IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 847/15**

IN THE MATTER BETWEEN:

TIMOTHY SHONGWE PLAINTIFF

AND

THE SWAZI OBSERVER (PTY) LTD FIRST DEFENDANT

THE EDITOR OF THE SWAZI OBSERVER SECOND DEFENDANT

Neutral Citation: Timothy Shongwe v The Swazi Observer (PTY) LTD (847/2015)[11th November, 2021] SZHC 212

CORAM: **N MASEKO J.**

FOR PLAINTIFF: **ADV PATRICK FLYN**

INSTRUCTED BY MR Z DLAMINI

(DLAMINI KUNENE ASSOCIATED)

FOR DEFENDANTS: **MR Z SHABANGU (MAGAGULA HLOPHE ATTORNEYS)**

DATE HEARD: **18/06/2019**

DELIVERED: **11/11/2021**

Preamble: *Civil law- Defamation suit in an action for damages for alleged defamation against the defendants for the publication of defamatory material about the plaintiff in the Observer on Saturday weekly publication of the 7th March 2015, the plaintiff contends that the contents of the article were untrue, a pure fabrication against the plaintiff. Further that the contents were wrongful and grossly defamatory against the plaintiff as they conveyed the message to ordinary readers of defendants' newspaper that plaintiff was a fraudster and/or thief, not trustworthy with finances. Further that before the publication of the story plaintiff enjoyed a good and untainted reputation amongst the citizens of Swaziland and was regarded as a respectable and noble family man with international reputation of excellence in all his dealings whatsoever.*

On the 14th March 2015, the defendants published a retraction and apology for the alleged defamatory publication of the previous weekend. The unconditional apology and retraction was published by the defendants on their own in the next weekly publication of the 14th March 2015 after discovering that the contents of the article of the 7th March 2015 was false and defamatory to the plaintiff.

***Held**: that the timeous apology and retraction of the original story by the defendants in the manner in which it was carried out exhibited reasonable conduct and lack of negligence on the part of the defendants.*

***Held**: further that the manner in which the article of the 7th March 2015 was reported constituted fair comment because it was not reported as a factual statement but rather as allegations which were being probed.*

***Held:** further that the plaintiff's claim as contained in the summons is hereby dismissed and each party is to pay its own costs.*

JUDGMENT

[1] On the 9th July 2015 the plaintiff issued a Combined Summons against the defendants for the payment of E2 000 000.00 (Emalangeni Two Million) at the rate of 9% per annum and costs of suit, being damages for alleged defamatory material published by the Defendants in the weekly publication of the 1st Defendant- on the 7th March 2015.

THE PLAINTIFF'S CASE

[2] The plaintiff's case is that on the 7th March 2015, the 1st defendant in its weekly Saturday publication published a story under the headlines **"RSSC probe Timothy Shongwe on missing E300 000.00"**. These headlines were at the back page of the publication, otherwise the whole story was on page 47. It is common cause that this story was the headline of the day in the sports section of the Saturday publication of that day the 7th March 2015.

[3] The content of the publication basically supported the headline in that it stated that the football team was probing the plaintiff and another former official of the team for the misappropriation of the aforesaid amount of E300 000. 00.

[4] The plaintiff contends in its Particulars of Claim that the said publication and content of the defendants' article were untrue and a pure fabrication against him. Further that the contents of the article were wrongful and grossly defamatory against him as they conveyed a message to ordinary readers of defendants' newspaper that the plaintiff was a fraudster and/or thief not trustworthy with finances.

[5] The plaintiff contends further that before the publication of the story he enjoyed a good and untainted reputation among the citizens of Eswatini and was regarded as a respectable and noble family man with an international reputation of excellence in all his dealings whatsoever. Therefore the publication created the impression that everyone who had financial dealings with him was doing so at his or her own risk as he was untrustworthy and a criminal under investigation.

[6] Plaintiff contends further that the defendants enjoys massive readership nationally and also that the publication circulate internationally as it is posted on the internet on defendants' website thus the whole world saw the defamatory material about him. Further that the placards that were posted all over the streets of the main cities and towns of the country and along the roadway so that even passing motorists were attracted by the story.

[7] The plaintiff testified that he was an employee of the then Royal Swaziland Sugar Corporation (the RSSC) as a Senior Agricultural Manager and that at some point in time he was at management of the RSSC football team, and most importantly that at the time when this story was published by the defendants he was no longer part of the team in any capacity.

[8] The plaintiff testified that throughout his life he has been involved in football, from the regional level to the national level in various capacities. He highlighted that during the publication of the story by the defendants on the 7th March 2015 he was out of the country on football duties representing the country.

[9] He testified that the publication of the alleged defamatory material traumatized him so much such that he consulted his doctor who prescribed that he had to take stress related medication as a result of the excessive assault on his reputation. It was his evidence also that he lost his dignitas more particularly because he is a well-respected family man with many relatives who hold him in high esteem. He testified further that the defamatory article was published during a period when he was the Vice Chairperson of the Eswatini National Sports Recreation Council, and also a member of the Tournaments Organizing Committee of the Council of Southern African Football Association (COSAFA) and also a FIFA Instructor for the African Continent.

[10] He testified that after the publication of the alleged defamatory story he had sleepless nights and also received numerous telephone calls from different

people enquiring about the story. He testified further that the story was publicized without him being consulted by the defendants. As a result not only was it false but it was also not a fair comment by the defendants, and further that it was a blatant fabrication intended to injure him in his reputation and further that it was not in the public interest.

[11] The plaintiff testified that the failure by the defendants to consult him and obtain his side of the story before publishing the alleged defamatory story about him, and also without disclosing their sources of the story, as well as their failure to obtain commentary from the club itself was wrongful, unlawful and grossly negligent on the part of the defendants. He testified further that the apology and retraction of the article on the 14th March 2015 was very small and of no importance because the damage had already been done.

[12] The plaintiff was subjected to a lengthy cross-examination by Mr. Z Shabangu for the defendants. At some point during the cross-examination Mr. Shongwe testified that he instituted the present proceedings because he had not been consulted at the time the story was published to present his side of the story to the defendant and also that the article caused harm to his international reputation as a sports personality.

THE DEFENDANT'S CASE

[13] The defendants led the evidence of two witnesses, namely DW1 the Reporter of the article complained of by the plaintiff and DW2 Mr. Alec Lushaba, the Editor of the Observer on Saturday.

[14] DW1 testified that he started working on the story about a few days during the week leading to its publication on Saturday the 7th March 2015. He testified that he relied on a source. It was his testimony that after he had collected all the information, he called the plaintiff on his cellular phone in order to get a response from him, however he was not able to get through to him. DW1 testified further that owing to deadlines which guide the publication of the stories, he then handed over the story to his supervisor, who then read and edited the story such that it was eventually published in the manner in which it appeared in the Observer on Saturday on the 7th March 2015.

[15] DW1 was subjected to a lengthy and searching cross-examination by Mr Flyn for the plaintiff, in particular on the short period of time within which the story was investigated and eventually published, and also the refusal to divulge the source of the information.

[16] DW2 was the Editor of the Observer on Saturday Mr Alec Lushaba. He testified that the story was indeed published on the 7th March 2015 without an input or response from the plaintiff. It was his testimony that after realizing that the story which had been published on the 7th March 2015 was untrue, he commissioned a retraction of the story together with an unconditional apology to the plaintiff through the Ombudsman. Mr Lushaba emphasized that the retraction of the story and apology to the plaintiff was carried out without a **complaint** from the plaintiff, but after he (Lushaba) discovered from a follow up investigation that it was in fact not true that the plaintiff was being investigated for misappropriation of funds. Further Mr

Lushaba testified that the retraction of the story and apology was afforded the same prominence in terms of print size and also in terms of posturing the retraction and apology as a headline story in the sports section of the publication of the 14th March 2015.

[17] DW2, Mr Lushaba was also subjected to a lengthy and searching cross-examination by Mr Flyn for the plaintiff.

ANALYSIS OF THE EVIDENCE

[18] It is common cause that the defendants published the alleged defamatory material on the 7th March 2015, and exactly on the next publication of the 14th March 2015 published a retraction of the article and an apology. I have no doubt as to the pain and anguish that the plaintiff went through as a result of the publication of this defamatory article which was published when he was out of the country on official sport activities.

[19] On the other hand I cannot ignore the swift action of Mr Lushaba and his editorial team in retracting the publication of the previous week, the 7th March 2015, and tendering an unconditional apology and retraction on the following publication of the 14th March 2015. It is common cause that this retraction and apology to the plaintiff by the defendants was not induced by any action on the part of the plaintiff, but rather such retraction and apology was self- induced by the realization by Mr Lushaba and his editorial team that the story they had published concerning the plaintiff was in fact incorrect hence it deserved a retraction and apology which was afforded the same prominence as the original article of the 7th March 2015. I must

emphasize that the Observer on Saturday is a weekly publication and not a daily publication.

[20] I am of the considered view that the article of the 14th March 2015 was published within a reasonable and short space of time from the original article of the 7th March 2015, such that, the retraction and apology were undertaken whilst the publication of the 7th March 2015 was still fresh in the minds of the readership. The retraction was carried out in the same fashion and prominence as the original article and as I mentioned above herein, it was not induced by the plaintiff but was as a result of the realization of the untruthfulness of the defamatory publication of the 7th March 2015 by Lushaba and his team.

[21] It is prudent to point out that the letter of demand from the plaintiff was written on the 17th March 2015, and it is important to point this out because the retraction of the article and tendering of the apology had already been carried out by the defendants. The plaintiff's letter of demand was referred to the Swaziland Royal Insurance Corporation, the defendant's insurers which again issued an unconditional apology to the defendant by correspondence dated the 23rd April 2015, which reads as follows:

Dlamini Kunene Associated
P. O. Box 6990
Manzini

Dear Sirs,
INSURED: SWAZI OBSERVER (PTY) LTD
CLAIM # 53298

THIRD PARTY: TIMOTHY SHONGWE

1. ***Reference is made to your letter of demand dated 17th March 2015.***
2. ***Kindly be advised that the Swazi Observer is our Client and the matter has been referred to ourselves for response.***
3. ***Our Client advises that the story was published in error and therefore tenders its unreserved apologies to your Client.***
4. ***Client further advises that upon realizing such error it caused to be published an apology in its newspaper on the 14th March 2015.***
5. ***The said apology included a retraction of the whole story and further re- affirmed your Client's good name.***
6. ***Our Client apologizes for the damage that the publication may have caused but is confident that the retraction achieved the desired effect.***

Yours faithfully
Signature of Sidumo Dlamini
Legal Executive Litigation & IR

[22] I have no doubt in my mind about the *bona fide* intention of the defendants in admitting and acknowledging that the story was defamatory to the plaintiff, and then tendering an unreserved and unconditional apology both in the publication of the 14th March 2015, as well as in the correspondence of the 23rd April 2015 quoted herein above. This is the maturity and positive attitude blended with the intention to correct an error of this nature that is expected of a media house which has committed such error during the course of duty. It is common cause that all legal process leading up to these

proceedings commenced after the retraction of the defamatory article together with the apology which had long been tendered by the defendants. It must therefore be borne in mind that the suit did not induce the retraction of the article and the apology of the 14th March 2015. Rather, the suit was instituted long after Mr Lushaba and his editorial team had acted responsibly by having the office of the Ombudsman retract the aforesaid defamatory article and further tendered apologies to the plaintiff.

THE LAW APPLICABLE

[23] In the case of **NATIONAL MEDIA LTD AND OTHERS V BOGOSHI 1998 (4) SA 1196 (SCA)** Hefer JA stated as follows at paragraphs 1209-1212:

> ***"…but, we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens- from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people- their means to convey their concerns to their fellow citizens, to officialdom and to government. To describe adequately what all this entails, I can do no better than to quote a passage from the as yet unreported judgment of the English Court of Appeal in***

Reynolds v Times Newspapers Ltd and Others delivered on 8th July 1998. It reads as follows:

> ***"We do not for an instant doubt that the common convinience and welfare of a modern and plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections … and public administration, but we use the expression, more widely than that, to embrace matters such as (for instance) the governance of public institutions and companies which give rise to a public interest in disclosure but excluding matters which are personal and private, such that there is no public interest in their disclosure. Recognition that the common convinience and welfare of society are best served in this way is a modern democratic imperative which the law must accept. In differing ways and to somewhat differing extents the law has recognized this imperative, in the United States, Australia, New Zealand and elsewhere, as also in the jurisprudence of the European Court of Human Rights…. As it is the task of the news media to inform the public and engage***

> ***in public discussion of matters of public interest, so is that to be recognized as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large…. We have no doubt that the public also have an interest to receive information on matters of public interest to the community.***

In endorsing this view I should add that it makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression albeit not entrenched, did exist in the society that we knew at the time when Pakendorf was decided, although its full import, and particularly the role and importance of the press, might not always have been acknowledged.

If we recognize, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in Pakendorf. Much have been written about the 'chilling' effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error…. Strict liability has moreover been rejected by the Supreme Court of the United States of America (Gertz v Robert Welch Inc.) (Supra at 323), the German Federal Constitutional Court, the European Court of Human Rights (Lingens v Austria (1986) 8 EHRR 407), the Courts in the Netherlands, the English Court of Appeal, the High Court of

Austria, and the High Court of New Zealand (Lange v Atkinson and Australian Consolidated Press NZ Ltd 1997 (2) NZLR 22…"

According to the judgment in Lange v Australian Broadcasting Corporation the requirement for protection is 'reasonableness of conduct', which is explained as follows at 574:

> ***"Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant has reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."***

In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been unreasonable to

publish the particular facts in the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that the greater latitude is usually allowed in respect of political discussion (Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) at 318 C-E) and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary sting. What will also figure prominently is their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Professor Visser is correct in saying (1982 THRHR 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community.

I have mentioned some of the relevant matters; others such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also comes to mind. The list is not intended to be exhaustive or definitive.

[24] The Bogoshi case (supra) is very instructive in ensuring a proper and fair balance between the freedom of the press, and the protection of the rights of persons who are defamed by certain press publication. The case provides guidelines and criteria by which courts must approach such cases, and in particular that courts must always assess the reasonableness of the conduct of the news media which published the defamatory article. This case entrenches the principle that whether the publication of the defamatory article was reasonable or not depends on particular circumstances of each case. This is the assessment which the court adjudicating on a defamation suit must always carefully interrogate, this is because each case has its own peculiar circumstances upon which it must be decided.

[25] It is common cause that Mr Lushaba and his editorial team upon discovering, subsequent to the publication that the story published about the plaintiff was not true, and that as a matter of fact there was no investigation being conducted against the plaintiff, they quickly had the story of the 7th March 2015 retracted together with an unconditional apology on the very next publication of the newspaper on the 14th March 2015. I have also observed that the apology and retraction were given the prominence, and 'headline status' which had been afforded the article of the 7th March 2015. This conduct on the part of Lushaba and his team is an indication of the reasonable conduct and importantly an admission that an error was made which resulted to the false and defamatory publication which error is now being corrected by the article of the 14th March 2015 wherein the retraction of the article and apology was tendered.

[26] In some instances an apology and a retraction of false and defamatory publications is usually extracted from the media through letters of demand issued by attorneys acting on behalf of affected parties, however in *casu*, that was not the position, Lushaba and his editorial team quickly published the retraction of the article of the 7th March 2015 together with the apology on their own and within a reasonable time without the plaintiff having invoked any pressure on them to do so. This conduct demonstrated the high degree of circumspect expected of editors and their editorial staff.

[27] The position in *casu* is in my view that the act of retracting the defamatory article so quickly in the next publication of the weekly publication of the defendants' newspaper, coupled with the apology did negate the *animus injuriandi* on the part of the defendants. The plaintiff is a public figure owing to the positions that he occupied in the sporting fraternity in the Kingdom of Eswatini. Undoubtedly soccer is the leading sport in the country and soccer administrators and players alike always attract media attention and always make headline news in the daily print, broadcast and electronic media in the country because they are public figures. Public figures attract attention, and it is this public attention which attracted the defendants to write the story about the plaintiff, which story turned out to be untrue.

[28] Upon realizing that the story was untrue, an apology and retraction were then made. It is a fact that whilst public figures attract media attention, the media itself must always ensure that any story published about any person must be as accurate as possible so that the publication of false and defamatory material is avoided.

[29] In the same breath, it would be prudent that where defamatory material is published and subsequently discovered that it is in fact inaccurate after such publication, then an apology and a retraction of that defamatory publication must be undertaken by the media house as soon as reasonably possible, and that such apology and retraction must be as prominent (or even more) as the original defamatory publication. This should be done to appease and inform the readership that the apology and retraction are genuine, remorseful and not just a formality.

[30] A genuine and passionate retraction coupled with an unconditional apology from the media is what takes off the sting and negative effect of a defamatory article from the victim. The negative impact that is caused by the defamatory article is neutralised by the retraction of such article and in the process the dignity and respect of the victim is restored. In other words a retraction and apology cleanse the victim of the tainted reputation caused by the defamatory publication. This is the position in *casu* because of the timeous and speedily retraction and apology tendered by Lushaba and his editorial staff on the 14th March 2015.

[31] In *casu*, the aforesaid retraction and apology of the 14th March 2015 by Lushaba and his editorial team was a turning point in what was otherwise a defamatory publication in that, it demonstrated a high degree of circumspect, remorse and genuineness in the manner in which the retraction and apology was prominently postured as a headline story. It wasn't a mere act of formality, rather it acknowledged that the article was false and had injured the plaintiff in his *dignitas*, further that it had created a wrong impression on the readership of the defendants' newspaper that the plaintiff resigned

because of the investigation yet there was no such probe, and in fact, after further investigations on the story the defendants established from the company itself (Royal Eswatini Sugar Corporation) that it was unaware that any money had been misappropriated within the company's football club-RSSC FC.

[32] The retraction and apology further concluded as follows:

> ***"We would like to withdraw entirely the contents of the story alleging that the mentioned people were involved in any malpractice and to the company for the impression that there was money that had gone missing.***
>
> ***Both Shongwe and Maziya are men of good standing."***

[33] The manner in which the article was reported indicated that these were allegations which were still under investigation by the company RSSC. It is for that reason that upon the discovery of the truth by Lushaba and his editorial team, the timeous retraction and apology was made on the following publication. And as I have pointed out on numerous occasions in this judgment, the retraction and apology was timeous and given an equally prominent space and was also a headline article in the sports section of the 14th March 2015 newspaper publication.

[34] During the trial Mr Lushaba testified that the article was retracted and an apology published in order to clear the name of the plaintiff. Having looked

at the pleadings and the evidence during the trial, I have not seen any malice on the part of the defendants, instead I can only see remorse and reasonable conduct more particularly from the manner in which the whole matter was handled by the defendants after discovering the truth that there was no probe against the plaintiff and the other gentleman.

[35] The impression I observed from Lushaba and the reporter DW1 is that at first they believed that their source was telling the truth and that DW1 made numerous attempts to contact the plaintiff without success and even the company was contacted without success until the story was then published without the input or comment from the plaintiff and the company. Mr Lushaba testified and explained the time constraints as regards the publication of stories, however he was quick to point out that time constraints can never be a justification for publishing untruths hence subsequent to the publication of the story on the 7th March 2015, they discovered the untruths in the story and then he quickly made sure that a retraction and apology was tendered forthwith.

[36] It is a fact that plaintiff himself confirmed that he was out of the country on national duties and therefore could not comment before the story was published. I have stated herein above that the saving grace to the defendants was the timeous and quick reaction of Lushaba and his editorial team in the retraction and unreserved apology which was executed through the Ombudsman, most importantly and significantly, before the plaintiff lodged a complaint or even demanded an apology or retraction of the article. This

therefore in my view negate any *animus injuriandi* that may be inferred from the manner in which the article was published.

[37] In the Constitutional Court of South Africa in the case of **KHUMALO AND OTHERS V HOLOMISA** (CCT 53/01) [2002] ZACC; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) O' Regan J stated as follows at paras 17-20 and 22 and 28

> *"(17) The law of defamation in South Africa is based on the 'actio injuriarum', a flexible remedy arising from Roman Law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another. One of these personality rights, is the right to reputation or 'fama', and it is this aspect of personality rights that was protected by law of defamation."*
>
> *"(18) At common law, the elements of the delict of defamation are-*
>
> *a) The wrongful and*
> *b) Intentional*
> *c) Publication of*
> *d) A defamatory statement*
> *e) Concerning the plaintiff.*
>
> *It is not an element of the delict in common law that the statement be false. Once a plaintiff establishes that a*

defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public interest, that the publication constituted fair comment and that the publication was made on a privileged occasion. Most recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in National Media Ltd and others v Bogoshi. In that case, Hefer JA, after a careful analysis of the development of a similar defence in Australia England and the Netherlands held that:

> ***"…the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.***
>
> ***In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We***

know, for instance, the greater latitude is usually allowed in respect of political discussion (Pienaar and Another V Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) at 318 C-E, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper (at 1212 G- 1213 A)"

"(19) This fourth defence for rebutting unlawfulness, therefore, allows media defendants to establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances."

(20)In Bogoshi, too, the question of the rebuttal of intention was considered. One of the aspects of animus injuriandi (the intention to cause injury) is subjective

intent which amongst other things, requires the person who made the defamatory statement to have been 'conscious of the wrongful character of his act'. In 1982 the Appellate Division held that the mass media could not avoid liability for the publication of a defamatory statement by relying on a defence that the publication was not intentionally injurious. The effect of this decision was to impose strict liability upon the media for the unlawful publication of defamatory material. In Bogoshi, the Supreme Court of Appeal overruled this decision. Hefer JA held that the Court in Parkendorf's case had failed to recognize the importance of freedom of expression and, in particular, the important role the mass media performs in a democratic society. He concluded that:

> ***"if we recognize, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of media in the process, it must be clear that strict liability cannot be defended and should have been rejected in Parkendorf" (at 1210).***

Hefer JA then considered whether media defendants should be permitted to rebut the presumption of intentional harm by establishing a lack of knowledge of wrongfulness, even where that lack of knowledge was as a result of the negligence of the defendant. He concluded that they should not, reasoning as follows:

"If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths. In practical terms (because intoxication, insanity, provocation and jest could hardly arise in the present context) the defence of the lack of animus injuriandi is concerned with ignorance or mistake on the part of the defendant regarding one or other element of the delict…. The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication. In such a case a defence of animus injuriandi can plainly not be available to the defendant.

Defendants' counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of animus injuriandi, and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case".

Hefer JA therefore concluded that media defendants could not escape liability merely by establishing an absence of

knowledge of unlawfulness. They would in addition have to establish that they were not negligent.

(22) The print broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate…"

(28)The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other".

[38] Ethical journalism can be gleaned from the conduct of Lushaba and his team in making a timeous follow up on the story and eventually discovering that the story was in fact not correct and thereby quickly setting in motion the retraction and apology by the Ombudsman. The article of the 14th March 2015 withdrew entirely the contents of the story alleging that the plaintiff

was involved in any malpractice resulting to misappropriation of RSSC FC funds. The withdrawal was also directed to RSSC itself for the wrong impression that had been created by the article of the 7th March 2015. The speed with which the article of the 14th March 2015 was effected is an indication that the said article was not published by defendants recklessly i.e. not caring whether the contents were true or false, I say this because the falsity and defamatory nature of the said article was quickly and speedily retracted and an apology tendered.

[39] In the case of **HOLOMISA V ARGUS NEWSPAPERS LTD** 1996 (2) SA 588 (W) Cameron J stated as follows at p601

> ***"…Professor JM Burchell, The Law of Defamation in South Africa (1985) at 195 suggests, regarding reform in this area:***
>
> > ***"It is clear that if freedom of speech is to be balanced against protection of reputation, this must be done under the element of unlawfulness (or wrongfulness), especially as the media is now strictly liable for defamation… These factors (including the social utility of the act and the injury to reputation) are traditionally dealt with under the negligence criterion, but, strictly speaking, they form part of an ex post facto enquiry into lawfulness or reasonableness"***

This question may have been thought settled by Melius de Villiers in 1899 and by the judgments of Innes J and Solomon J in Whittaker in 1912. According to them, animus injuriandi was present when the defamer intended 'to produce the effect of his act'; and this entailed no more than that he or she must have had in view 'the necessary consequence of the conduct'. But O'Malley, Pakendorf and Hofmeyr in any event evidence a trend away from focusing on animus injuriandi as a means for describing or circumscribing a wrongdoer's liability for injuria. That assessment, it seems to me, should take place in relation to the criterion of unlawfulness, and not fault. This conforms with the trend away from the wrongdoer's subjective state of mind, and to an objective assessment of the justification for his or her conduct. It also, in my view, promotes clarity and ease of assessment".

[40] At page 602, Cameron J stated as follows when dealing with freedom of expression and of the press:

"The temper, and the effect, of these decisions emerges in two passages from the judgments of Corbett CJ in Esselen's Estates and of Hoexter JA in Neathling v Du Preez. In the former case, Corbett CJ stated, in response to Counsel's argument invoking the right to

free expression as a component of democracy (at 25 B-E):

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

[41] In *casu* it is my considered view that although the contents of the article was false and obviously defamatory, but it was reported in a moderate tone and fair manner, and thus in my view ascribing to the defence of fair comment because it conveyed the impression to the mind of the readership that there were investigations (probe) being conducted by RSSC. The article was not in any way conclusively informing the readership that the plaintiff had misappropriated the funds but that there was a probe on missing funds. Upon discovery of the falsity of the statement by the defendants, it was quickly and speedily retracted together with an apology which was prominently published as well through the Ombudsman.

[42] I do not believe it would be fair to find fault or liability on the defendants where they have transparently and *bona fide* admitted their fault and further tendered an unconditional apology and an unreserved retraction of the defamatory material. My objective assessment of the conduct of the defendants from the publication of the article on the 7th March 2015 to its retraction and apology on the 14th March 2015 is that they were unaware of the falsity of the article on the 7th March 2015 and upon subsequent discovery of such falsity of the statement, they were remorseful and quickly did the correct thing by tendering an apology and a retraction of the false and defamatory article. As I stated in the preceding paragraphs above this conduct of the defendants was reasonable and exhibited the lack of intention to injure the plaintiff in his dignity, and in the process negate the unlawfulness of the article of the 7th March 2015.

[43] The issue of a retraction and apology is discussed at length by Boqwana J sitting in the High Court of South Africa, Western Cape Division, Cape

Town) Case No. 20117/2017 in the case of **MOUNTAIN OAKS WINERY (PTY) LTD AND ANOTHER V MARRION SMITH AND ANOTHER** at paragraphs 48-60….. Where the learned Judge state the following:

> ***(48) The applicants rely on the judgment of the Constitutional Court in Le Roux & Others v Dey (Freedom of Expression and Restorative Justice Centre as Amici Curriae) 2011 (3) SA 274 (CC) as authority for the publication of the retraction sought in the notice of motion. In Dey the applicants who were then learners at a high school in Pretoria, overlaid images of the faces of Dr Dey (then the Deputy Principal at the school) and that of the school principal, on an image of two naked men sitting in a sexually suggestive manner. The High Court found that the learners had defamed Dr Dey and awarded him damages. This was confirmed by the Supreme Court of Appeal.***
>
> ***(49)In the Constitutional Court the award for damages was reduced, and in addition it ordered the learners to render an unconditional apology to Dr Dey for the injury they had caused him.***
>
> ***(50)An important feature in that case is that the Court was invited to develop Roman-Dutch Common Law, by giving due recognition to the value of an apology and retraction in restoring injured dignity. In paragraphs 197-200, the Court observed, inter alia, as follows:***

"[197]…we think it is time for our Roman-Dutch Common Law to recognize the value of this kind of restorative justice. Moreover, we think it can be done in a manner which, at the same time, recognizes the shared values of fairness that underlie both our common law and customary law, which form the basis of values and norms that our constitutional project enjoins us to strive for.

[198]Roman- Dutch Law was a rational, enlightened system of law, motivated by considerations of fairness which combined the wisdom of the Roman law jurists with the idealism of the Dutch scholars. This feature of it was sometimes lost from view in pursuit of doctrinal purity, but in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness. And this area of the law is no exception."

(51)In this connection, the court at paragraph 202, was of the view that:

"Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society

we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endevour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them…

We can see no reason why the creation of these conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another."

(52)The Court ultimately found that the depiction of Dr Dey's image was an actionable injury to his reputation and that he was entitled to an apology. It therefore ordered that an apology be tendered to him for the injury caused, in addition to the damages awarded.

(53)In another decision, that of Media 24 Ltd and Others v SA Taxi Securitisation (Pty) ltd (Avusa Media Ltd and Others as Amici curiae) 2011 (5) SA 329 (SCA, at paragraph 72, Nugent JA, stated the following:

[72]It seems to me that our courts are quite capable of expeditiously granting reparatory remedies, without damages, even without the intervention of legislation.

(57)Retraction and an apology are often used together. This can be seen in paragraph 74 of the Media 24 decision supra; Le Roux supra at paragraph 197; and University of Pretoria V South Africans for the Abolition of Vivisection and Another 2007 (3)SA 395 (O) at para 1.

(58)In the University of Pretoria decision, the Court granted an order directing defamatory statements to be retracted and an apology to be published and simultaneously the correct facts to be set out (at paragraphs 1 and 18).

(59)The University of Pretoria judgment is further authority for the proposition that it is competent for a court to grant an order directing respondents to retract statements which are factually incorrect to set the record straight. An order containing a retraction and an apology was also made by Willis J in the judgment of Mineworkers Investment Company (Pty) Limited v Modibane (2001/20548, 2001/21162 [2002] ZAGPHC 6 (18 June 2002), which was one of the earliest judgment to grapple with whether an apology can be ordered in a defamation case. Damages in that case were only made payable in the event that an apology and retraction was not published in the Business Day Newspaper. The court in that case, at paragraph 25, also found that:

"A public apology which will usually be far less expensive than an award of damages, can set the record straight, restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression".

[60]Hiemstra AJ in the decision of Isparta v Ritcher and Another 2013 (6) SA 529 (GNP), at paragraph 41, supported apology or retraction as an appropriate remedy in its own right. In that instance, he stated the following:

"An apology in the same medium (Facebook) would have gone a long way towards mitigating the plaintiff's damages. In fact there is much to be said for the proposition that orders for damages for defamation are inappropriate. Nugent JA, in a minority judgment in Media 24 Ltd and Others v SA Taxi Securitisation (Pty) ltd (Avusa Media ltd and Others as Amici Curiae) as referred to by Willis J in Mineworkers Investment Co (Pty) Ltd v Modibane, which called damages as the sole remedy for defamation 'remedially crude', Nugent JA said in para 72:

"As it is, an order that damages are payable implicitly declares that the plaintiff was

unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a pre-condition for having a declaration".

An apology to the plaintiff, or a retraction in writing, in the same forum that the offending statements had been made, also clears the name of the plaintiff.

[44] I have extensively reproduced the judgment of Boqwana J in the Mountain Oaks Winery case **(supra)**, to demonstrate the importance of a retraction and apology in defamation cases. The judgment of Boqwana J makes it clear that an apology and retraction by a defendant in certain circumstances of a case is a sufficient and appropriate remedy in its own right. In fact the judgment deals with a retraction and an apology which is demanded by a plaintiff or applicant pursuant to publication of defamatory material where a demand for the apology and retraction was made by the aggrieved party and not tendered by the party who caused the publication.

[45] The situation in *casu* is different from the Mountain Oaks judgment (**supra)** because the retraction and unconditional apology which was published on the 14th March 2015 and given the same prominence and headline status, was in fact self-induced by the timeous and quick discovery by Lushaba and his editorial team that the publication of the 7th March 2015 concerning the plaintiff was in fact false and defamatory, hence they initiated such retraction and unconditional apology through the Ombudsman. Lushaba

testified that the reason for such timeous retraction and tendering of the unconditional apology to the plaintiff was to clear plaintiff's name from the offending statement published about him on the 7th March 2015. The actions of Lushaba and his team were not as a result of a letter of demand from the plaintiff forcing a retraction and apology, neither was it induced by a court order compelling them to publish a retraction and apology.

[46] I have no doubt indeed that the public retraction and apology of the 14th March 2015 was genuine and set the record straight in so far as the defamatory article of the 7th March 2015 was concerned and further and importantly restored the reputation of the plaintiff.

[47] The subject of retraction in defamation cases is also dealt with by Professor David L Hudson Jr in his article titled Retraction, where he states as follows:

> ***"In a legal sense retraction is the act of taking back- or disavowing- a defamatory statement made about an individual or a group that is false, incorrect or invalid.***
>
> ***An effective retraction corrects the original statement and often enables a defendant who is charged with defamation, which is not considered to be protected by the Frist Amendment freedoms of speech or press, to mitigate damages he or she otherwise would have to pay.***

Many states have retraction statutes that can reduce liability for incorrect defamatory statements.

Retraction statutes vary considerably from state to state. (33 States have retraction statutes). Some Statutes apply only to statements that were made in good faith. Some state laws apply only to newspapers, while others apply only to media defendants.

The measures also vary considerably in the time period within which a retraction must be issued, ranging from 48 hours to three weeks. Generally, the statutes or common law require that a retraction be full and effective. Some statutes require the retraction to be displayed as prominently as the offending defamatory statement.
In many states defendants can reduce their liability if they properly comply with the state's retraction statute.

Under Tennessee's statute, for example, a media defendant cannot be held liable for punitive damages if the defendant properly complies with the law. Other states- Pennsylvania, for example, do not have specific retraction statute but provide the concept in their common law".

[48] The article by Professor David Hudson Jr is proof that the retraction and apology of any defamatory article is recognized internationally to the extent that many states in the United States of America have enacted retraction statutes which sets standards and criteria on how the retraction of a defamatory publication or material is to be carried out, for example in one state the retraction statute prescribe that the retraction be carried out between 48 hours and three weeks and that such retraction be 'full and effective'.

[49] These are the characteristics that are in existence in *casu*. The retraction and unconditional apology was carried out by the Ombudsman within seven (7) days of its publication, and in the Defendant's next weekly publication. Further the said retraction and apology was in my view full, frank and effective.

[50] As I have stated in the preceding paragraphs above, this conduct of the defendants was reasonable and constitute fair comment, and in the process negate the unlawfulness of the article of the 7th March 2015.

[51] Upon the consideration of the above circumstances, I am of the considered view that the following order is appropriate in the circumstances of this case, consequently I hand down the following judgment:

1. The Plaintiff's claim for defamation against the defendants as contained in the plaintiff's

particulars of claim and the pleadings in general is hereby dismissed.

2. Each party to pay its own costs.

So ordered!