REPORTABLE

CASE NO.: SA 8/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between

TRUSTCO GROUP INTERNATIONAL LTD	**FIRST APPELLANT**
MAX HAMATA	**SECOND APPELLANT**
FREE PRESS PRINTERS (PTY) LTD	**THIRD APPELLANT**

and

MATHEUS KRISTOF SHIKONGO	**RESPONDENT**

Coram: Chomba, AJA, Langa, AJA *et* O'Regan, AJA

Heard on: 15/04/2010

Delivered on: 07/07/2010

APPEAL JUDGMENT

O'REGAN AJA:

[1] How should the law of defamation give effect both to the right to freedom of speech as entrenched in article 21(1)(a) of the Namibian Constitution[1] and the constitutional precept that the dignity of all persons shall

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1 Article 21(1)(provides that: "All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media; …". Article 21(2) then provides that: "The fundamental freedoms referred to in sub-article (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 by 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."

be inviolable as set out in article 8 of the Constitution?[2] That is the question that arises in this appeal. It is a question that has arisen in many democracies in many parts of the world.[3]

[2] The three appellants are the owner, editor and printer of a weekly newspaper published in Windhoek called *Informanté.* The circulation of *Informanté* is approximately 65 000 copies per week. It is also made available on the internet.

[3] The respondent is Mr M K Shikongo, the Mayor of Windhoek. The Mayor sued the appellants for defamation in relation to an article published in *Informanté* on 21 September 2006. He succeeded in the High Court and was awarded N$175 000 damages. The High Court also ordered the first and second appellants to pay the costs of the respondent on the scale as between attorney and own client.

[4] The appellants appeal on the merits, the quantum of the award and the special order of costs made against them. The respondent cross-appeals on

2 Article 8 provides that: "(1) The dignity of all persons shall be inviolable.
(2)(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

3 See for example *New York Times Co v Sullivan* 376 US 254 (1964); *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96; *Lange v Atkinson* [2000] 3 NZLR 385; *Reynolds v Times Newspapers* [1999] 4 All ER 609 (HL); *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44 [2007] 1 AC 359 (HL); *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1; *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA); *Khumalo v Holomisa* 2002 (5) SA 401 (CC); *Mthembi-Mahanyele v Mail and Guardian Ltd* 2004 (6) SA 329 (SCA); *Grant v Torstar Corporation* 2009 SCC 61.

the issue of the quantum of damages only, seeking an increase in the award to an amount of N$250 000.

[5] The article that gave rise to the defamation case read as follows:

> *"Fincky aids Broederbond's land cause*
>
> A Broederbond cartel is said to have made a killing after buying municipal land in Olympia for one cent per square meter and cashing in on millions of dollars after reselling the land. The land sale to the cartel was facilitated by Chairperson of the City of Windhoek Management Committee Dr Bjorn von Finckenstein.
>
> The City of Windhoek is expected to lose out by at least N$4,8million after the Management Committee allegedly misled the City of Windhoek on the status of the prime land in Pioneerspark, which was sold to Wanderers Sports Club at a subsidized price of N$1 172.
>
> The piece of land has now been sold to Viking Developers, which is busy constructing a N$40 million housing development, financed by Bank Windhoek, on the land.
>
> Inside sources said the Mayor of Windhoek Matthew Shikongo, who is a Bank Windhoek board member, should have declared his association with the bank, instead of letting the underhanded land deal go through without scrutiny. 'How could the Mayor allow himself to be used for self-gain and to empower previously advantaged persons. He is supposed to serve the people that have elected him, instead of just looking after his Bank Windhoek interests', said a concerned Council member who preferred anonymity.
>
> In July, City of Windhoek lawyers recommended that the land sale be rescinded. However, Von Finckenstein claimed he was not aware of this and therefore he said he could not comment.

Informanté has reliably learned that the deal has placed the City of Windhoek's management and the Council on a collision course because City management was now trying to recover the lost revenue.

The City of Windhoek could have raised close to N$5 million had it placed the land on auction and not bypassed legal advice.

Wanderers Sports Club bought the land on condition that 'it may not be sold by the owner before it has been offered to the Municipality of Windhoek.'

Wanderers Sports Club undertook not to sell the land until the City of Windhoek had been given the opportunity to make a purchase offer.

'One wonders why the Council was never advised of its rights in terms of the pre-emptive right which was part and parcel of selling such huge tracts of land to Wanderers Club, while it was obvious that Wanderers Sports Club was diverting from its sporting activities,' stated the legal opinion submitted to the Council.

'Would the type of facilities which Wanderers wish to provide on the erven benefit the community at large or are they venturing into businesses which Council can also undertake,' asked another Council member.

'It is my submission that Wanderers Sports Club must be made to pay the difference in value as per deed of sale and the current market value of the sub-divided properties', the source added.

The Council now also faces the task of reversing its decision of giving away the land cheaply after it has been cautioned that Viking Developers have been constructing on the 'site without the necessary approved building plans and foundations were excavated and built and services were inserted without the said densities being proclaimed by the Government.'

It is also feared that the land sale to Wanderers Sports Club will serve as precedent for other sports clubs in Windhoek."

[6] In his particulars of claim, the Mayor based his defamation claim on the grounds that the article alleged that he was connected to a Broederbond cartel, that he was involved in an irregular land deal, that he caused the City to lose money, that he misled the City regarding the status of the land, that he abused his position both as a board member of the Bank Windhoek (which he is not) and as Mayor of the City of Windhoek for personal gain and that he neglected the electorate in favour of his Bank Windhoek interests. He stated that these allegations were wrongful and defamatory and would have been understood by readers to mean that he was dishonest, that he abused his position as Mayor of Windhoek and that he neglected his duties to the public.

[7] The defendants (the appellants) resisted the claim on the basis that the publication of the article was not defamatory. In the alternative, the defendants raised three defences: they asserted that any facts contained in the article were “essentially the truth” and that the publication was in the public interest (the defence of truth in the public benefit); insofar as the article contained comment, they asserted that it concerned matters of public interest, and the comment was fairly and reasonably made (the defence of fair comment); and they asserted that the article was published in good faith without knowledge of untrue facts and without negligence or recklessness with regard to the truth or otherwise of the facts so that the publication of the article was in all the circumstances reasonable (the defence of reasonable publication).

[8] The article related to an application for the removal of title deed conditions that had been approved by the Windhoek City Council on 30 June 2005 more than a year before the article was published. The application, brought by a group of planning consultants on behalf of the Wanderers Sports Club (the sports club), sought the removal of a title deed condition that had required the land to be used as private open space and the waiver of a pre-emptive condition registered in favour of the municipality.

[9] In 1973, the sports club had purchased a piece of land measuring approximately 12 hectares from the Windhoek Municipality at a price of R100 per hectare or a cent per square meter for a total price of R1172,22, well below the market value of the land which was valued in the title deed at the time at R5000. The title conditions stipulated that the land be used as private open space and that:

"the erf may not be sold by the owner before it has been offered to the Municipality of Windhoek and then for the amount which it was sold to the current owner, plus a reasonable amount for any improvements on the property".

[10] The application was first placed before the Management Committee of the Council towards the end of June 2005. The Management Committee recommended granting the application and it was then considered and approved a few days later by the full Council. The agenda and minutes of the Management Committee meeting and the Council meeting make plain that the

application had been considered by all the relevant departments which, save for one department, had recommended that the application be approved.

[11] The Strategic Executive: Planning, Urbanisation and the Environment suggested that the City consider seeking to enforce its right of pre-emption. The Chief Legal Officer stated that there was no way to force the Club to sell the land back to the City as provided for in the right of pre-emption. What might happen should the City seek to enforce the right of pre-emption, the Chief Legal Officer speculated, was that the Club might decide not to sell the land at all. This speculation was probably based on the fact that the application made clear that the Club intended to sell the portion of land to raise funds to enable the club to improve the facilities it offers to its members.

[12] The application was approved by the Council on condition that an endowment of 7.5% of the market value of the additional erven created by the subdivision be paid to the City in accordance with section 19 of the Townships and Division of Land Ordinance, 11 of 1963 as well as an amount of N$2 137 350 to the City being betterment fees calculated at 75% of the increase in land value of the subdivided portions between 1973 and 2005.

[13] In his evidence in the High Court, Mr Hamata, the second appellant who is also the editor of *Informanté,* stated that his attention was drawn to the story in September 2006 by a confidential source within the City of Windhoek. That source suggested that a “serious corruption deal” was unfolding in the City in relation to the sale of land by the Wanderers Club. The source stated

that the Council had been misled in regard to its legal position, and that if the Council had been properly advised it would not have approved the application for removal of the title deed restrictions. The source also suggested that the effect of granting the application had been to deprive the city of millions of dollars it might have made from selling the land through a tender process. The source furnished Mr Hamata with a seven-page document that Mr Hamata identified as the basis of his story. The source informed him that the document had served before the Council.

[14] To verify the story Mr Hamata spoke to several other unnamed sources, including one who confirmed (incorrectly) that Mr Shikongo was a member of the board of Bank Windhoek. Mr Hamata also checked the deeds office records and telephoned Dr von Finckenstein, the chairperson of the Management Committee of the Windhoek Council. He also attempted to call Mr Shikongo on his cell phone but it was not answered. Mr Hamata did not check the minutes of the Council meeting, which he knew he was entitled to do, nor did he seek to leave any messages for Mr Shikongo at his office, nor did he call Bank Windhoek to verify the fact that Mr Shikongo was a board member of Bank Windhoek.

[15] After the publication of the story, Mr Shikongo's lawyers wrote to the publisher of *Informanté* demanding that an apology be published. The apology was not published although on 12 October 2006 a correction was – stating that Mr Shikongo was not a director of the Board of Bank Windhoek as

the story had asserted but a director on the board of the parent company of Bank Windhoek.

The High Court proceedings

[16] Mr Shikongo then issued summons claiming that the publisher, editor and printer of *Informanté* had defamed him and seeking damages. When the matter came to trial, four witnesses were led on behalf of Mr Shikongo. Expert evidence was led concerning the history and nature of the Broederbond, the organization mentioned in the article. A former employer of Mr Shikongo testified about Mr Shikongo's career at Metropolitan Life. The company secretary of Bank Windhoek and Capricorn Holdings gave evidence about Mr Shikongo's relationship with these two companies. Mr Shikongo's attorney gave evidence concerning monetary value to assist the Court in determining the current value of previous awards for defamation. Mr Shikongo himself did not give evidence.

[17] Eight witnesses were led on behalf of the defendants. The most important of these witnesses were Mr Van Rooyen, the managing director of the first appellant, the owner and publisher of *Informanté*; Mr Hamata the editor of *Informanté* and author of the story; expert evidence led on the protection of journalists' sources; and three witnesses from the City Council who were issued with subpoenas: the Chief Executive of the City, Mr N Taipopi; as well as two officials: Ms U Mupaine (from the Strategic Executive: Planning, Urbanisation and the Environment) and Mr B Ngairorue (the Legal

Officer of the City of Windhoek since February 2007 who had been acting Chief of Housing and Property at the time the application was approved).

[18] The defendants also tendered the transcribed conversations Mr Hamata had had with Mr von Finckenstein and with the unnamed source within the Bank of Windhoek who had erroneously confirmed that Mr Shikongo was a board member of that Bank. The defendants also tendered several codes of professional ethics for journalists (to which I return later).

[19] During the hearing it became clear that the document on which Mr Hamata had based his story had never served before Council. The Chief Executive had prevented the document being circulated once legal advice had been obtained to the effect that the Council could not rescind its decision to grant approval to remove the title deed conditions.

[20] In his judgment in the High Court, Muller J noted that the Supreme Court has not reconsidered the law of defamation in Namibia since independence in 1990. Prior to independence, the South African Appellate Division decision in *Pakendorf and Others v De Flamingh,*[4] which held the press strictly liable for the publication of defamatory statements, had been binding on the courts of Namibia. Muller J observed that "[i]n this case, the Court has to decide whether the media is still bound by the concept of strict liability or not." The court held, consistently with two recent judgments of the

4 1982 (3) SA 146 (A).

High Court,[5] that the principle of strict liability was not appropriate given the provisions of the Constitution that entrench both the right to freedom of speech and the affirmation of the inviolability of human dignity. The Court held that a defence of reasonable publication should be developed to give effect to the constitutional provisions. In so doing, the trial court found the decision of the South African Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*[6] to be persuasive.

[21] The Court held that the article was defamatory of Mr Shikongo and that Mr Hamata had written the article with the aim to harm Mr Shikongo. The Court also found that in material respects the article was not true and that Mr Hamata had not taken steps to ascertain the truth of the article and had thus acted negligently. The Court thus dismissed all three defences and upheld Mr Shikongo's claim. It awarded damages of N$175 000, apparently the highest award of damages for defamation ever made by a Namibian court.

Arguments on appeal

[22] In this Court, the appellants assert that the High Court should have found that article 21(1)(a) of the Constitution read with article 21(2) requires a plaintiff in a defamation action to establish that the defamatory facts are false. Such an approach, they argue, would fit with the general approach to constitutional litigation in Namibia in terms of which a burden of proof is cast

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5 See *Shifeta v Munamava and Others* (P) I 2106/2006, unreported judgment of the High Court dated 5 December 2008 (per Parker J)*; Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd t/a The Southern Times* 2009 (1) NR 65 (HC) (per Silungwe AJ).

6 Cited above n 3.

upon those seeking to justify the limitation of a constitutional right.[7] The appellants also argue that article 66 of the Constitution does not permit the courts to develop the common law. This task, they argued, is reserved under article 66 of the Constitution for Parliament.

[23] It was argued on behalf of the Mayor in this Court that the High Court was correct in its approach to the development of the common law. The respondent argued that the courts did have the competence to develop the common law and that the High Court had been correct to adopt the approach developed in the South African Supreme Court of Appeal decision of *National Media Limited and Others v Bogoshi.*[8] The respondent submitted that the High Court's application of the law to the facts was correct and that its decision on the merits should be confirmed. The respondent cross-appealed on the quantum of the award for damages, seeking an increased award.

The law of defamation

[24] The law of defamation in Namibia is based on the *actio injuriarum* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was

7 See *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (NmS). See also *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia,* as yet unreported in print, may be found at http://www.saflii.org.za/na/cases/NASC/2009/17.html.

8 Cited above n 3.

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.[9] If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.

[25] The next question is whether a media defendant may avoid liability for defamation by showing that a defamatory statement was not made with the intention to injure. In *Pakendorf and Others v De Flamingh*,[10] the Appellate Division held that mass media could not avoid liability by showing that they did not have any intention to injure the plaintiff. The court stated that, unlike other defendants, "newspapers owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material."[11]

[26] When Namibia became independent in 1990, this was the common-law rule then in operation. This Court has held that any common-law rule operative at the date of independence will not have survived the advent of the Constitution if the rule is in conflict with the Constitution.[12] The appellants argue that the rule in *Pakendorf* is repugnant to the principles espoused in the

9 See *National Media Ltd v Bogoshi* cited above n 3 at p 1213.

10 Cited above n 4.

11 At 148 A.

12 *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

Namibian Constitution and that therefore it did not survive the adoption of the Constitution.

[27] In considering this argument, the importance of freedom of expression and the media in a constitutional democracy must be borne in mind. In *Kauesa,*[13] this Court quoted the powerful words of Brandeis J in his concurrence in *Whitney v California.*[14] In memorable words, Brandeis J reasoned:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. .... Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

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13 Cited above n 7 at 187. See also *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 at 99I – 100B where the Brandeis J dictum was referred to with approval. The citation from *Whitney v California* that appears in the text of this judgment is a fuller quotation than the one in *Kauesa.*

14 274 US 357 (1927) at 375-6.

[28] Freedom of speech is thus central to a vibrant and stable democracy. The media play a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in section 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians.[15] In performing this task, however, the media need to be aware of their own power, and the obligation to wield that power responsibly and with integrity.

[29] The effect of imposing strict liability on the press and mass media for any defamatory statement would mean that the only recognized defences available to the media when it is established that they have published a defamatory statement would be truth in the public interest; fair comment and in appropriate and rare circumstances, qualified privilege. The defence of fair comment itself requires the underlying facts upon which the comment is based to be true or substantially true.[16] It is notorious that there are many facts the truth of which cannot be proven.[17]

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15 See the similar remarks of Silungwe AJ in *Universal Church of the Kingdom of God v Namzim Newspapers (The Southern Times)* cited above n 5 at para 33.

16 See *Crawford v Albu* 1917 AD 102 at 114; *Marais v Richard and Others* 1981 (1) SA 1157 (A) at 1167.

17 See discussion in *Khumalo and Others v Holomisa* cited above n3 at paras 38 – 44.

[30] Requiring the media to establish the truth or substantial truth of every defamatory statement, given the difficulty of establishing truth in many circumstances, may often result in the media refraining from publishing information they cannot be sure they can prove to be true because of the risk of a successful defamation action against them. As McLachlin CJ observed in a recent case:

"… to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. … This … may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day."[18]

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

18 *Grant v Torstar Corporation*, cited above n 3 at para 53.

[32] The next question that arises is whether the rights of freedom of expression and freedom of the media require any reconsideration of the common law of defamation. Before turning to consider this question, it is necessary first to deal with an argument raised by the appellants in oral argument. Counsel submitted that article 66 of the Namibian Constitution, properly construed, does not permit this Court to develop the common law but reserves this power for Parliament. Article 66 provides that

"Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other statutory law."

[33] In support of their submission, appellants' counsel also referred to *Myburgh v Commercial Bank of Namibia*[19] in which this Court had to consider the proper approach to article 66. The Court held that article 66 "renders invalid any part of the common law to the extent to which it is in conflict with the Constitution."[20] The corollary of this principle is that the rule of the common law that is in conflict with the Constitution was rendered invalid at the date of Independence. It does not only become invalid once a court rules that it is inconsistent with the Constitution. In *Myburgh,* however, the Court did not consider the question whether the courts retained the power to develop the common law as that issue was not before the Court.

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19 Cited above n 12.

20 Id at p 263 E-F.

[34] A common-law legal system is based upon the principle that the courts will develop the common law on an incremental basis. Common law is judge-made law and from time to time it needs to be developed to take account of changing circumstances. It is clear from article 66 that the Constitution recognizes that Namibia is a common-law legal system. The proposition urged by appellant's counsel is fundamentally at odds with the nature of a common-law legal system and so it is not surprising that the authority counsel cite for the proposition (article 66 of the Constitution and *Myburgh's* case) provide not the slightest support for it. It follows that counsel's argument on this score is firmly rejected.

[35] The next question that arises is whether the common law of defamation requires further development to give effect to the constitutional right to freedom of speech and the media. Appellants' counsel argued that the appropriate manner in which the law should be developed was to hold that a plaintiff in a defamation claim might only succeed if he or she establishes that the defamatory statement was false. Counsel for the respondent, on the other hand, argued that the High Court's approach, that a defence of reasonable publication, as recognized in *Bogoshi*'s case[21] was appropriate.

Approach of other jurisdictions

[36] This is a question that has been confronted by courts the world over in the last few decades. One of the earliest and most famous cases is the decision of the United States Supreme Court in *New York Times v Sullivan*[22] in

21 Cited above n 3.

22 Cited above n 3.

which the Court held that a public official may not recover damages for defamation unless he or she can show that the publisher acted with actual malice. Although the free speech concerns which animated this decision are shared in many other jurisdictions, the precise manner in which the balance between freedom of speech and protection of an individual's dignity was struck in *Sullivan* has generally not been adopted elsewhere.

[37] In a recent judgment, *Grant v Torstar Corporation,*[23] the Canadian Supreme Court helpfully described the developments since *Sullivan* in several other major English-speaking jurisdictions. McLachlin CJ notes that although *Sullivan* has not been followed elsewhere, there has been a shift in favour of broader defences for media defendants in many English-speaking jurisdictions. Although the precise contours of the defence are not identical, Australia,[24] New Zealand,[25] South Africa[26] and the United Kingdom,[27] have all developed a defence of reasonable or responsible publication of information that is in the public interest.

[38] Having analysed the defence as developed in these jurisdictions, and after a careful consideration of the jurisprudential issues arising from the need to provide protection for freedom of expression, the Canadian Supreme Court

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23 Cited above n 3.

24 See *Theophanous*, cited above n 3.

25 See *Lange v Atkinson*, cited above n 3.

26 See *Bogoshi*, cited above n 3.

27 See *Reynolds,* cited above n 3.

in *Grant* also recognised a defence of responsible communication on a matter of public interest. The elements of the defence are that the publication is on a matter of public interest; and that, despite the fact that its truth cannot be established, it was nevertheless acting responsibly to publish it. Considerations identified by the Canadian Supreme Court relevant to establishing responsible publication included the seriousness of the allegation (the more serious the effect of the allegation on the named person's rights, the more care should be taken before publication); the public importance of the matter; the urgency of publication; the status and reliability of the source and whether the plaintiff's version was sought and accurately reported.

[39] In concluding that the law should be developed to recognize such a defence, McLachlin CJ reasoned:

"The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable. The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P stated in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA) at p 700: 'The law of defamation is one of the comparatively few checks upon [the media's] great power.' The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however,

entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfect would impose."

[40] The defence developed by the Canadian Supreme Court in *Grant's* case is similar to the defence of responsible publication established in the United Kingdom in *Reynolds*[28] as refined in *Jameel.*[29] It is also similar to the defence established in Australia in *Theophanous*[30] and in South Africa in *Bogoshi*[31] as approved in *Khumalo v Holomisa*.[32]

The significance of Kauesa[33] *in this case*

[41] Appellants' counsel argued that this Court should impose an onus upon a plaintiff in a defamation case to establish that the facts published were false, rather than to develop a defence of reasonable or responsible publication. They submitted that imposing an onus on a plaintiff in a defamation case was consistent with the general approach to article 21 established by this Court in *Kauesa*[34] and followed in many cases since then.

[42] In *Kauesa* this Court held that a person who bases a claim on an infringement of a constitutional right bears the onus to establish that the right

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28 Cited above n 3.

29 Cited above n 3.

30 Cited above n 3.

31 Cited above n 3.

32 Cited above n 3.

33 Cited above n 7.

34 Cited above n 7.

has been limited or restricted. Once that onus has been discharged, a person seeking to assert that the limitation is justifiable within the meaning of article 21(2) bears the onus of establishing that.[35] The case concerned regulation 58(32) of the regulations promulgated under the Police Act 19 of 1990 which prohibited members of the police force from publicly commenting unfavourably on the administration of the police or other government department. The Court found that regulation 58(32) constituted a limitation of the right to freedom of speech and expression entrenched in article 21(1)(a) and held that it was not a justifiable limitation within the meaning of article 21(2).

[43] *Kauesa* is not directly comparable to the case at hand. It was concerned with a regulation that expressly prohibited speech and this Court held that the Minister of Home Affairs who was seeking to argue that regulation 58(32) was a reasonable and necessary restriction on the freedom of expression bore the onus of establishing that proposition. Here we are concerned with the question whether the law of defamation should be developed to give appropriate protection to the rights.

[44] To determine whether the appellants' submissions concerning the onus of proof in defamation claims should be accepted, it is necessary to consider the text of article 21(2) more closely. Sub-article (2) provides that the limitation of a fundamental freedom entrenched in article 21(1) is permissible if the limitation is one that arises from –

35 Id at 189.

(a) law; that

(b) imposes reasonable restrictions on the exercise of the rights; that

(c) are necessary in a democratic society; and

(d) are required for "the interests of 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".

[45] Two observations need to be made: First, article 21(2) is concerned with the question whether a rule of law that limits rights constitutes a reasonable restriction that is necessary in a democratic society. Broadly speaking, this is not a question of fact to which the rules of burden of proof apply. It is better understood as a question of law to which a burden of persuasion attaches. The person who asserts that a particular law is a reasonable and necessary restriction of rights will not succeed if the court is not persuaded that this is so.

[46] Secondly, article 21(2) expressly contemplates that the law of defamation may constitute a permissible limitation of the right to freedom of speech and expression and freedom of the press if it "imposes reasonable restrictions on the exercise of the rights" that are "necessary in a democratic society".

[47] Having considered article 21(2), it becomes clear that the import of *Kauesa* in this case is that a person seeking to allege that the law of defamation constitutes a limitation within the meaning of article 21(2) will fail if

the court is not persuaded that the law is a reasonable restriction necessary in a democratic society. The onus rule in *Kauesa* does not therefore relate primarily to the proof of facts, but concerns the question whether a law that limits a fundamental freedom is a reasonable restriction that is necessary in a democratic society. The appellants' argument that it follows from *Kauesa* that a plaintiff should establish that defamatory facts are false does not follow from *Kauesa.* A direct application of *Kauesa* in this case would mean that a party seeking to assert that the law of defamation is a reasonable restriction necessary in a democratic society would bear the risk of non-persuasion should the Court find otherwise.

[48] Neither the appellants nor the respondent seek to defend the current rules of the law of defamation as being a reasonable restriction on the freedom of speech that is necessary within a democratic society. The appellants argue primarily that the rules need to be developed to impose a burden of proof on the plaintiff in a defamation case. The respondent argues that a defence of reasonable publication should be developed to protect speech that is in the public interest in circumstances where a publisher who cannot prove the truth of the facts stated can nevertheless show that the publication was reasonable in the circumstances. The question for this Court to determine is whether the litigants are correct that the law should be developed and if so how.

Development of the law of defamation

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

[50] Jurisdictions all over the world have recognized the need to provide greater protection for the media to ensure that their important democratic role of providing information to the public is not imperiled by the risk of defamation claims. One possibility, not proposed by either party, would be to permit the media to raise a defence of absence of intention to injure (ie to rebut the presumption that they acted intentionally that arises once a plaintiff establishes proof of publication of a defamatory statement). It was this defence that was expressly rejected by the court in *Pakendorf*'s case.

[51] The difficulty with this potential defence is that it does not require those seeking to publish harmful facts about citizens to take any steps to ensure that the facts are true as long as they can establish that they did not intend to harm the person concerned. Those publishing harmful statements are not required to take steps to ensure that what they publish is true. In my view, although this approach would give greater protection to publishers of

defamatory statements, it does not protect the constitutional principle of human dignity sufficiently.

[52] A second possibility, the one proposed by the appellants, is that plaintiffs be required to establish that defamatory facts are false. The difficulty with this proposal is that it is the mirror image of the rule in *Pakendorf.* Before a plaintiff could succeed he or she would have to prove the falsehood of every fact in an article relating to him or her. Just as it is difficult for a publisher to prove the truth of every statement, as was described above at paragraphs 30 - 31 of this judgment, so it will often be difficult for a plaintiff to establish that all the relevant facts are false. The result, therefore, of burdening a plaintiff with a duty to establish falsehood is that the risk of not being able to prove the falsehood of the facts will lie on plaintiffs. Such a result would put plaintiff's constitutional rights at risk, just as requiring publishers to prove truth puts their constitutional rights at risk. The appellants' arguments in this regard cannot be accepted.

A defence of reasonable publication in the public interest

[53] On the other hand, the development of a defence of reasonable or responsible publication of facts that are in the public interest as proposed by the respondent (and as accepted by the High Court) will provide greater protection to the right of freedom of speech and the media protected in section 21 without placing the constitutional precept of human dignity at risk. The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the

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

[54] It is clear that this defence goes to unlawfulness so that a defendant who successfully establishes that publication was reasonable and in the public interest, will not have published a defamatory statement wrongfully or unlawfully. A further question arises, however, given the conclusion reached earlier that the principle of strict liability established in *Pakendorf* was repugnant to the Constitution. That question is what the fault requirement is in defamation actions against the mass media. The original principle of the common law is that the fault requirement in the *actio injuriarum* is intentional harm not negligence, although there are exceptions to this rule. Distributors of defamatory material are liable if it is shown that they acted negligently.[36]

[55] In *Bogoshi*, the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach is consistent with the establishment of a defence of reasonable publication and should be adopted. It is not necessary in this case to consider whether a media defendant could avoid liability if a defence of reasonable publication does not succeed by showing that the publication was nevertheless made on the basis of a

36 See SAUK v *O'Malley* 1977 (3) SA 394 (A) at 407 E; *National Media Ltd v Bogoshi* cited above n 3 at 1214 B.

reasonable mistake.[37] The appellants did not plead or argue such a defence and the question can stand over for another day.

[56] The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity. It is not necessary in this case to decide whether this defence is available only to media defendants. It should be observed that in some jurisdictions, such as South Africa, the defence has so far been limited to media defendants, while in other jurisdictions, such as Canada, the defence is not limited to media defendants.

[57] Having determined the law that will be applicable to this case, it is now necessary to consider the facts of the case and apply the law to them. Three questions arise: was the article defamatory of Mr Shikongo; if it was, have the appellants established a defence; and if not, may and should the quantum of the award for defamation made by the High Court be varied.

Was the article defamatory?

[58] The opening paragraph of the article states that a "Broederbond cartel" has made a financial "killing" from a land sale that has been approved by the

37 See the discussion of this issue in Burchell *Personality Rights and Freedom of Expression: The modern actio injuriarum* (Juta: 1998) at 226.

City Council. The second paragraph states that the City is going to lose at least N$4,8million as a result of the transaction and that the Management Committee misled the City. The fourth paragraph states that the Mayor is a Board member of the Bank that is financing the development of the land and that in letting the "underhand" deal go through, he was acting in the interests of the Bank rather than the interests of citizens. From these paragraphs, an ordinary reader would have gained the impression that the Mayor was in cahoots with a profiteering Broederbond cartel and that he is being criticized for furthering the interests of the cartel, rather than the interests of the City or its citizens.

[59] There is doubt as to how an ordinary reader would have read the words in the fourth paragraph: "How could the Mayor allow himself to be used for self-gain and to empower previously advantaged persons." These words could be read as implying that the Mayor himself gained financially from the transaction or as stating that only the members of the Broederbond cartel gained financially. Given the ambiguity of the language, I am willing to accept in favour of the appellants that a reasonable reader would not necessarily have read the words to mean that the Mayor himself was a financial beneficiary of the scheme.

[60] Even accepting that the article does not state that the Mayor benefited financially from the scheme, the article unmistakably suggests that the Mayor is linked to and furthering the financial interests of a "Broederbond cartel" with resulting great financial loss to the City. Is this defamatory?

[61] Expert evidence was led at the trial by the Mayor to indicate that an ordinary reader reading the article would conclude that the word "Broederbond" was a reference to the clandestine, racist and exclusive organization called the Broederbond that existed during the years of apartheid both in Namibia and South Africa. I have no doubt that this evidence is correct. The Broederbond was well known, as were its mode of operation and its deplorable attitudes. A reasonable reader would consider that any group described as a "Broederbond cartel" is a group sharing the racist attitudes and secretive mode of operation of the notorious Broederbond that was disbanded in the 1990s. This interpretation is strengthened by the use of the word "underhand" later in the article as well as the reference to "previously advantaged persons".

[62] In his evidence, Mr Hamata suggested that by the use of the word Broederbond, he was not referring to the infamous Broederbond, but rather to a group that was supportive of each other in the sense of "you scratch my back, and I will scratch yours". Whatever may have been Mr Hamata's intention, which is not relevant to the question of whether the article itself is defamatory, the ordinary reader would not have interpreted the phrase "Broederbond cartel" as he suggests.

[63] Instead, the ordinary reader would have understood the article to mean that the Mayor was in league with a clandestine, racist and exclusive group of people pursuing their own financial advantage. Such a statement is

defamatory. It is especially defamatory of a public figure who plays a leading role in a political party that was committed to the overthrow of apartheid and the eradication of racist policies as it suggests that the Mayor, in his role as Mayor, is betraying the principles for which he and his political party stand.

[64] The article is also defamatory in suggesting that the Mayor is favouring the interests of the Broederbond cartel and Bank Windhoek over the interests of the City and its citizens and causing as a result a major financial loss to the City.

[65] The High Court finding that the article was defamatory of the Mayor cannot be faulted.

Have the appellants established a defence?

[66] In their plea, the defendants sought to raise the defences of truth in the public interest; fair comment and reasonable publication. The appellants could point to no facts to justify describing those that were taking part in the land development as a "Broederbond cartel". The complete absence of any factual basis for this damaging slur prevents them from relying on either the defence of truth in the public benefit or fair comment.

[67] Moreover, the assertion that the land deal was "underhanded" is also not supported on the evidence. What is clear from the record of the decision presented by the Mayor is that the application for the removal of title deed

restrictions was properly considered by all relevant departments within the City, by the Management Committee and by the Council itself.

[68] The assertions that the Council was "misled" as to the right of pre-emption in favour of the City and that the City "bypassed legal advice" (in the seventh paragraph) is also not correct. The very issue before the Council was whether the title deed condition conferring the right of pre-emption should be removed from the title deed. The full minutes of the Council make plain that the issue was discussed in the Council. The legal advice provided to Council was that the City could not enforce the pre-emptive right if the Club did not want to sell at the reduced price on the basis that if the City sought to enforce the right to purchase at the reduced price, the Club may well have decided no longer to sell.

[69] The quantum of the estimated N$4,8 million loss referred to in the article is also not established on the record. What is plain is that the City required the developers to pay just over N$2 million in betterment fees in order to obtain permission for the development as well as an endowment based on the increased value of the new erven. Even on the appellants' version that if the City had purchased back the land it could have sold it for $4,8 million, the quantum mentioned in the article is quite incorrect, as the amount of the betterment fees and endowment would have had to be deducted from the estimated purchase price.

[70] Finally, the assertion that the Mayor was a member of the board of Bank Windhoek is incorrect. The Mayor is in fact a member of the Board of the holding company of Bank Windhoek, Capricorn Holdings. *Informanté* corrected this error in a subsequent edition.

[71] In argument before this Court, the appellants pointed out that the Club had signed an irrevocable option to purchase with the developer of the land in November 2004 valid until 31 December 2005. Counsel argued that given the existence of this option to purchase, the City could have forced the Club to sell under the title deed pre-emption clause. It is not necessary for us to decide whether this argument is correct or not. At all times it was clear to the City that the Club intended to sell the land in order to raise funds to pay for the upkeep of the Club's sporting facilities. There can be no suggestion that the Council was misled in this regard. At best for the appellants, if their argument on the right of pre-emption is correct, something upon which we express no opinion, the legal advice given to the City was incorrect. Even if that were so, it still does not establish that the Management Committee misled the City, or that the transaction was "underhand" or that the City "bypassed legal advice", as the article alleged.

[72] From the above, it is clear that the appellants have not established that the facts alleged in the article were true or substantially true. As a result the appellants have not established a defence of truth in the public benefit. Given that many of the key facts asserted in the article are false, the appellants may also not succeed on a defence of fair comment.[38]

38 See *Marais v Richard and Others,* cited above n 16.

[73] The final question for consideration is whether the appellants have established that publication of the article was reasonable in the circumstances. 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.

[74] There can be no doubt that the issues raised in the article are in the public interest. The manner in which democratically elected officials and institutions perform their public duties will always be issues in the public interest in a democracy. Media reporting and commentary on government affairs is one of the key ways of holding government accountable to the people. As Lewis JA remarked in the South African Supreme Court of Appeal in *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*:

"Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably."[39]

The next question that arises is whether the publication of the article was reasonable.

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39 Cited above n 3 at para 65.

[75] In considering whether the publication of an article is reasonable, one of the important considerations will be whether the journalist concerned acted in the main in accordance with generally accepted good journalistic practice. During the trial, the appellants tendered three codes of conduct relating to journalistic practice in evidence in the High Court: the Code of Ethics of the Society of Professional Journalists; *The Star* (a Johannesburg daily) newspaper Code of Ethics; and the *Mail & Guardian* (a South African weekly) Code of Ethics. Codes such as these provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article.

[76] The Code of Ethics of the Society of Professional Journalists states that:

"Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:
– test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
– diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
– identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.
– always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
– make certain that headlines, news teases and promotional material, photos … and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

…

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

…

– avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. …"

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

[78] Can it be said that the publication in this case was reasonable? Mr Hamata gave evidence about the steps he followed prior to publication. He spoke to several anonymous sources within the City and had been shown a document that had been prepared in the City concerning the land transaction and suggesting that it should be rescinded. Although his sources told him that the document had been tabled before the Management Committee, this was not in fact correct. He took several steps to verify the story. He went to the Deeds Office to check the title deeds.

[79] He also testified that he called Mr von Finckenstein, the chairperson of the City's Management Committee once on 19 September in the evening nearly 15 months after the relevant application had been granted by the Council. It appears from the transcript of that phone call that Mr von Finckenstein told Mr Hamata that he had just returned from a week away and could not comment on the land transaction then. He stated that he would first need to get "the background" before commenting.

[80] It is not surprising that Mr von Finckenstein was unable to comment upon it immediately given the time that had lapsed since the application had been granted. Instead of affording Mr von Finckenstein time to refresh his memory, Mr Hamata chose to publish the story. In it he misleadingly stated that Mr von Finckenstein had claimed that he was not aware that lawyers were seeking rescission of the approval of the land deal. This attempt to check the story does not constitute a diligent attempt to give a person named in the story an opportunity to respond as fair and reasonable journalistic practice requires.[40]

[81] Secondly, Mr Hamata called the Mayor on his cell phone several times to give him an opportunity to comment on the story. The phone was not answered and Mr Hamata made no further attempts to contact the Mayor. He neither called the Mayor's office nor sent the Mayor a text message or an

40 See Code of Ethics of the Professional Society of Journalists quoted above paragraph 76.

email explaining why he was trying to contact him. This too does not constitute a diligent attempt to give the Mayor an opportunity to respond.

[82] Thirdly, Mr Hamata "verified" (incorrectly as it turned out) that the Mayor was a member of the board of Bank Windhoek from an anonymous source. This practice flies in the face of the principle that journalists should only use anonymous sources for information that cannot be obtained using "traditional open methods".[41] Mr Hamata could have easily obtained the names of the board members of Bank Windhoek without the use of an anonymous source. This step too did not accord with ordinary journalistic practice and indeed produced an incorrect factual assertion.

[83] Fourthly, Mr Hamata did not attempt to obtain copies of the minutes of the Council meeting at which the application for removal of the title deed restrictions had been granted, despite the fact that he testified that he knew that the minutes were publicly available. Again this does not accord with good journalistic practice which requires journalists to exercise care to avoid inaccuracy.

[84] Such an obligation is particularly acute where the original source of the story wishes to remain anonymous given the risk that an anonymous source may be serving a particular agenda not apparent to the journalist. To minimize this risk, the rules of good practice require journalists to investigate the motives of anonymous sources and where possible to base sources upon

41 Id.

open forms of information gathering. As the Canadian Supreme Court commented in *Grant*, "it is not difficult to see how publishing slurs from unidentified "sources" could … be irresponsible".[42]

[85] Counsel for the appellants argued that the pressure of deadlines of a weekly newspaper should be taken into account in determining whether the publication was reasonable. At times, the pressure of deadlines may be a relevant consideration. But it will depend on the importance and urgency of the story and the question whether a delay will enable the journalist to verify the story and correct errors. Here the facts upon which the story was based had occurred more than a year before. The story itself constituted a significant defamation of the Mayor. The slipshod manner in which Mr Hamata sought to give the Mayor an opportunity to respond to the story is particularly unacceptable. It is an elementary principle of fairness that a person should be given an opportunity to respond.[43] Failure to do so will often increase the risk of inaccuracy (as indeed it did in this case).

[86] It cannot be said that the publication of the article in all these circumstances was reasonable or constituted responsible journalism. It may be that if there had only been one or two departures from the principles of responsible journalism, the situation might have been different. Of particular

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42 Cited above n 3 at para 114.

43 See *Grant*, cited above n 3 at para 116.

importance is the fact that the Mayor was given no effective opportunity at all to respond to the defamatory story that was to be published about him.

[87] Finally, the High Court was correct in concluding that the appellants acted wrongfully when they published the defamatory article concerning the respondent. We, therefore, uphold its determination in the regard. The next question that arises is whether the quantum of damages awarded by the High Court should be interfered with on appeal.

Quantum

[88] The award of damages is a matter ordinarily left to a trial court that is better placed than an appellate court to assess what damages are appropriate.[44] An appellate court will only interfere with the award of damages in a defamation case if it is persuaded that the damages awarded by the trial court are "so unreasonable as to be grossly out of proportion to the injury inflicted".[45] The respondent appeals on the issue of quantum seeking an increase in the amount of the award from N$175 000 to N$250 000. The appellants, on the other hand, appeal against the quantum on the ground that the award is too high.

[89] In determining the amount of damages to be awarded, the High Court commenced by noting how difficult it is to place a monetary value on damage that has been caused to a person's reputation. In determining the seriousness

44 See *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para 93- 95.

45 Id at para 95.

of the defamation, it took account of the fact that the article was published on the front page of *Informanté* which is widely circulated; the seriousness of the allegations against the Mayor in the article; that, in the view of the High Court, the article was "clearly calculated" to injure the plaintiff; and that no serious attempt was made to verify the allegations by the defendants; that the defendants refused to apologise (something the appellants' counsel mistakenly asserted the appellants had done in their written submissions to this Court). The Court also took into account the fact that the Mayor had not testified and found that his failure to testify meant that the Court could not fully assess the subjective extent of the damage caused by the article. Nevertheless the Court found that the defamation was very serious. It then considered other recent defamation awards and determined the quantum of damages at N$175 000.

[90] In determining whether this Court should interfere with this award, the primary question is whether the award of damages is grossly disproportionate to the injury suffered as a result of the defamation. One of the difficulties in applying this test is how one quantifies harm to reputation in monetary terms. As Sachs J noted in *Dikoko's* case in the South African Constitutional Court:

"There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his

or her reputation, not the amount of money he or she ends up being able to deposit in the bank."[46]

[91] Sachs J has however also pointed out that awards of damages remain important:

"In our society money, like cattle, can have significant symbolic value. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains a money-oriented as it is. Many miscreants would be quite happy to make the most fulsome apology (whether sincere or not) on the basis that doing so costs them nothing – 'it is just words'. Moreover it is well established that damage to one's reputation may not be fully cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation."

[92] It is useful to compare the award made to other awards of damages recently made for defamation. Counsel informed us that the amount awarded here is to their knowledge the highest amount ever awarded in Namibia by a significant margin. Previously, we were told the highest award for defamation was the award made in *Shidute* in 2008 where an amount of N$100 000 was awarded in favour of the first plaintiff.[47] In that case the first plaintiff was an assistant credit controller in the Walvis Bay municipality and the second plaintiff was her attorney. The defendants were the publisher and editor of the *Namib Times.* The claim arose from a story that had appeared on the front

46 Id at para 110.

47 *Shidute and Another v DDJ Investment Holdings CC and Another,* (P) I 2275/2006 unreported judgment of the High Court dated 11 March 2008 (per Manyarara AJ).

page of the newspaper alleging that the first plaintiff paid her water and electricity accounts late. This was quite untrue but the defendants refused to acknowledge this.

[93] Other recent awards include an award of N$50 000 in *Shifeta v Munamava and Others*[48] in which the plaintiff was a former secretary-general of the National Youth Council. The *New Era* newspaper had published two articles suggesting that the plaintiff was under investigation in relation to the disappearance of National Youth Council funds amounting to N$40 000. This was not true.

[94] Another recent award was made in *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd t/a The Southern Times.*[49] The plaintiff complained of a story that had appeared in the defendant newspaper: the front page of the paper contained a headline "State bans Satanic sect" and a large photograph of the plaintiff's church building situated in Windhoek. The front page referred readers to page 3 where the relevant story related not to the plaintiff church but to the Zambian government's decision to ban a church sharing the same name in Zambia. The court held the defendants liable and awarded damages of N$60 000.

[95] Against this background, the award of N$175 000 seems extremely high. It is true that there are aggravating factors in this case: the defamation is

48 Cited above n 5.

49 2009 (1) NR 65 (HC) per Silungwe AJ.

serious and the appellants refused to make an apology as requested by the respondent thus losing an opportunity to make amends for the damage that they had done. But there were also aggravating factors of this kind in the other recent cases I have mentioned.

[96] Thus despite these aggravating factors, it seems to me that the award is considerably in excess of the awards generally made for defamation. For that reason, the award should be set aside and replaced by a smaller amount. In all the circumstances, I consider that an amount of N$100 000 is appropriate.

Costs

[97] The last issue for consideration is the question of costs. The appellants appealed against the special order of costs made in the High Court. The High Court ordered the first and second appellants to pay the respondent's costs on the basis of attorney and own client. Such an award is ordinarily made as a mark of displeasure by a court at the manner in which the matter has been litigated. There is no clear indication in the High Court judgment of any basis for such displeasure.

[98] The High Court relied upon the South African decision of *Buthelezi v Poorter and Others*[50] in which the court made a special order of costs against the first defendant in favour of the plaintiff. The court did so after remarking that it should take care "to avoid double punishment in the sense of loading

50 1975 (4) SA 608 (W).

the award for damages because of disapproval of the defendants' conduct in the actual litigation and at the same time punishing the defendants for the same conduct by means of an award of attorney and client costs."[51] In that case, the first defendant had withdrawn his defence of justification just before the trial, something the court found inexplicable. For this and other reasons, the Court found the conduct of the first defendant to have "been contumacious of both the Court and of the plaintiff"[52] and this conclusion led to the special order of costs.

[99] In this case, the High Court did not point in its judgment to similar vexatious conduct by the defendants. Mr Hamata did refuse to disclose his sources, but this cannot ordinarily be a ground for criticizing the manner in which the litigation has been undertaken nor was it expressly criticized by the High Court. It is not clear therefore why the High Court considered the approach in *Buthelezi v Poorter and Others* to be relevant in this case.

[100] An appellate court will not interfere with the order of costs made by a court below unless it is clear that the order was made on the basis of an incorrect principle. During oral argument in this Court, we asked counsel whether they were aware of any conduct in the appellants' conduct of the proceedings in the High Court which could have been the basis of the High Court's order. Neither counsel for the appellants nor counsel for the respondent could suggest any. Given the absence of any explicit reason for

51 Id at p 619B.

52 Id at 619H.

the order by the High Court, and the absence of any obvious basis for such an order in the record, the order of the High Court will be set aside and replaced with an order that the defendants shall bear the costs of the respondent, such costs to include the costs of two instructed and one instructing counsel.

[101] The appellants have only succeeded in part in their appeal. Their main argument that they were not liable for defamation has been rejected. It is thus appropriate to order them to pay the costs of the respondent in this court, such costs to include the costs of one instructed, and one instructing counsel.

[102] The following order is made:

1. The appeal is upheld in part and dismissed in part.
2. The order of the High Court is set aside and replaced with the following order:
   (i) Judgment is granted against the defendants, jointly and severally, in the amount of N$100 000,00;
   (ii) The defendants must pay interest on N$100 000, jointly and severally, at the rate of 20% per annum, calculated from the date of judgment to the date of payment;
   (iii) The defendants are to pay the costs of the plaintiff in this action, jointly and severally, such costs to include the costs of two instructed and one instructing counsel.
3. The appellants shall pay the costs of the respondent in this Court, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN, AJA

I concur.

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CHOMBA, AJA

I concur.

_____
LANGA, AJA

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