, whether the information was on the OPC form or DCA form is that, it was insignificant. Van Niekerk testified that in some instances they got away with it.

[58] Counsel further relied on Brammer's email marked # 6 for the submission that Brammer was under pressure and the article correctly referred to the respondent's requests to transpose the information as pressure on Brammer to falsify information on the DCA form, in order to obtain validation for Mndawe to fly Beech Craft 1900 aircraft in Namibia and that paragraphs 1 and 2 of the article are the truth, at the very least, substantially the truth and that on that basis alone the appellants have established that they were justified in publishing the article. In *Modiri* at 379F, Brand JA said, 'If a defamatory statement is found to be substantially untrue, the law does not regard its publication as justified.' The article, as I have already stated is inundated with inaccuracies. Almost every paragraph, except for the reply of Namases, is inaccurate, therefore it is substantially untrue. Brammer is an independent flying instructor, who was accredited to the DCA and contracted with Air Namibia. Air Namibia or the respondent could not put pressure on him. The respondent could only request him, which was what the respondent did and nothing more. For the inaccuracies in the article, particularly that Brammer was employed by Air Namibia the assumption was made that Air Namibia and/or the respondent pressurised him to falsify information for a South African citizen to obtain a validation certificate when there is no evidence or basis to have made the allegations. The email communications between the respondent and Brammer are cordial, and professional, but the communication between the two was triggered by Van Niekerk, who gave conflicting information on the same subject of the validation certificate. Brammer's communication that 'the issue at hand (Mndawe's retest or transposition of information) has led to many unfair insinuations levelled at me and I believe that I

have no place in such a hostile environment'. The insinuations, Brammer having declined to be involved, and testify could have emanated from different angles not necessarily from the respondent, namely, Mndawe herself, Captain Ekandjo or other sympathetic black and white pilots to Mndawe. The evidence tends to show that the issue turned racial, blacks and whites. Van Niekerk does not seem to have liked the respondent, he amongst other things testified that when he approached him to seek clarification on Mndawe's validation certificate, ' . . . he came to my office. . . as a raging bull' (record p 738) 'Mr Nyandoro never ever he was always coming to me in a very deceiving manner . . . ' (record p 741)

[59] From the above, it is undoubtedly clear that the appellants failed to establish that the facts alleged in the article were true or substantially true, consequently the defence of truth in the public benefit fails. Given the fact that the article is substantially if not wholly untrue the defence of qualified privilege does not arise. The court below rejected that defence for the reason that there was no duty on the appellants to publish the allegations, because the material concerned was from an anonymous source and not tested or probed in any way by any independent source. Counsel submitted that both Lister and Van Niekerk testified that the irregularities in regard to issuing of commercial licences or validations is a matter of high public interest and the public had a right to be informed and the newspaper had the right and duty to inform the public and that the rights and duties of the newspaper to disseminate the information to the public arose from common law and Art 21(1)(a) of the Constitution. In *Borgin v De Villiers and another* 1980 (3) SA 556(A) at 577E-G, referring to this instance of qualified privilege, Corbett JA (as he then was) said:

‘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.)

[60] Applying these principles to the present case, I find no reason to fault the trial court for rejecting the defence. The information forming the subject matter of the article was amassed, except for Van Niekerk from anonymous sources, it could be unreliable, not surprising it is so littered with inaccuracies. The newspaper had no duty or legal moral obligation to publish the same. As it turned out in evidence, it is substantially bordering at wholly untrue. The respondent was not responsible for issuing pilots' licences, that was Van Niekerk and/or DCA's responsibility. From the evidence, the person who should have received the brunt of the newspaper is Van Niekerk and his department, who for flimsy reasons issued Mndawe's validation certificate erroneously. Van Niekerk testified that he deals with individual pilots and not with Air Namibia. The assertion that Air Namibia applied for Mndawe's validation certificate is false. False again is the assertion that Air Namibia was informed that Mndawe required a retest. Van

Niekerk admitted that he did not inform the respondent directly that Mndawe needed a retest. In fact he gave conflicting information on whether Mndawe required a retest. What he said in the letter to Mndawe he said he meant a retest, when the letter states that Mndawe should have submitted a correct form.

[61] The last of the appellants' defences is reasonable publication. In order to raise this defence, the appellants must establish that the publication was in the public interest; and that, even though they cannot prove the truth of the facts in the publication, it was nevertheless in the public interest to publish. See *Trustco* at 399D.

[62] The issue of irregularities in issuing pilots' licences is in the public interest. The issuance of licences in the aviation industry will always be an issue in the public interest. 'It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal-and inept administration . . .' See *Government of the Republic of South Africa v Sunday Times Newspaper and another* 1995 (2) SA 221(T) at 227I-228A.

[63] In the determination whether a journalist acted reasonably or not in publishing a particular article, codes of ethics provide a vital guidance to the courts. Lister testified that the ethos of the Namibian Newspaper was to report accurately and objectively in regard to matters of public interest. She also testified that the newspaper subscribes to the applicable journalism code of ethics committed to investigative journalism.

[64] 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. See *Trustco* at 399H. In the *Trustco* matter at 399I-400A-G O'Regan AJA referred to the Code of Ethics of the Society of Professional Journalists and said the following:

‘[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 forgiving manifest 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.’

[65] The appellants’ plea elaborate in sufficient detail the steps the third appellant took prior to publication of the article. The third appellant also testified and the salient features of her testimony is that she confirmed Lister’s evidence on the ethos of the newspaper and that she applied the governing principles of the newspaper when she wrote the article. She received a report that there were issues concerning a pilot in the employ of Air Namibia, who was a South African and her competence as a pilot. She followed various anonymous sources who gave her information that formed the content of her article. She contacted the South African Express to enquire on Mndawe’s employment experience with that company and she was informed that at one point she was grounded and given a

desk job. She contacted Brammer, who declined to be involved, but he confirmed his resignation. She contacted the DCA, in particular Van Niekerk who confirmed the information she received from some anonymous sources. She contacted the respondent who referred her to Namases. Namases advised her to put her questions in writing, which she did and she received a brief reply thereto. She was also provided with the email correspondences between the respondent and Brammer. She testified that she based the statements in the article about “pressure” and “persistent pressure” on what the anonymous sources and Van Niekerk told her. She also interpreted the email correspondences between the respondent and Brammer to mean that.

[66] Counsel for the appellants submitted that the third appellant was entitled to rely upon the information furnished by Van Niekerk who held (then) a director position in the DCA, particularly that he has technical knowledge in relation to licencing issues concerning pilots employed by Air Namibia and that third appellant was entirely justified and it was reasonable for her to conclude that the respondent was trying to force Brammer to transpose information from an incorrect form to the DCA form which was illegal to do so. That Air Namibia and/or the respondent were given the opportunity to respond to third appellant’s questions, but the respondent failed to use that opportunity and thus the publication of the statements concerning the respondent was reasonable.

[67] I have already alluded to the fact that the article is inundated with inaccuracies and that therefore the article is substantially, bordering on wholly untrue. In *Modiri* at 379F, Brand JA, after observing that ‘if a defamatory statement

is found to be substantially untrue, the law does not regard its publication as justified', he went on to say, 'publication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story.' The trial court found that the third appellant's attempts to contact and interview Brammer, approaching Van Niekerk of the DCA for comment, approaching the South African Express on Mndawe's pilot licence and Air Namibia was appropriate, but it found that the third appellant did not in all instances do what is reasonable to verify certain information to avoid errors in the article. I agree. Third appellant triggered the investigation, because she received a report about issues with Mndawe's flying skills but she failed to approach Mndawe to illicit information from her, particularly whether she had a pilot's licence. One of the complaints against her was that she had problems landing, which raises the issue how she obtained the South African pilot's license. It was imperative to contact her. One of the issues she received from her sources was that Mndawe's validation certificate was withdrawn, but failed to secure the letter written to her withdrawing the same and yet she spoke to Van Niekerk, the author of that letter. The sources informed third appellant that the respondent pressurised Brammer to falsify information on the DCA form, but the questions she directed to Namases was about Air Namibia bypassing procedures and regulations, which she never spelt out. The respondent was at all times under the impression that Brammer only needed to transpose information from the wrong form to the correct form. He could not have guessed what information the third appellant required.

[68] The questions directed to Namases are far divorced from the article produced. Third appellant had access to the email communications between

respondent and Brammer. The emails marked # 3 and # 5 from the respondent to Brammer were copied to Van Niekerk, that should have raised questions in the mind of the third appellant and enquire more on the emails from the respondent. It appears that she had all the information she needed for the article before she approached Air Namibia. As soon as she received the reply from Namases, she had the article published. It also does not appear that third appellant verified the information she received from the anonymous sources, who possibly could be serving a particular agenda, especially in this case where Mndawe is a foreigner. Van Niekerk in his testimony alluded to the fact that there were Namibians who had pilots' licences who were unemployed.

[69] On the totality of evidence it cannot be said that the publication of the article was under the circumstance reasonable. Worse still, after the publication when the correct information was placed before the third appellant by the respondent and Air Namibia, the appellants declined to retract or apologise for the article. The public, they so much wished to inform, was left with untrue allegations seven years later. The trial judge was correct when she remarked, 'I have the impression that by the time she [third appellant] contacted the plaintiff [respondent] she had already largely made up her mind that he [the respondent] was guilty of serious wrongdoing.' No doubt as the trial court stated, she acted unreasonably and negligently and I will find no reason to disturb the finding of the trial court. Clearly she fell short of the principles governing the Namibian Newspaper and generally the Code of Ethics adumbrated in the *Trustco* matter referred to in para [64] above.

Quantum of Damages

[70] It is a well settled general rule that the assessment of sentimental damages properly reside within the province of a trial court. An appellate court will only interfere 'when the trial court has misdirected itself in the sense that it has awarded high or low damages on the wrong principle or when in the opinion of the appellate court the award is so unreasonable as to be grossly out of proportion to the injury inflicted.' See *Dikoko v Mokhatla* 2006 (6) 235 (CC) at paras 93-95. See also *Neethling v Weekly Mail and others* 1995 (1) SA 292 (A) at 301H. The respondent cross appealed against the award of N\$80 000,00 seeking an increase to N\$150 000,00. The appellants seek the award to be reduced to N\$60 000,00 should the appeal fail.

[71] The trial court proceeded on this issue on the plaintiff's testimony that the article was devastating and that it caused him and his family emotional stress for a long time. Respondent stated that the article appeared online and it is read all over the world. He stated that he had 30 years experience then in the aviation industry, well-known in Namibia and the world beyond and he received emails from friends and acquaintances in the aviation industry who made enquiries about the allegations in the article. He flew the President and VIP's. In brief the trial court found that he had a good reputation as a pilot, well-known in the aviation circles. Given the wide circulation of the Namibian Newspaper, the court found that the respondent's personal and professional reputation was damaged. The trial court considered the allegations of dishonesty in a serious light and that the damage is inherently likely to have been significant and that respondent's career might very well be negatively affected. The court below also took into consideration the fact

that the appellants did not even rectify the inaccuracies in the article they admitted or at least publish the respondent's version. The trial court also took into consideration the awards made in other defamation cases. That court further stated that placing a monetary value on damages that has been caused to a person's reputation is always a difficult task, but taking into consideration the damaging effect the article, which was also published on the internet would have had on a reputable pilot the court awarded damages in the amount of N\$80 000,00 plus interest at the rate of 20 percent per annum from date of judgment until date of payment, plus costs of suit.

[72] The question which arises is whether the N\$80 000.00 under the circumstance is grossly disproportionate to the injury suffered as a result of the defamation. What is always material to an award is the extent to which the harm that was caused was mitigated by the defendant. See *Tsedu and others* at 379H. I have already stated that the third appellant and/or the editor were alerted to the inaccuracies in the article, they were called on to retract and/or apologise, but they chose not to do so. Monetary award for harm of the nature suffered by the respondent is not capable of being determined by any empirical measure. Awards made in other cases might provide a measure of guidance, but only in a generalised form. See *Tsedu and others* at 381D. The trial court considered awards made in other cases in this jurisdiction and found N\$80 000,00 to be appropriate under the circumstances.

[73] I find no reason to disturb that award. The reasons granting the award are sound, the award is consistent with other awards – it is not grossly

disproportionate to the injury suffered. That follows that the cross-appeal seeking to increase the award should also fail.

[74] The costs should follow the event. Although the cross-appeal fails, the issue did not take both counsel's time and therefore the respondent should be entitled to full costs. Mr Namandje of Namandje & Co assisted by Mr Amoomo of the same law firm appeared for the respondent in this court. While the dispute of defamation between the parties is a vexed one and continues to rumble on, the issues in this court are more defined and costs of one counsel should be appropriate.

[75] In the result I make the following order:

1. The appeal is dismissed.
2. The cross-appeal on quantum of damages is dismissed.
3. The appellants shall pay the costs of the respondent in this court such costs to include the costs of one counsel.

HOFF JA

CHOMBA AJA

APPEARANCES:

Appellant:

A W Corbett

Instructed by ENSafrica | Namibia

(Incorporated as LorentzAngula Inc.

Respondent:

S Namandje (with S P Kadhila
Amoomo)

Instructed by Sisa Namandje & Co.