

REPORTABLE

CASE NO: SA 35/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TANGENI AMUPADHI

First Appellant

FREE PRESS OF NAMIBIA (PTY) LTD

Second Appellant

and

FERDINAND VINCENT DU TOIT

Respondent

Coram: MAINGA JA, HOFF JA and SHONGWE AJA

Heard: 19 March 2021

Delivered: 02 August 2021

Summary: This is an appeal from an order of the court *a quo* granting an action for defamation respondent had instituted in that court.

During 2007, the respondent at the request of his then domestic worker, Ms Afrikaner, bought a house situated at Erf 3337, Tekoa Street, Katutura, Windhoek at a sale in execution on behalf of Ms Afrikaner for N\$33 000. The house was thereafter registered in the name of Ms Afrikaner. The said house was previously owned by Ms Gamxamus before the sale in execution and subsequent registration in the name of Ms Afrikaner. Ms Gamxamus had defaulted on municipal rates and taxes and the house fell to the hammer in execution. Besides the purchase price of N\$33 000, the respondent was required to pay rates and taxes outstanding on the house which brought his total expenditure to N\$83 213, 70. The respondent

and Ms Afrikaner agreed that she would refund all the expenses the respondent would incur in the purchase of the house. She would apply and obtain a bank loan once Ms Gamxamus had vacated the house. Ms Gamxamus continued to reside in the house and refused to vacate same. The initial attempt by respondent to evict her from the house failed. On 14 December 2012, Ms Afrikaner resigned from her employment as a domestic worker of the respondent. When she left her employment she informed the respondent that she was going to stay with her daughter. She further said that since it did not work out for her, the respondent can have the house back as he had paid for it. On the same day the two concluded a deed of donation. The respondent obtained a valuation of the house on 19 March 2013 for transfer duty purposes. Subsequent thereto, on 13 October 2013 the house was transferred in the name of the respondent. During 2016 the respondent obtained an eviction order against Ms Gamxamus and she agreed to vacate the house.

Determined to shed light upon what seemed to be a ghastly system, the Namibian Newspaper published an article on 12 July 2016 headed '**A DOMESTIC worker who was helped to buy a Katutura pensioner's house over a N\$33 000 debt in 2007, later donated it to her employer**'. On 15 July 2016, the Namibian Newspaper again published an article, this time an editorial headed 'Shylock Justice for the Greedy' authored by the first appellant who was then editor of the Namibian Newspaper based on the article of 12 July 2016. In summary, the editorial depicted the respondent as a greedy, morally corrupt person who profiteers from the vulnerable in society. As a result, the respondent instituted an action for defamation in the court *a quo*. In response thereto, the first appellant denied claims about his editorial being defamatory. The court *a quo* found in favour of the respondent holding that the editorial unfairly commented of the respondent depicting him as one of those professionals who exploited the poor and vulnerable members of the Namibian society in the housing market and is a dubious profiteering character. It further held that the comment was not protected under article 21(1)(a) of the Namibian Constitution as it was unbalanced regard had to article 8(1) and (2) of the Constitution. As a consequence, the court *a quo*

ordered a written apology and retraction to the respondent, payment of N\$100 000 jointly and severally to the respondent, interest thereon and costs of the suit.

It is against this background that the appellants now appeal to this court. The appellants in their oral argument abandoned their denials of the editorial article being defamatory of the respondent - they concede it was defamatory of the respondent but persist that the article was protected and lawful because it was an expression of opinion or comments on a matter of public interest. In essence therefore, the question on appeal is whether the statements complained of are protected by the defence of fair comment.

Held that the requirements of the defence of fair comment are that the statement(s) concerned must amount to comment (opinion); it must be fair; the statement of fact commented upon must be true; and the comment must refer to matters of public interest.

Held that criticism is protected even if they are extreme, unjust, unbalanced, exaggerated and prejudiced; so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true.

Held per Mainga JA:

That the appellants failed to meet the threshold for the defence of fair comment as some facts relied on were untrue and even if they were regarded as comments, such comments were unfair.

Mainga JA would have allowed the appeal partially to the extent that the High Court award of N\$100 000 be set aside and replaced with a proposed award of N\$60 000, order the apology as proposed by the High Court and costs.

Held per Shongwe AJA (Hoff JA concurring):

That the court *a quo* misdirected itself in specifically considering the nature and ambit of the defence of fair comment.

That the court *a quo* wrongly rejected the first appellant's reliance on the underlying facts to justify his opinion.

That the court *a quo* erred in holding that the said opinion was not fair comment based on true facts or substantially true facts stated in the said editorial.

That the appellants were exercising their right of freedom of speech and expression, including the freedom of the media protected by article 21(1)(a) of the Constitution.

That the court *a quo* erred in not upholding the defence of fair comment.

The majority concluded that the appeal succeeds and the action is dismissed with costs.

APPEAL JUDGMENT

MAINGA JA:

Introduction

[1] This is an appeal from an order of the High Court (Main Division) upholding an action for defamation respondent had instituted in that court. My brother Shongwe AJA (Hoff JA concurring) upholds the fair comment defense in relation to the whole statement *infra* the subject matter of this appeal. He holds that what is stated in the editorial are the true facts and a comment or opinion of the appellants, that all the facts relied on by the appellants are true or substantially

true, fair and without malice, no twisting of words facts, or fabrication thereof. I irrespectfully disagree.

[2] On 15 July 2016, The Namibian Newspaper owned, published and distributed by the second appellant published an editorial article headed 'Shylock Justice for the Greedy' authored by the first appellant who was then editor of The Namibian Newspaper.

[3] The article as a whole reads as follows:

'A STORY in The Namibian this week (Tuesday, 12 July 2016) had us reaching for the bookshelf, dusting off "The Merchant of Venice", William Shakespeare's masterpiece.

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

The story with the headline "Worker donates house to boss" is one that defies logic, but perfectly fits the expression that "truth can be stranger than fiction." In this instance, domestic worker Eli Afrikaner "donated" her Katutura house to her employer, a lawyer by the name Ferdinand Vincent du Toit.

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

But the poorer owners end up on the streets.

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

The house belonged to Rebekka Gamxamus, who is now 63 years old. She put up a fight, but was finally evicted this year.

Du Toit claims Afrikaner had to donate the house to him after she in turn failed to honour her debt to him.

Du Toit's story is perhaps *not as dubious* as that of Sanna Dukeleni, who lost her house in Aimablaagte, Mariental, in early 2004, because she failed to pay a butchery bill of N\$168.

The law firm Garbers and Associates got a default judgment against Dukeleni. Garbers allegedly sold Dukeleni's house on auction for N\$1 800 to one of his employees, Melanie Bamberger, who quickly sold it on for N\$25 000.

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

In the first half of 2012, Ombudsman John Walters took an unprecedented step that forced a change of court rules, by which the registrar of the High Court approved so-called judgements to auction people's homes without arbitration.

The courts obliged. But a lot more should have been done by lawmakers, politicians in government and institutions such as the Law Reform Commission.

Even hardcore capitalist countries have laws that make it difficult to seize the roof over people's heads and then simply dump them onto the streets. Why is it easy in Namibia, where stricter rules are needed due to poor functional literacy and high unemployment?

In "The Merchant of Venice", Shylock (the lender) got the desperate Antonio to sign an agreement that he would pay with a pound of his flesh if he defaulted on his loan of 3 000 ducats.

Antonio failed to pay on time. Shylock refused to accept any late payment, though he was offered two or three times more than the original amount. The court of the Duke of Venice found no way to nullify the contract and save Antonio's flesh.

In the nick of time, a saviour arrived in the form of a "doctor of law", who poked holes in the agreement, such that Shylock must not spill a drop of Antonio's blood because the contract spoke only of "a pound of flesh".

After 26 years of independence, our government must not hope for miracles. Nor should the poor be left hoping for a Superman or Spiderman-type rescue in the nick of time, similar to the kind-hearted act of President Hage Geingob and his business partner Jack Huang, who built a house for a Katutura family which was evicted from their own and ended up living with the dead in a cemetery.

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

The state can act immediately against the unbridled greed by, for example, expropriating those cheaply acquired houses and handing them back to the rightful owners.

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

[4] The respondent had more specifically relied on the italicised statements and the context/tone of the article as a whole to allege wrongfulness and defamatory of him in that the article or the italicised statements relied on were intended and understood to mean that respondent is –

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

- 9.2 profiteering from the poor and vulnerable in society;
- 9.3 a morally corrupt person alternatively a person of low morals;
- 9.4 a dubious person with poor morals if any;
- 9.5 a person without proper moral judgement or fibre;
- 9.6 unable to conduct his practice in an independent and uncompromised manner; and
- 9.7 a dishonest person.'

[5] The first appellant admits the editorial of 15 July 2016 but denies that the said article was without any of the words or the italicised statements. The first appellant further denied defaming the respondent and in amplification stated that:

- '5.1 The words of the article and its context as a whole, are not wrongful and defamatory of the Plaintiff.
 - 5.2 The article was not intended nor could it be understood by the readers of the article to mean that the Plaintiff is of any as alleged by the Plaintiff.
6. It is further pleaded that the article, being the weekly editorial column where the Editor (i.e. the First Defendant) and the senior editorial staff express their opinion on matters of public interest, and:
- 6.1 was a fair comment or opinion, which comment or opinion was based on facts, which facts are true and were stated in the said editorial article;
 - 6.2 the facts on which the opinion or comment were based, were truly stated in the said editorial article;

- 6.3 the comment or opinion was fair and reasonable in that it was relevant to the facts involved and on which it was based, and it was a honest and *bona fide* comment or opinion of the First Defendant;
- 6.4 the comment or opinion expressed in the editorial article concerned matters of public interest, in particular the issue of poor people and access to affordable housing, the wealthy and wealthier members, often professionals who are expected to be of assistance to the poor, uneducated or less educated members of the society, accessing housing traditionally meant for the poor – often for speculation for profit, and not for shelter – over the poor members of the society, and the desperate shortage of adequate and affordable [sic] housing in Namibia, which matters and issues are continuously and pertinently debated in public;
- 6.5 the comment or opinion was conducted in an exercise of the Defendants' rights to freedom of speech and expression, including the freedom of the media, and therefore protected by Article 21(1) (a) of the Namibian Constitution.
7. The editorial article was therefore not published in any wrongful or unlawful manner.'

The first appellant further averred that respondent's reputation was not damaged and did not suffer any damages.

[6] The defence is that of fair comment.

[7] The High Court found in favour of the respondent holding that the editorial unfairly commented of, and concerning, the respondent, that the respondent was one of those professionals who exploited the poor and vulnerable members of the

Namibian society in the housing market, and is a dubious profiteering character. Therefore the comment was defamatory of the respondent, unreasonable and irresponsible. That court further held that the comment was not protected under article 21(1)(a) of the Namibian Constitution as it was unbalanced, regard had to article 8(1) and (2) of the Constitution. It further held that reasonable readers require and expect justifiable publications and opinions or well researched and well-founded responsible endeavours aimed at providing contextually accurate facts on which the opinion is founded. As a consequence, the High Court ordered a written apology and retraction to the respondent, payment of N\$100 000 jointly and severally to the respondent, interest thereon and costs of the suit.

[8] The appellants appeal against that order and the whole of the judgment.

[9] In their heads of argument, after an analysis of the facts relied on for the comment or opinion, the appellants concede that 'none of these facts is to suggest that Mr du Toit did not act entirely lawfully' but contend that 'that too, however, misses the fundamental point about fair comment.' It was open to Mr Amupadhi, so it was argued, as it was to any citizen, to be critical of a system (from which Mr du Toit benefitted) in terms of which people were evicted from their houses for relatively insignificant debts and that Mr Amupadhi was perfectly entitled to his opinion that the circumstances surrounding the donation from Ms Afrikaner to Mr du Toit were indeed dubious.

[10] The appellants also argue that a conspicuous feature of the High Court's judgment is the absence of any consideration of the nature and ambit of the fair

comment defence. Except mention of the availability of the defence and need for the facts on which the comment is based, to be substantially true, there was simply no discussion of the scope the law affords to comment or opinion which, on the authorities, maybe prejudiced, exaggerated or wrongheaded.

[11] It is further argued that the court *a quo* was wrong when it rejected Mr Amupadhi's reliance on the two categories of facts to justify his opinion, the first group being the facts concerning the sale and purchase of the house from Ms Gamxamus, the transfer to Ms Afrikaner and the donation back to Mr du Toit; which were established and substantially true. The second category were facts concerning the plight of poor people generally who had lost their homes for their inability to pay often trifling debts.

[12] It was further argued that the court *a quo* did not make a distinction at all of the two categories of facts, but appeared to have dismissed the defence for failure to substantiate the second category. Reference was made to para 58¹ of the court *a quo*'s judgment and submitted that that approach was wrong in law. It is further argued that implicit in the court *a quo*'s findings was that the first appellant should have led first hand evidence from Ms Dukeleni, Ms Gamxamus and her son, the messenger of court, the Ombudsman and the chair of the National Council, which insistence would eviscerate the scope for fair comment. Fortunately that is not the law for the following reasons. First, although the instances which the court expected the first appellant to lead first hand evidence

¹ 'While accepting that affordable housing for the poor is in the public interest, this court cannot accept and condone contextually wrong comparisons by an editor of a newspaper as responsible and reasonable comment when it is based on unverified hearsay information, gleaned from another newspaper article, without any reasonable attempt of verification on the material available with the subject of reportage. Repetition does not rectify contextually wrong facts.'

on were objected to, counsel for the respondent during cross-examination of the first appellant, ultimately accepted that the public was very much aware of the said instances and that the law does not demand proof of such matters as the court is entitled to have regard to facts, even if not stated in the article in question, but which form 'part of the recent history of the country'. On this point, counsel relies on the South African case of *Johnson v Beckett & another*.² Secondly, the statements concerning the plight of poor people who had lost their homes for the inability to pay often trifling debts are not alleged to be defamatory of the respondent, they merely explain first appellant's ongoing concern with the plight of the poor. Thirdly, the yardstick in question is one of reasonableness, as the court *a quo* observed at para 24 of its judgment by making reference to this court's judgment in *Trustco Group International v Shikongo*.³ Fourthly, the potential abuse of process involved in sales in execution has received recognition by this court.

[13] It was argued on behalf of the respondent that the article was intended to expose and show the respondent as a Shylock and a person who exploits the poor for his own benefit and submits that a simple reading of the editorial evidences its defamatory nature of the respondent.

² 1992 (1) SA 762(A) at 780E-F where Harms AJA said: 'The matter was once again raised by Innes CJ in *Crawford v Albu* (*supra*) where he stated, as set out above, that the defence of fair comment is only available if it is ' . . . based upon facts expressly stated or clearly indicated This statement was, probably, in its context, *obiter*, but it nevertheless is of strong persuasive character. If regard is had to the rest of the judgment one notices that the learned Chief Justice had regard to facts which were not stated in the offending speech of the defendant but which were part of the recent history of the country (*per* Solomon JA at 124) and in the common knowledge of the author and addressee (*per* De Villiers AJA at 137).'

³ 2010(2) NR 377 (SC) at 390B-C. ' . . . to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed This . . . may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.'

[14] Thus the question for determination before us is whether the statements complained of are protected by the defence of fair comment.

[15] The facts said to have been relied on are in this form: During 2007 the respondent at the request of his then domestic worker Ms Afrikaner bought a house situated at Erf 3337 Tekoa Street, Katutura, Windhoek at a sale in execution on behalf of Ms Afrikaner on 8 March 2007 for N\$33 000. The house was thereafter registered in the name of Ms Afrikaner. The said house was owned by Ms Gamxamus previously before the sale in execution and subsequent registration in the name of Ms Afrikaner. Ms Gamxamus had defaulted on municipal rates and taxes and the house fell to the hammer in execution. Besides the purchase price of N\$33 000, the respondent was required to pay rates and taxes outstanding on the house which brought his total expenditure to N\$83 213, 70. The respondent and Ms Afrikaner agreed that Ms Afrikaner would refund all the expenses the respondent would incur in the purchase of the house. She would apply and obtain a bank loan once Ms Gamxamus had vacated the house. Ms Gamxamus continued to reside in the house and refused to vacate same. The initial attempt by respondent to evict her from the house failed.

[16] On 14 December 2012 Ms Afrikaner resigned from her employment as a domestic worker of the respondent. In the letter registering her resignation she graciously and very kindly thanked the respondent for the 12 years the respondent and his family's trust in her to raise their children. I must pause here to say, up to that moment, more than four years since the house was purchased for her in 2007 she had not taken occupation of same as the previous owner refused to vacate the

house. When she left her employment she informed the respondent that she was going to stay with her daughter. She further said that since it did not work out for her, the respondent can have the house back as he had paid for it. On the same day the two concluded a deed of donation. The respondent obtained a valuation of the house on 19 March 2013 for transfer duty purposes. Subsequent on 13 October 2013 the house was transferred in the name of the respondent. During 2016 the respondent obtained an eviction order against Ms Gamxamus and she agreed to vacate the house. The deed of donation is in this form:-

'DEED OF DONATION IN RESPECT OF FIXED PROPERTY

MEMORANDUM OF AGREEMENT made and entered into by and between:

ELI AFRIKANER
BORN 15 AUGUST 1963
Unmarried

(hereinafter referred to as the DONOR)
ON THE ONE SIDE

and **FERDINAND VINCENT DU TOIT**
ID NO 610612 0101096

(hereinafter referred to as the DONEE)

ON THE OTHER SIDE

WHEREAS the DONOR is willing to donate the hereinaftermentioned property to the DONEE, subject to the hereinaftermentioned terms and conditions;

AND WHEREAS THE DONEE has agreed to accept the said donation subject to the said terms and conditions;

NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:

1. DONATION

The DONOR hereby irrevocable donates as a donation inter vivos to the DONEE all the DONOR'S right, title and interest in and to the hereinafter mentioned fixed property, namely:

CERTAIN Remainder of Erf no 3337 Katutura Ext 7

SITUATE in the Municipality of Windhoek

MEASURING 255 square metres

HELD by the DONOR by virtue of Deed of Transfer No T 3898 /
2011

2. TRANSFER

The DONOR hereby undertakes, to take all necessary steps and to complete all the necessary documents in order to effect transfer of the said property in the name of the DONEE. The DONEE shall pay all costs incidental to this transfer.

3. ACCEPTANCE

The DONEE hereby accepts the aforesaid donation inter vivos, subject to conditions in the title deed and the lifelong usufruct in favor of the DONOR.

4. CONVEYANCERS

The Conveyancers appointed by the DONOR and DONEE shall be DU TOIT ASSOCIATES, WINDHOEK

5. AMENDMENTS

No alteration, cancellation, variations, addition or amendment hereto shall be of any force and effect, unless it is reduced in writing and signed by both parties.

SIGNED AT **Windhoek** on this **14** day of **December 2012.**

AS WITNESSES:

- | | |
|-----------------------|--------------------|
| 1. _____ Signed _____ | _____ Signed _____ |
| 2. _____ Signed _____ | DONOR |

SIGNED at **Windhoek** on this **14** day of **December 2012.**

- | | |
|-----------------------|--------------------|
| 1. _____ Signed _____ | _____ Signed _____ |
| 2. _____ Signed _____ | DONEE |

[17] The appellants in their oral argument abandoned their denials of the editorial article being defamatory of the respondent, they concede it was defamatory of the respondent but persist that the article was protected and lawful because it was an expression of opinion or comment on a matter of public interest.

[18] The essential elements of the defence of fair comment were first considered by Innes CJ in *Crawford v Albu* and are set out in this form:

'Inasmuch as it is the expression of opinion only which is safeguarded, it follows that the operation of the doctrine must be confined to comment; it cannot protect mere allegations of fact. It is possible, however, for criticism to express itself in the form of an assertion of fact deduced from other clearly indicated facts. In such cases it will still be regarded as comment for the purposes of this defence. The operation of the doctrine will not be ousted by the outward guise of the criticism Then the superstructure of comment must rest upon a firm foundation, and it must be clearly distinguishable from that foundation. It must relate to a matter of public interest, and it must be based upon facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true. And those to whom the criticism is addressed must be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact. Further, the comment, even if clearly expressed as such and based upon true facts, must be "fair" in the sense that it does not exceed certain limits.¹⁴

[19] In other words, the expression of comment even when so found, it must be fair. The court in *Crawford* accepted that an expression of comment is fair if it embraces honesty and relevancy and without malice.⁵ Keeping pace with the English Courts in extending the doctrine of fair comment, Innes CJ stated, 'so that I think we should also now laydown the rule that the defence of fair comment will cover imputations as to motive, if such imputations are reasonable inferences from the facts truly stated.'⁶ Thus the defence of fair comment requires the defendant to justify the facts, but he need not justify the comment; it is sufficient if he satisfies the court that it is fair.⁷

⁴ 1917 AD at 114-115.

⁵ *Id* at 115 (per Innes CJ), 133 (per Solomon JA) and 137 (per De Villiers AJA).

⁶ *Id* at 117.

⁷ *Id*.

[20] The requirements of the defence of fair comment as distilled from case law are the following: (i) the statement concerned must amount to comment (opinion); (ii) it must be fair; (iii) the statement of fact commented upon must be true; (iv) the comment must refer to matters of public interest.

[21] Cameron J in *The Citizen 1978 (Pty) Ltd & others v McBride*⁸ (*Johnstone & others, amici curiae*) states that at common law it was rightly held that 'fairness' in fair comment must draw on the general legal criterion of reasonableness.⁹ He went on to say in a constitutional state, comment on matters of public interest receives protection under the guarantee of freedom of expression.¹⁰ Hence the values and norms of the Constitution determine the boundaries of what is protected.¹¹

[22] But that guarantee of freedom of expression is just as important as human dignity.¹² It is not a pre-eminent freedom ranking above all others.¹³ It cannot be said automatically to trump the right to human dignity and it does not enjoy superior status in our law.¹⁴ This is also true of human dignity and equality.¹⁵ The right to freedom of expression must be balanced against the individual's right to

⁸ 2011 (4) SA 191 (CC).

⁹ *Ibid*, para 84.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *S v Mamabolo (E TV & others Intervening)* 2001 (3) SA 409 (CC) para 41. See also *Free Press of Namibia (PTY) v Nyandoro* 2018 (2) NR 305 (SC) paras 37, 38 and 39. See also *McBride* in 8 above para 148.

¹³ *Ibid* para 41.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

human dignity.¹⁶ Human dignity, equality and freedom of expression are conjoined, reciprocal and covalent values to be foundational to the Republic.¹⁷

[23] The first appellant in his witness statement which was his evidence in chief relies on three items on the facts allegedly relied on, namely, the deed of donation between Ms Afrikaner and the respondent, which he said, 'no doubt the purported donation was dubious, the usufruct provision in the donation agreement, which when he perused the title deed and other documents, the usufruct was not registered against the title deed, and the value of the house of N\$220 000 which the respondent received on 1 October 2013 when the house was transferred in his name, making a profit of N\$137 000 almost twice the original loan amount of N\$83 000. The issue of the usufruct the first appellant found very strange and that it underpinned the very issue that the editorial article sought to highlight the dispossession of homes of the poor people in favour of wealthy or wealthier people, very often professionals, who supposed to assist the poor and unsophisticated members of society. That Ms Afrikaner was forced by circumstances to forfeit her property. Her fate was likened to that of Ms Sanna Dukeleni who in 2004 lost a house after she failed to repay a debt of N\$168. The law firm Garbers & Associates auctioned the house for N\$1800 to one of their employees at the law firm, who quickly resold for N\$25 000 making a massive profit. Ms Gamxamus is then brought in having lost the house which was purchased for Ms Afrikaner for a debt of N\$33 000. The first appellant then goes on to say the three persons and many others (not revealed) paid with a pound of flesh for their debts and the character 'Antonio' in the Merchant of Venice play found application.

¹⁶ *McBride* in 8 above, para 240.

¹⁷ *Mamabolo* in 12 above para 41.

[24] In as much as first appellant was entitled to question the dubious donation and the lifelong usufruct contained in the donation agreement, the issues first appellant relied on for his opinion, in my opinion he could have easily verify the same with the respondent and/or Ms Afrikaner which the first appellant omitted to do. First appellant on his testimony appears to say he was not obliged to do so or not bound by journalism ethics because it was a comment/opinion. On the value of N\$220 000 the article of 12 July 2016 had it wrong. The municipal value on 8 March 2007 was N\$37 000. Ms Gamxamus ceased to be the owner of the house as of that date or subsequent once registered in the name of Ms Afrikaner. To have reported that 'the pensioner Rebekka Gamxamus is now living on a farm after the municipality auctioned her N\$220 000 house off for N\$33 000 to recover a debt arising from unpaid rates since 1994 the underlined words at least are false and irresponsible reporting. First appellant concluded that the respondent got away with a profit of N\$137 000 almost twice the original loan amount of N\$83 000. But the truth is that during December 2012 when Ms Afrikaner retired/resigned her job the known value was the municipal value of N\$37 000, or alternatively given the period that lapsed between 2007 when the house was purchased and December 2012 when Ms Afrikaner retired, no value was attached to the house or it was unknown. The value of N\$220 000 came into being during October 2013 when the house was registered in the name of the respondent.

[25] The article of 12 July 2016 which the first respondent relied on, in part reads:

‘A DOMESTIC worker who was helped to buy a Katutura pensioner’s house over a N\$33 000 debt in 2007, later donated it to her employer.

The pensioner, Rebekka Gamxamus, is now living on a farm after the municipality auctioned her N\$220 000 house off for N\$33 000 to recover a debt arising from unpaid rates since 1994.

The house was bought by Ferdinand Vincent du Toit on 8 March 2007 on behalf of Eli Afrikaner, who was his domestic worker at the time.

Afrikaner then donated the house to Du Toit in December 2014, according to documents at the deeds office.

Du Toit, a partner in the law firm Du Toit Associates, admits buying the house for Afrikaner, and getting it back as a donation.

He however, said they agreed with Afrikaner that he buys her the house, and she would pay him back for it.

“She was going to apply for a loan, and then pay me back the money I spent, and just continue paying off the rest of the bond with the bank,” Du Toit told The Namibian.

He also said the house had to be donated to him because they could not evict Gamxamus, and because Afrikaner could not afford to pay rent as well as pay back the loan.’

[26] But the first appellant held the opinion that Ms Afrikaner was, ‘from the versions he [respondent] gave us as the Namibian and even subsequently through explanations here [in court] is very clear to me at least to my mind that Afrikaner was forced by circumstances of having a debt to him [respondent] to donate the house.’

[27] This opinion would be contrary to the facts above. The version the respondent told the reporter or author of the article of 12 July 2016 was that, Ms Afrikaner said it did not work out for her, respondent can keep the house, after all he paid for it and that she would not afford to pay rent for the house and the loan. In other words, even where she could afford the loan, she herself told the respondent that she could not afford the rates and taxes. To have doubted respondent's version and make assumptions because that's what happened here, or twisted those hard facts to say respondent was greedy, of questionable morals, profiting from the poor, a shylock who was gunning for a pound of flesh from Ms Afrikaner was unreasonable and unfair. From the facts, respondent was intent on assisting Ms Afrikaner to acquire and own a house of her own. Assisting the vulnerable of our society does not manifest in the only form advocated for by the first appellant, but in different forms depending on the means of the giving hand. To propagate subjective moral values/standards which do not suite the life and style of others and cloth them as fair comment is unfair. In fact in cross-examination first appellant conceded that the shylock part of his article, 'I would agree with you that yes that part would render the article not correct.' The first appellant further conceded that there is no obligation on any person to help the other person and that it was his view only but he thought there was a general expectation hence his use of the words 'greedy', 'unkind' etc. In as much as the article of 12 July 2016 is headed 'A domestic worker who was helped to buy a Katutura pensioner's house over a N\$33 000 debt in 2007, later donated it to her employer', it appears that the greater content of that article was about the eviction of Ms Gamxamus. First appellant conceded that, 'so in essence it was the trigger that got us to the story.' The eviction of Ms Gamxamus is irrelevant to the

circumstances of the respondent and Ms Afrikaner. The respondent in purchasing Ms Gamxamus' house at an auction, participated in a legitimate legal process of our laws and did not deserve to be lynched or named and shamed or insulted for his participation.

[28] It was argued that it was open to the first appellant to be critical of a system (from which respondent benefitted) in terms of which people were evicted from their houses for relatively insignificant debts and that, moreover first appellant was perfectly entitled to his opinion that the circumstances surrounding the donation from Ms Afrikaner to respondent were indeed dubious.

[29] In the debate of the vulnerable and the poor, first appellant's criticism should have been directed to the legal system which allows so important a property like a house to be sold in execution. That was open to him but what is impermissible is to turn that agenda, vitriolically on the participants who participated legally, in that legal system, to borrow the words of Mogoeng J, as he then was, first appellant could not 'insult, demonise and run down the dignity'¹⁸ of the respondent on the facts of this case. Respondent in his witness statement states that in the matter of Ms Sanna Dukeleni, the lawyers involved admitted to The Namibian that it was morally wrong to sell the house for a debt of N\$168; but they were quick to point that they were acting on instructions of their client who had paid for their services. Indeed so, and nothing wrong with that assertion. In this case, in appellant's heads of argument, after the analysis of the facts relied on, they state that 'none of this is to suggest that Mr du Toit did not act entirely

¹⁸ Footnote 8 above para 218.

lawfully', but adds that, 'that, too misses the fundamental point about fair comment. The authorities has it that criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true.¹⁹ We know now that first appellant failed to verify the donation he termed dubious, and the usufruct of the property Ms Afrikaner should have enjoyed. He decided he was not obliged to, or not bound by the ethics as he was rendering an opinion. The profit of N\$137 000 respondent must have scooped from the house of Ms Afrikaner was calculated ten months after the donation agreement, when in the true sense during December 2012 when Ms Afrikaner made the donation no value was attached to the house, alternatively the known value was that determined by the Windhoek Municipality at N\$37 000. That being the case, the issues purportedly relied on were unverified or incorrect and cannot be protected under the rubric of fair comment.

[30] First appellant authored related articles on 23 May 2007 headed, 'Destitute Pensioners Lose Houses' and 2 March 2012 headed, 'A Country of the Rich and the Elite.' In the article of 23 May 2007 he quotes at length the then Councilor of the Khomasdal North Constituency who addressed a meeting in her constituency stating that the poor elderly are likely to be thrown onto the streets for failure to pay municipal bills and that there was an urgent need to repeal the law (Magistrates' Court Act 32 of 1944) that provided for the sale of houses in execution, as it was in conflict with the constitution and violates the basic human right to shelter. In the article of 2 March 2012, first appellant reported on the cases

¹⁹ *Ibid*, para 83.

of Ms Sanna Dukeleni who lost her house for a debt of N\$168, Ms Aletta Goagoses of Gobabis who lost a house worth N\$280 000 sold to a former messenger of court for N\$15 000 for a debt of N\$1000 owed to a bank. First appellant further references the Ombudsman John Walters who according to the first appellant took steps which the Namibian lawmakers and courts should have taken over the past two decades – to make it difficult for banks and other lenders to take away people’s homes to cover puny debts and that the Ombudsman was challenging a default judgment in the High Court where the owner was to lose a house valued at N\$390 000 for a debt of N\$48 000, and the arguments he made in court. First appellant then without giving examples refers to countries that have laws that restricts the sale of houses easily and that in Namibia there is a massive abuse of the majority of people who are illiterate and do not understand the foreign court system, loans and repossessions. First appellant then went on to say many legal practitioners, property dealers and bank employees collude to track loan defaulters and eventually sell their houses on auctions. He then calls on lawmakers and law reform agents to put measures in place to protect the poor and the vulnerable.

[31] I delve in these details for dual purposes. Firstly, both the Councilor of Khomasdal North and the Ombudsman, first appellant relies on for his articles challenged the law or the legal system or court processes, the source of the poor’s inequities. In the case of the Councilor for Khomasdal North she went to the extent of approaching the CEO of the Windhoek Municipality to raise the issue of loss of houses by failure to pay rates and taxes. Second, the two articles show what the first appellant is advocating for and its relevancy. In the third article on the same

subject, he decided to take an aggressive approach of naming and shaming the respondent the way he did under the cloth of fair comment. And yet the cases of Ms Dukeleni and that of Ms Goagoses are far worse scenarios. The creditor in the Dukeleni case was prepared to pay thousands in legal fees to recover a debt of N\$168 and interest added on. I assume the houses referenced were paid off, the owners had sentimental values, good and bad memories for the said houses including Ms Gamxamus who was 63 years at the time. The comparison of Ms Afrikaner to the other scenarios in my opinion I find malicious. Ms Afrikaner never spent a penny on that house, never resided in the said house. It is a house she owned on paper and probably had no value to her. In her letter of separation from the respondent and his family she did not mention the house. Given the agreement between the respondent and Ms Afrikaner which she renegaded on, I am not surprised she offered the house back. That arrangement was dubious in the opinion of the first appellant, because he never believed the version of the respondent when regard is had to the use of the words 'Du Toit claims' in the article. The opinion is based on first appellant's own assumptions and not the facts as related by the respondent as Ms Afrikaner could not be traced. The omission of a fact may make an expression of comment untrue in relation to the stated fact.²⁰

[32] I have alluded to the threshold of the defence of protected comment and the allegations complained of against the respondent and it fail to meet that threshold for the reason that even if I were to accept that the statements complained of were comments, the comments were unfair.

²⁰ Footnote 8 above para 186.

[33] Inherent dignity features prominently or it is safe to say, dignity forms the preamble to the Namibian Constitution. It is the opening statement in the preamble, 'inherent dignity and of the equal and inalienable rights of all member of the human family . . .'. Further down the preamble reads '. . . we the people of Namibia desire to promote amongst all of us the dignity of the individual . . .'. While it is accepted that no one right trumps the others, the right to dignity for the purposes of Namibia, on the strength of the preamble appears to prioritise that right. Understandably so, our painful past was centered around violation of human dignity and every other violation followed. First appellant could have articulated his viewpoint without trumping the intrinsic worth of the respondent. He did that on two earlier on occasions. The ultimate argument of the first appellant in this saga is to persuade the lawmakers to repeal or make it difficult for banks and any money lenders to repossess houses and sell them in execution. What would have been the motive of the first appellant's comment except to expose the respondent, to 'odium, or ill will and disgrace.'²¹

[34] Respect for the dignity of others is foundational to the Constitution of the Republic and the society we aspire to.²² Freedom of expression, important a right as it is in our democracy, is not absolute, it is, like other rights, subject to limitation and must be balanced against the individual's right to human dignity.

[35] To sum up, the defence of fair comment should fail.

²¹ *May v Udwin* 1981 (1) SA 1 (A) at 18A-B.

²² *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011(3) SA 274 (CC) para 202.

[36] We have been urged by the appellants to grant apology and retraction as a stand-alone remedy, in that the law of defamation is developing that way. That monetary award plus apology and retraction as ordered by the High Court was an overkill in the extreme and that a combination of both was punitive. They urge this court to recognise the legitimacy of an apology as an appropriate or stand-alone remedy in a defamation suit and the appellants should be put to an election of making a written apology and retraction to the respondent and in the event they fail to do so, the award of damages should become operative. Appellants thus pray for an order allowing the appeal with costs alternatively the appeal should be allowed in part by setting aside the High Court order and replacing it with a written apology and retraction in the words as ordered by the High Court and if the appellants do not publish the apology and retraction within 14 days the award as granted in the High Court should come into effect immediately.

[37] The respondent argue that the publication is currently still ongoing until such time as the article is retracted and apology offered. The respondent in the absence of an apology and retraction is still portrayed as the villain, greedy, immoral and taking advantage of the poor. His reputation as a legal practitioner has been unjustly tarnished when in his own way he tried to help Ms Afrikaner. That the second appellant's newspaper circulates country wide and read by almost everyone the respondent knows. That the article has cast a dark shadow over the character and conduct of the respondent. That the appellants in the conduct of their defence showed no remorse; had no wish to apologise which is aggravating. Respondent submits although it is recognised that the law of defamation is developing in the direction of an apology as a stand-alone remedy, it should

depend on the circumstances of each case as an apology must be genuine and be of a meaningful nature to the person hurt.

[38] In *Esselen v Argus Printing & Publishing Co Ltd and others*, Hattig J said:

‘In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways – as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant’s conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.’²³

[39] Indeed an apology must be genuine and be of a meaningful nature to the person hurt. The party that waits until it is ordered to apologise does so to comply with the order in the circumstances where the apology is not genuine. It is over four years, almost five years, since the respondent was named and shamed, the appellants have conceded that the article was defamatory of the respondent but the article remains published. Masuku AJ as he then was is on point when he said:

‘. . . I am of the considered view that for an apology, to be efficacious and to serve as the balm intended, it should ordinarily come from the defendant out of his or her own free will and volition, following a realization of their foolery and culpability. In that setting, the court can be certain that the apology offered is genuine and *bona fide*. Where the court, on the other hand forces, as it were, an apology down the throat of an unwilling defendant, the words proffered or mumbled in compliance with an order of court, will be empty, mechanical and

²³ 1992 (3) SA 764 (T) at 771F-I.

lacking in *bona fides*. They cannot for that reason, in my view, properly serve to soothe the wounded feelings and reputation of the person injured.¹²⁴

[40] In the *Le Roux v Dey* matter appellants relied on for the argument that the retraction and apology be considered as a defence, rather than a remedy and be accepted as part of restorative justice, the Constitutional Court of South Africa, stated, 'the principled justification for the acceptance of retraction and apology as part of restorative justice that we suggest should be adopted will mean that its application will depend on the facts of each case.'¹²⁵

[41] Therefore it would be inappropriate under the circumstances of this case to order an apology alone. It is a case that warrants an award of damages (reduced though for the reason it is coupled with an apology) to compensate the respondent for both wounded feelings and loss of reputation and an apology on the content with cosmetic changes as proposed by the High Court.

[42] On the facts of the case, I cannot imagine how the respondent could have been disgraced the way he was. The consequence of my colleagues' judgment would be that the floodgates of attack on the intrinsic worth of a being are open clothed under fair comment, obliterating that existing, balance between the right to dignity on the one hand and that of freedom of speech on the other. The first appellant admitted in cross-examination that his inclusion of the 'Shylock' part in the article rendered the article not correct. The house of Ms Gamxamus was not valued at N\$220 000 at the time it was auctioned in 2007. To have reported that

²⁴ *Purity Manganese (Pty) Ltd v Mineworkers* (I 4026/2014) [2015] NAHCMD 204 (3 September 2015) para 41.

²⁵ Footnote 22, above at footnote 42 per Froneman J and Cameron J.

the municipality auctioned her N\$220 000 house off for N\$33 000 is false. First appellant admitted that the eviction of Ms Gamxamus after she had put up a fight, triggered the article of 12 July 2016 and the subsequent opinion by the first appellant, which had nothing to do with the respondent. First appellant admitted that there was no obligation on any person to help the other. The defamatory article is the subjective opinion of the first appellant. For my colleagues to have put emphasis on the fact that respondent benefited from the legal system in terms of which people were evicted from their houses for relatively insignificant debts and therefore first appellant's opinion was fair when it is as clear as daylight that it was never respondent's intention to purchase Ms Gamxamus' house for his own benefit, veers our law on fair comment in the wrong direction and it not our law. The agreement between respondent and Ms Afrikaner was that respondent would purchase a house for her but she would compensate him for all his losses on the house. When she renegaded on that agreement she gave the house back and respondent received it back. Whether it was a donation, arrangement or something else was of no consequence. The evidence was that Ms Afrikaner could not afford the house. There is absolutely no evidence that she was forced to give back the house. In fact to have placed the circumstances of Ms Afrikaner, with the other scenarios first respondent referenced, was malicious. First respondent was at liberty to criticise the legal system, question the donation and the usufruct but was impermissible on the facts of this appeal to name and shame the respondent.

[43] For these reasons, I would uphold the appeal partially to the extent that the High Court award of N\$100 000 would be set aside, replaced with a proposed N\$60 000, order the apology as proposed by the High Court and with costs.

MAINGA JA

SHONGWE AJA (HOFF JA concurring):

[44] I have had the pleasure and honour of reading the eloquently and well-reasoned judgment of my colleague Mainga JA, (the first judgment). However, with due respect, I hold a different view on the conclusion he reached based on the following reasons.

[45] I, broadly speaking, agree with the exposition of the factual matrix as stated in his judgment. Therefore, it will not be necessary to repeat all the facts, save where it is necessary and relevant. In my view, the facts of this case are substantially common cause, the difference between my colleague and myself is on the proper interpretation and application of the defence of fair comment. I, therefore, agree that the question to be determined is whether the appellants succeeded to meet the threshold for the defence of fair comment.

[46] In *Trustco Group International Ltd & others v Shikongo*²⁶ at para 24, the court concluded that ‘. . . a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication . . . was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. This list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.’

‘It is a good defence for the defendant to show that the statement complained of is a fair comment on a matter of public interest. (Hiemstra J observed in *Waring v Mervis*, 1969 (4) (SA) 542 (W) at 546 “The doctrine of fair comment is not of Roman-Dutch but of English origin”. Every person has a right to express an opinion honestly and fairly on matters which are of public interest, and it is upon this right that the defence is based. There are three essentials of the defence of fair comment. The first is that the statement must appear and be recognizable to the ordinary reasonable man as comment and not as statement of fact. For it is expressions of opinion only, and not allegations of fact, which are protected by a plea of fair comment.²⁷’

[47] In this case, the appellants have conceded that the published statement is defamatory of the respondent, however the appellants argue that the statement is or was fair comment and was in the public benefit or interest. That it was in the public interest/benefit is not in dispute, in my view, what is disputed by the

²⁶ 2010 (2) NR 377 (SC).

²⁷ See RG Mckerron *the Law of delict: a treatise on the principles of liability for civil wrongs in the law of South Africa* 7 ed (1971) at 200.

respondent is the fairness thereof. The unfairness, is attributed to the appellants likening the respondent to a Shylock seeking a pound of flesh as in the fictional story of the Merchant of Venice. The respondent understood that to mean that he is greedy, rapacious, corrupt and with dubious ways. In my view, fairness does not necessarily mean 'just', 'balanced' or even 'reasonable'. It requires that the statement of opinion is honestly held and genuine, relevant to the facts upon which it was based and does not disclose malice. Hence, views that are 'extreme', unjust, unbalanced, exaggerated, and prejudiced will be protected as fair comment provided the requirements of the defence are met.

[48] In *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*²⁸ at para 90, the Constitutional Court reasoned that 'The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question'. This court, following the authority of the Supreme Court of South Africa has laid down the following test to determine whether a particular statement is defamatory:

'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 have been made when answering that question are conveniently replicated in the following extract from a judgment of an English court:

²⁸ 2011 (3) SA 274 (CC).

“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.²⁹”

[49] The undisputed facts are that the respondent and Ms Afrikaner (respondent’s erstwhile employee) entered into an oral agreement. The detail terms and conditions of which are not fully disclosed, save to say that the respondent would buy a house on behalf of Ms Afrikaner, which he did, but she would repay him. As to when and how the money would be repaid is unknown. One would have thought that the respondent would draw up a written agreement just as he did with the deed of donation.

[50] The house was indeed registered in the name of Ms Afrikaner. She, however, could not take occupation as the previous owner refused to vacate the house, even after several attempts were made to evict her (Ms Gamxamus). Ms Afrikaner would apply and obtain a loan once Ms Gamxamus had vacated the house. How much Ms Afrikaner earned or was worth is unknown, whether she

²⁹ See *Free Press of Namibia (Pty) Ltd and others v Nyandoro* 2018 (2) NR 305 (SC) at para 41.) Importantly, the test is objective with the consequence that evidence is not admissible as to how the statement in question was understood. (see also *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at para 90.

would afford to repay the loan was also not canvased. She simply offered to repay the bank loan and also pay the respondent the purchase price plus expenses.

[51] It is common cause that after Ms Afrikaner's retirement or resignation from her work on 14 December 2012, the respondent and Ms Afrikaner concluded a deed of donation for her to donate the house to the respondent, as things did not go according to plan. Therefore, instead of repaying the respondent the money she would rather donate the house to the respondent. Normally or ordinarily a donation is made without expecting anything in return – in this case, however, Ms Afrikaner was paying back the respondent's expenses of purchasing the house for her. In my respectful view that which is referred to as a donation was actually not a true donation but a pay back in compensation of the respondent's purchase price and expenses.

[52] The said property was valued on 19 March 2013 for transfer duty purposes when the house was to be transferred to the respondent. The amount of the valuation was the sum of N\$220 000. What we know is that the municipality's valuation was N\$37 000 on 8 March 2007. Six years down the line the property appreciated exponentially. In all the six years the property was registered in the name of Ms Afrikaner, any increase must have been for her account. If the respondent was the good samaritan, as he professes to have been, he should have refunded the difference between N\$220 000 and N\$86 000 to Ms Afrikaner. In my view, the respondent profited financially unfairly from the deal. Ms Afrikaner could have had the property valued before donating it to the respondent, sell it for more than N\$86 000, went on to pay the respondent and pocketed the balance as

her profit. In other words, she donated/compensated the respondent the property without evaluating and not knowing the value thereof. The respondent, in my view, as an attorney, was morally bound to advise her in that regard, if he was fair and transparent.

[53] On the evidence of the respondent, he expected Ms Afrikaner to refund him, and that she would obtain a loan at the bank and would repay the loan to the bank. Her financial position had not been vetted in any way – with what or which money would she repay the loan. She was unemployed after her retirement; no bank would grant her a loan under the circumstances. No investigation was embarked on to ascertain if some relatives would assist her in repaying the loan. The respondent conceded that she was unable to repay the loan.³⁰ The donation was, in my view, a way of avoiding any legalistic explanation by the respondent. Hence, I respectfully, refer to it as 'DONATION'. Even the first appellant in his article referred to it as 'donation' because he also opined that it was a strange kind of a donation. The inclusion of the usufruct clause is so meaningless that it makes no sense why it was included. She never occupied the property before and she was never going to do so in the future. It does appear that Ms Afrikaner was an ordinary person of humble beginnings, not a professional like the respondent, she could not have suggested a donation on her own but intended a compensation in order to avoid any further commitment to the respondent.

[54] What is stated in the editorial are the true facts as they are and a comment or opinion of the appellants. The defence of fair comment which is recognised by

³⁰ Record, Vol 2 p 90 line 17-19.

our courts is that the allegation must amount to a comment or opinion. It must be fair. The factual allegation on which the comment is made must be true or substantially true and the comment must be on a matter of public interest. In my view, the court *a quo* misdirected itself in specifically considering the nature and ambit of the defence of fair comment. It only referred to the availability of the defence and the need for the facts on which the comment is based to be substantially true. The court *a quo* did not discuss the scope the law affords to comment or opinion which on the authorities, may be prejudiced, exaggerated or wrongheaded.³¹

[55] In my view, the court *a quo* wrongly rejected the first appellant's reliance on the underlying facts to justify his opinion. For example, there were the facts concerning the sale and purchase of the house from Ms Gamxamus, the transfer to Ms Afrikaner and the donation back to the respondent. And also the facts concerning the plight of poor people generally who had lost their homes for their inability to pay often trifling debts. In my considered view, the court *a quo* did not make the distinction but appeared to have dismissed the defence for failure to substantiate the second category of facts by concluding that:

'While accepting that affordable housing for the poor is in the public interest, this court cannot accept and condone contextually wrong comparisons by an editor of a newspaper as responsible and reasonable comment when it is based on unverified hearsay information, gleaned from another newspaper article, without any reasonable attempt of verification on the material available with the subject of reportage. Repetition does not rectify contextually wrong facts.'³²

³¹ Record, Vol 4 p396 para 23; p 400 para 30; p 405 para 61.

³² Record, Vol 4 p 404 para 58.

[56] This approach is, in my view, wrong in law. The implication is that it was incumbent on the appellant to lead first hand evidence from, for example, Ms Gamxamus and her son, Ms Dukeleni, the messenger of the court, the Ombudsman and the chair of the National Council. To so insist would eviscerate the scope for fair comment. This is not the law. My colleague in his judgment deals with this aspect in para 12 of his judgment. My considered view is that the court *quo* erred in its appreciation of the defence of fair comment, the requirements for that defence were properly established and the defence ought to have been upheld. In my respectful view, the law does not demand proof of such matters, on the contrary the court is entitled to have regard to facts, even if not stated in the article in question but which form 'part of the history of the country'.³³

[57] It is the appellants' case that the article in the editorial of 15 July 2016 was an expression of their opinion on matters of public interest. The said opinion was a fair comment based on true facts or substantially true and were stated in the said editorial. It was honest, relevant, reasonable and bona fide. The comment expressed matters of public benefit namely, the issue of poor people and access to affordable housing and the practice of professionals and wealthy members of society profiteering on having access to housing traditionally earmarked for poor people. The first appellant even went further by referring to examples of previous similar cases like the Ms Dukeleni matter, the Ms Gamxamus matter to show the public interest aspect. All these matters are continuously debated in public. The appellants were equally exercising their right of freedom of speech and

³³ See *Johnson v Beckett & another* 1992 (1) SA 762 (A) at 780 E- F.

expression, including the freedom of the media protected by article 21(1)(a) of the Constitution of Namibia.

[58] On the other hand, the respondent argued that the 'editorial' references and implied the following facts regarding the respondent; that the respondent is greedy, that the respondent is rich and enjoys profiteering from the poor; that the respondent is a professional who takes part in morally indefensible practises; that it is easy for the respondent to end up owning houses of the poor, because it can be done easily and cheaply and that the respondent lent Ms Afrikaner about N\$83 000 to buy the house, but when she could not pay she was forced to donate the house to the respondent. It is further argued that substantial portions of the editorial relating to the respondent, are facts conveyed by the first appellant and not comments.³⁴

[59] The above argument is a clear display of how much the defence of fair comment is incorrectly understood. What is argued by the respondent as facts referenced in the editorial are actually not facts but comments/opinions. That the respondent is greedy is not a fact but a comment or/an opinion; that the respondent is rich and enjoys profiteering from the poor is not a fact but an opinion or comment by the editorial, and the rest of the comments mentioned above - all these are comments/opinions and not facts.

[60] The first appellant is criticised on the statement made in the article of 12 July 2016 regarding the value of Ms Gamxamus' property. Firstly, the statement of

³⁴ See respondent's heads of argument at p29 para (e) (i) - (v).

the 12 July was not written by the first appellant, although published by the second appellant. Secondly, the complaint and defamation action by the respondent was essentially based on the opinion published on 15 July 2016 – hence he prayed for the retraction of the said opinion and not the article of 12 July 2016. The value of N\$220 000 is not strictly false because indeed the said property was valued at such amount when it was registered in the respondent's name. It cannot be true that in 2012 when Ms Afrikaner retired no value was attached to her house, it may not have been actually determined and written down but it was valuable and the only substantial asset she possessed, only the following year was the value determined at N\$220 000. The difference maybe on the physical mathematical calculation – but in truth and principle the property was valuable and the value was not very far off the N\$220 000 mark. In any case the fact of the matter is that the amount of N\$220 000 was not a fabrication and cannot be said to have been false.

[61] In *The Citizen 1978 (Pty) Ltd & others v McBride (Johnstone & others, Amici Curie)*,³⁵ the Constitution Court concluded that:

‘... An important rationale for the defence of protected or (fair) comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.

[83] Protected comment need thus not be (fair or just at all) in any sense in which these terms are commonly understood. Criticism is protected even if

³⁵ 2011 (4) SA 191 (CC) paras 82 – 83.

extreme, unjust, unbalanced, exaggerated and prejudiced so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must “justify the facts; but he need not justify the comment”.’

[62] Reasonable people may differ; it is perfectly legitimate to view these various arrangements as exploitative of poor people. Of course the respondent saw the matter differently, but that is beside the point, the question is whether the first appellant’s criticism can be accommodated under the topic of fair comment. In my respectful view, all the facts relied on by the first appellant are true or substantially true, fair and without malice, no twisting of hard facts and no fabrication of any facts was committed by the appellant. The first appellant was perfectly entitled to ventilate his view of what he perceived to be an uncaring society. Indeed, he was entitled to adopt the view that poor and vulnerable people should never be evicted from their houses for the payment of relatively minor debts. That such was open to abuse permits of no doubt. The High Court has recognised that ‘. . . the issue of people losing their homes following unpaid debts became a source of concern in this country. . .’. This concern eventually led to the introduction of a new High Court Rule to grant judicial oversight in this arena.³⁶

[63] It was open to the appellant, as it was to any citizen, to be critical of a system (from which the respondent benefitted) in terms of which people were evicted from their houses for relatively insignificant debts. The appellant was perfectly entitled to his opinion that the circumstances surrounding the donation to the respondent from Ms Afrikaner were indeed dubious. What was questionable to

³⁶ *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC) para 34.

the appellant was 'how can you give a right to use a place that you even cannot use'.³⁷ It is common cause that Ms Afrikaner never took occupation of the house.

[64] It follows, in my respectful view that the court *a quo* erred in its appreciation of the defence of fair comment. The requirements for that defence were properly established and the defence ought to have been upheld.

[65] As regards the remedy, I think the court *a quo* was a bit harsh on the appellants in that the award was very high considering the inclusion of a retraction and apology. It is safe to consider that there is a growing recognition in our law of an apology in the development of the law of defamation. After all, an award of damages is an approximation which can never serve meaningfully to assuage the hurt caused.

[66] I believe that it is high time that courts should recognise the legitimacy of an apology as an appropriate remedy in defamation cases (see *Mineworkers Investment Co (Pty) Ltd v Modibane*³⁸). In that case the court gave the defendant an option either to pay damages or publish an apology. If the defendant fails to publish the apology, then the damages would take effect. It would be difficult to envisage a situation where a defendant would apologise, while believing that he or she was justified in publishing the comment especially to apologise before the hearing and judgment.

³⁷ Record, Vol 3 p 275 (line 2) – p 276 (line 2).

³⁸ 2002 (6) SA 512 (W).

[67] The combination of the award for damages and the direction to publish an apology and retraction was, in my view, punitive.

[68] In the premises, I would uphold the appeal, set aside the High Court order and replace it with an order that the action is dismissed with costs. The respondent shall pay the appellants' costs of the appeal, to include the cost of one instructing and two instructed counsel.

SHONGWE AJA

HOFF JA

APPEARANCES:

1st and 2nd Appellants:

G Marcus SC (with him R Maasdorp)

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Respondent:

A Van Vuuren

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