

SOUTH AFRICA / JUDGMENT

Acting Prime Minister v Swaziland News (Pty) Ltd and Others (1643/21) [2024] ZAMPMBHC 72; [2024] 4 All SA 714 (ML) (27 September 2024)

[2024] ZAMPMBHC 72

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse AJ

CASE / FILE NUMBER

1643/21

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FLYNOTES:

CIVIL LAW – Defamation – Newspaper articles
– Alleging articles make harmful and misleading allegations against eSwatini government – Articles defame persons mentioned therein –
Publication was unlawful – Grounds of justification not established – Minister was not defamed
– Minister failed to establish an infringement of personal rights – Not entitled to interdictory relief –
King and other officials have not established a clear right – No evidence regarding effect of statements in articles
– Application dismissed.
SAFLII
Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII
Policy
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION (MAIN SEAT)
Case
Number: 1643/21

1.
REPORTABLE: YES/NO

2.
OF INTEREST TO OTHER JUDGES: YES/NO

3.
REVISED.

DATE: 27 September 2024

SIGNATURE
[SIGNED]
In

the matter between: THE ACTING PRIME
MINISTER
(who is cited in his
capacity as the representative and the executive person in charge
of the Government of eSwatini responsible
for the overall
governance of the Kingdom of eSwatini and who is cited in his
capacity as the representative of the eSwatini
Head of State)
Applicant
and
SWAZILAND NEWS
(PTY) LTD
(Registration Number:
2018/0005438/07
First
Respondent
ZWELWI MARTIN
DLAMINI
(Identity Number:
8[...])
Second
Respondent
AVULEKHA AMAZULU
(PTY) LTD
(Registration
Number: 2015/054357/07)
Third
Respondent
This
judgment will be handed down through distribution to the parties by
e-mail and by publication on SAFLII. The judgment shall
be deemed to
be delivered sat noon on 27 September 2024.

JUDGMENT

Roelofse AJ:

Introduction

[1] The dispute is about series of articles offensive (“the articles”) that were published by the respondents about the King of eSwatini, various of the eSwatini Government’s Ministers, certain public officials including other persons all of

which the eSwatini Government contends are defamatory of the King of eSwatini and his entire government.

[2] The articles were published by the first and second respondents (“Swaziland News”) on its website (hosted by the third respondent) and on Swaziland News’s other social media platforms.

[3] The applicant is the Acting Prime Minister of eSwatini (“the Minister”), allegedly duly authorised in these proceedings. The Minister represents eSwatini’s Head of State, King Mswati III (“the King”)[1] in these proceedings. The Minister says that “Any reference to the ‘applicants’ includes me [the applicant] in my personal and representative capacity, Head of State, the Government of eSwatini, the various Ministers and public officials of the Government of eSwatini.”[2]

[4] I therefore accept that the Minister seeks to obtain relief not only for himself but also for the King and the eSwatini Government.

[5] The second respondent (“Mr. Dlamini”) is the first respondent’s editor. Mr. Dlamini admitted that he is the author

of the articles. Mr. Dlamini is a citizen of eSwatini but apparently finds himself in South Africa.

[6] The first and third respondents are companies registered and domiciled in South Africa.

[7] This application concerns a difficult issue namely the omnipresent divide between freedom of expression, more particularly, the freedom of the press and the right to dignity and a good name.

[8] In *Islamic Unity Convention v Independent Broadcasting Authority and Others*[3] Langa DCJ said as follows about freedom of expression:

“[26] This Court has held that - “. . . freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial”. As to its relevance to a

democratic state, the Court has pointed out that freedom of expression - “. . . lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . .” [Footnotes Omitted.]

- [9] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*[4], the inevitable divide between freedom of speech and the protection of reputation and a good name is aptly described as an “intersection”:

“In democratic societies, the law of defamation lies at the intersection of freedom of speech and the protection of reputation or a good name. The law does not allow the unjustified savaging of an individual’s reputation. The right of freedom of expression must sometimes yield to the individual’s right not to be defamed. In striving to achieve an equitable balance between the right to speak your mind and the obligation not to harm or injure someone else’s name or reputation, the law has devised defences such as fair comment, and truth and in the public interest.”

- [10] In *Islamic Unity Convention*[5], the divergence of freedom of speech and the right to dignity was set out. I have resolved to quote extensively from the judgment because it shows that the transformation of society to an open, transparent and free society is dependent upon freedom of expression:

*“[27] Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa’s present commitment to a society based on a “constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours”. As pointed out by Kriegler J in *Mamabolo* -*

“. . . freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.”

- [28] South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as “one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .”. As such it is protected in almost every international human rights instrument. In *Handyside v The United Kingdom* the European Court of Human Rights pointed out that this approach to the right to freedom of expression is - “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . .

Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

[29] The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms." Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials. Speech of an inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere. There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution. Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests. Thus in *Mamabolo*, the following was said in the context of the hierarchical relationship between the rights to dignity and freedom of expression: "With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law." [Footnotes omitted.]

[11] In *Midi Television (Pty) Ltd v Director of Public Prosecutions*[6], the principle pertaining to a free press (in all its forms) and its limitation is explained by Nugent JA:

"[5] Freedom of expression, which includes freedom of the press and other media, is protected by s 16 of the Bill of Rights. That a free press (by which I mean the media in all its forms) is indispensable to democracy is axiomatic and has been articulated so often that nothing is served by adding to what has been said in that regard. Yet the constitutional promise of a free press, like other constitutional promises, is not absolute. In issue in this appeal is the extent to which that protected freedom may be abridged in favour of preserving the integrity of the administration of justice.

[6] It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. As pointed out by Anthony Lewis, in a passage that was cited by Cameron J in *Holomisa v Argus Newspapers Ltd*: 'Press exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine.' The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."

[12] The matter is further complicated because, besides the central issue being defamation and the redress that is sought, the parties

are citizens of two countries, namely, South Africa and eSwatini, each with their own municipal law that provides for the protection of fundamental rights including the right to dignity and the right to freedom of expression, the jurisdiction of this court to adjudicate over the dispute is challenged and, the applicant's locus standi is in dispute.

The dispute

[13] The Minister, the King and the eSwatini Government are aggrieved by the articles that were published by the respondents over the period 1 August 2020 to 12 December 2022. According to the Minister, “....all of those articles are critical of [the applicant] either in my personal capacity or representative capacity as aforesaid, and in this regard, I refer to the defamation apparent in the following headings appearing for articles published by the Swaziland News.”[7]

[14] The Minister also alleges that Swaziland News maintains a website on the Internet and under the tab “investigations”,

it contains a link to Swaziland News's previous articles. The link, according to the Minister, is accessible to anyone who has access to the Internet. The link includes the articles.

[15] The Minister initially applied for the following relief[8]:

“1 granting a mandatory interdict: ordering and directing the first and second respondents (including their agents, representatives and employees):-

1.1 Not less than 7 (seven) calendar days notice (excluding (1) public holidays in South Africa and eSwatini and (2) Sundays) before publishing any article which is prima facie defamatory and/or critical of the applicant and/or the Government of eSwatini and/or the Head of State of eSwatini and/or a Minister or public servant in the Government of eSwatini and/or a member of the Royal Family in eSwatini, to provide the applicant, through the following representatives:-

1.1.1

1.1.2

with the written content of the material as well as a list of questions in relation to the proposed publication to be published in order for the applicant to comment thereon; and

1.2 to publish any comment furnished by the applicant in conjunction with any article published by the respondents of and concerning the applicant, the Government of eSwatini and / or the Head of State of eSwatini and/ or a Minister or public servant in the Government of eSwatini and / or a member of the Royal Family in eSwatini in a way in which, and in accordance with, what is expected of a responsible journalist and / or news publication as provided for in the South African press Council code of ethics.....”

[16] In an “AMENDED ORDER PRAYED”[9], the Minister seeks additional relief as follows:

“[2] It is declared that the First and Second Respondents:

[a] are in constructive contempt of Court from the time of receipt of the founding papers in this application by continuing to publish articles of a nature which are defamatory and/ or crimen injuria in a malicious campaign of fake news and the harassment directed at the Applicant in both his personal and representative capacities;

[b] have committed acts of terrorism under sections 2 and 3 read with the definition of terrorist activity in section 1 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act no 33 of 2004 by publishing false allegations against King Mswati of eSwatini and the soldiers and police of the Eswatini government in the articles of 25 November 2022 and 13 November 2022 in relation to the terrorist activities of the organization known as the Swaziland International Solidarity Forces described in those articles.

[3] An order interdicting and restraining the first and second respondents from publishing false allegations against King Mswati of eSwatini and the soldiers and police of the Eswatini government in relation to the terrorist activities of the organization known as the Swaziland International Solidarity Forces on the website of the First Respondent or any other way in the Republic of South Africa.”

The interim order granted

[17] The court heard the parties on 13 August 2024. Although being acutely mindful of what was said in HIX Networking Technology CC v System Publishers (Pty) Ltd[10], I granted an interim order in favour of the Minister. I did so in order to give the eSwatini Government some measure of restricted

protection as in my view, the balance of convenience favoured the eSwatini Government while I was considering what final relief (if any) to grant to the Minister and those he purport to represent. The interim order reads:

“[1] It is ordered that pending the delivery of a final judgment in this matter an order is made granting a mandatory interdict: ordering and directing the First and Second Respondents (including their agents, representatives and employees):-

[a] to furnish not less than 72 hours’ notice before publishing any article which is prima facie defamatory and/or critical of the Applicant and/or the Government of eSwatini and/or the Head of State of eSwatini and/or a Minister or public servant in the Government of eSwatini and/or a member of the Royal Family in eSwatini;

[b] to provide the Applicant with such notice through the following representatives of the Applicant:-

[i] ALPHEOUS NXUMALO, by email.

[ii] THABILE MDLULI, with email address: j[...];

by providing the written content of the material as well as a list of questions in relation to the proposed publication to be published in order for the Applicant to comment thereon and;

[c] to publish any comment furnished by the applicant in conjunction with any article published by the First and Second Respondents of and concerning the Applicant, the Government of eSwatini and/or the Head of State of eSwatini and/or a Minister or public servant in the Government of eSwatini and/or a member of the Royal Family in eSwatini in a way in which, and in accordance with, what is expected of a responsible journalist and/or news publication as provided for in the South African Press Council Code of Ethics (the “Code”), a copy of which is annexed to the Founding Affidavit as Annexure “EG4”.

[2] Judgment is reserved on the remaining aspects of the matter including the question of costs.”

Swaziland News’ alleged unlawful conduct

[18] The eSwatini Government have been monitoring and reading various articles published by Swaziland News.

[19] The Minister alleges that the articles refer to the King, members of the royal family various Ministers and/or public officials the eSwatini Government and members of parliament. The Minister alleges that it is apparent from the content of the articles themselves that Swaziland News and Mr Dlamini consistently make harmful derogatory false and misleading allegations against the eSwatini Government in order to undermine the legitimate purpose, authority and decisions of the eSwatini Government and to lower its standing in the public’s eyes. The Minister says that these articles are relentless, unsubstantiated and cause reputational harm to the eSwatini Government.

[20] The Minister mentions the articles, their title and some of their content. The content, so the Minister alleges, is offensive and

defamatory. The articles, amongst other things say that: the King, the CEO of the National Defence Council, a Chief, the King’s

CEO and army Commander met. The King stated that they must work together in unity to protect the Royal Family and his Throne at all cost; the King and his Finance Minister are secretly transferring ownership of a large portion of land through questionable lease agreements; the secret dealings of the King was prevented from reaching public domain through the State controlled media; the King seized full control of the Public Service Pension Fund; the King benefitted from the Public Service Pension Fund’s systematic looting; the Public Service Pension Fund is controlled and looted by the King and the Royal Family; the King allegedly defrauded the Swazi Nation in a shareholding deal; eSwatini is led by a serial dealer who had no interest for the nation; the King grabs shares from giant companies; the King defrauded a company and the eSwatini Government in taxes; the King demanded free shares in the cannabis farming industry

and demanded bribes; the King can best be described as a dangerous dagga dealer hiding behind a COVID-19 mask; the King manipulates the law; the King pushes his corrupt dealings using politicians; the King is the most corrupt, selfish and greedy King in the history of eSwatini; and the King manipulates the law including his absolute powers to accumulate wealth through shady dealings.

[21] The Minister alleges that the statements in the harmful articles are clearly prima facie and/or per se defamatory on an ordinary reading of the words on an ordinary reading of the words or any interpretation thereof. The statements were made with the intent

to: injure the reputation of the eSwatini Government; undermine the eSwatini Government; and lower the character of the persons mentioned in the articles.

[22] The Minister further alleges that the articles impute dishonesty, fraud, criminal conduct, association with criminals, unethical or unprincipled behaviour, grave misconduct as well as base, sordid and corrupt motives; that the publication of the articles is unlawful and/or wrongful and was published with the intent to defame the eSwatini Government; the articles remain in circulation and continue to cause reputational harm to the eSwatini Government; certain of the articles reflect on the moral character, office, profession, occupation and political character of the members of the eSwatini Government. In addition, the Minister alleges that

the articles impute dishonesty and treachery; Swaziland News acted unreasonably because the information and its truth was not verified

or established and that the eSwatini Government was not given (and the persons mentioned in the articles was not given an opportunity to respond to the articles before its publication.

[23] In an effort to stop the offending conduct, the eSwatini Government wrote to Swaziland News. In the letter, the eSwatini Government requested Swaziland News to verify the information it wishes to publish and to afford the eSwatini Government (and the persons to which the information relates) a fair and reasonable opportunity to respond thereto. In the letter, eSwatini Government referred Swaziland News to the Code of Ethics and Conduct for the South African Print and Online Media (“the Code”)[11] and drew its attention to some terms of the Code. The terms referred to are in clauses 1, 2 and 3 of the Code.[12]

[24] There was no response to the letter.

[25] With regards to the Code, the Minister says that the Code: imposes a positive duty on Swaziland News to verify the information they wish to publish and to afford the persons and/or entities to whom the content relates a fair and reasonable opportunity to respond

thereto; and the existence of the Code demonstrate that a society now recognizes the media has a positive duty of care to afford any individual or entity a fair opportunity to comment on prima facie and/or per se defamatory allegations concerning that individual or entity.

[26] The eSwatini Government also wrote to the third respondent. No response was received from any of the respondents. However, in an

article published in the Times of Swaziland on 8 March 2021, it was reported that the King has hired a South African law firm to deal with Swaziland News and Mr. Dlamini. This, according to the Minister, is proof that the Swaziland News and Mr. Dlamini received the correspondence. In addition, the article quoted extensively from one of the eSwatini Government's letters.

[27] The Minister says that it does not "quarrel" with the respondents' entitlement to write about the eSwatini Government. However, the eSwatini Government is entitled to: "fair and reasonable treatment from the media"; "have their version fairly reflected in articles which refer to them"; "prevent one-sided articles appearing about them where they have something to say which is relevant"; "and, obtain relief to prevent them from being needlessly defamed on an ongoing basis".

[28] The Minister further alleges that: the publication of the articles is continuous and ongoing; Swaziland News' Twitter and Facebook accounts have large numbers of followers; the impact of the harmful content is no doubt extremely far reaching; the eSwatini Government have a right not to be defamed; the public has the right to news which accurately and fairly reflects events; the respondents have a duty of care to:- report news truthfully, accurately and fairly; present only what may reasonably be true as fact; verify the accuracy of doubtful information; seek the views of the subject of critical reportage in advance of publication; exercise care and consideration in matters involving the private lives of individuals; and exercise care and consideration in matters involving dignity and reputation.

[29] According to the Minister, the respondents have failed to adhere to aforesaid duties and obligations all of which leads to the irresistible conclusion that the respondents intended or continue to intend to defame the eSwatini Government. This is all the more so because the respondents have failed to heed the eSwatini Government's demand not to resist defaming the eSwatini Government and not to comply with the Code. In addition, it is the eSwatini Government's position that, separate and distinct from the Code, equity, fairness and the public good require persons such as the respondents who wish to convey of the sort in the articles to do so responsibly and in a balanced way.

[30] The eSwatini Government submitted a complaint to the Press Council Ombudsman despite Swaziland News not being registered with the Council and in that sense not bound by the Code. No response was received from the Council. The Minister alleges that he is aware that the complaint was sent to the council because an article appeared in the Times of Swaziland which constitutes an admission that the Council forwarded the complaint to Swaziland News.

[31] The Minister concludes saying that the eSwatini Government has satisfied the requirements for the relief he and the eSwatini Government seeks.

Swaziland News defences

- [32] Swaziland News opposes the application on the basis that: the eSwatini Government has failed to demonstrate a clear or prima facie right; the eSwatini Government has not identified the legal system it contends finds application; the law of eSwatini applies in terms of the *lex loci delicti commissi*[13] and the *lex causa*[14] and the eSwatini Government has failed to plead such law.
- [33] Swaziland News contends that even if eSwatini recognises a civil cause based on defamation, such law cannot be applied by a South African court as it conflicts with the South African law; the South African law of defamation does not protect the good name of a government; even if the South African law applies, in the absence of a clear and definite right, the eSwatini Government fails to pass the first threshold and therefore the application must fail.
- [34] Swaziland News also contends that the eSwatini Government has failed to demonstrate the right to a good name and reputation on which it relies because the eSwatini Government has failed to specify why it contends that the articles are defamatory the eSwatini Government has not laid the basis for an apprehension of future harm.
- [35] Furthermore, Swaziland News says that the application has been instituted for extraneous purposes and constitutes an abuse of process because the eSwatini Government does not only seek the draft article but also the material upon which the article is based, this in turn will impermissibly constrain Swaziland News to disclose its sources; and the true purpose of the application is to obtain the respondent's confidential sources and stifle freedom of press in eSwatini.
- [36] Swaziland News say that it is disturbing that the eSwatini Government elected to refer to certain articles and failed to give conflicting information disputing the articles and therefore, a clear dispute of fact arises. The Minister has failed to furnish confirmation that he represents the King and the whole of the eSwatini Government. The persons complaining about the articles should have brought applications in their own names. Swaziland News admit that they are not registered with the Council. As a matter of fact, Mr Dlamini says: "Swaziland News is an independent news publication, does not and will not, submit to the jurisdiction of the Press Council"[15].
- [37] Swaziland News admits that they have not responded to eSwatini Government's attorney's letters.
- [38] Swaziland News admits that it published all of the articles which was included under the heading "Ongoing Attacks on the eSwatini Government and the Head of State"). Swaziland News denies that the articles are defamatory of the individuals mentioned.
- [39] Swaziland News, in addition, say that it is clear that the eSwatini Government seeks an infinite limitation of the freedom of expression while such right has Constitutional protection. The eSwatini Government has failed to say why such right must be limited.

[40] Finally, Swaziland News say that the eSwatini Government has failed to show that balance of convenience favours it.

[41] Swaziland News admits the articles and also refers to other articles about actions of the King, an army commander, the Minister,

the Police. Swaziland News alleges that the applicant is misleading when he states that none of Swaziland News's articles

constitute public news but are mere "exposés".

[42] Mr. Dlamini admits that he is the author of the articles appearing on Swaziland News's website. Swaziland News does not deny that it published the articles. What Swaziland News says is that the eSwatini Government has failed to "....substantiate its claims that the impugned articles are defamatory" [16] "of the affected persons"[17].

[43] Swaziland News also takes issue that the eSwatini Government provided no evidence disputing the content of the articles in these proceedings. Swaziland News contends that it is severely prejudiced by eSwatini Government's failure to present inadequate evidence where the eSwatini Government seeks a final interdict. For this reason, Swaziland News finds it impossible to respond to "....a blanket allegation stating that the news articles referred to are either false, defamatory, unsubstantiated or that such cause[ed]

reputational harm".[18] Swaziland News says that ".... the applicant seeks, by implication, a declaration as to the King and the whole of the eSwatini Government being defamed, yet did not present sufficient evidence for the consideration of such an order".[19] Swaziland News admits that the articles refer to the persons mentioned therein. Swaziland News denies that it is bound by the Code. Swaziland News alleges that if Swaziland News is forced to hold over news for three to seven days, its business would be destroyed.

Swaziland News denies that the articles are harmful.

[44] Swaziland News contends that a government cannot be defamed, if members of the eSwatini Government were defamed, they should have

instituted individual actions this includes the monarchy. No persons seeking to enforce personal rights are before the court.

Discussion

[45] I have to decide, firstly whether the law of South Africa applies, secondly, if the South African law applies, whether the articles are prima facie defamatory, thirdly, if the articles are prima facie defamatory, whether the respondents have established any justification for their conduct, fourthly, whether the Minister has locus standi to represent himself and those who he purports to represent; fifthly whether Minister (and those who he purports to represent) has established the requirements for an interdict and, lastly whether the Minister and the eSwatini Government are entitled to the declaratory relief they seek.

What law to apply

[46] The articles were published on the world wide web. The respondents are domiciled in South Africa. The Minister (and those who he purports to represent) are peregrine.

[47] In my view no other law concerning the defamation but the South African is to be applied. Whether the articles were published on the internet is of no moment. Long gone are the days when news was disseminated through newspapers, either bought at a corner store or delivered to those who were fortunate. Today news is disseminated almost instantaneous over the myriad of electronic media at

communities' disposal. News content is open for everyone who has connectivity to read. In our modern era, it is nearly impossible

to determine where content is heard or read. It is not the manner in which a publication took place or where it is read. It is about publication of defamatory content in whatever way. The manner in which the content was published serves to limit or expand the reach of a defamatory statement. Surely, defamation over the internet and various social media platforms has a wide reach. In my view such publication with its wider reach makes the defamatory statement all the more far reaching, damaging and profound.

[48] Although Swaziland News says that this court has jurisdiction to adjudicate the matter[20] I nevertheless deal with the issue of jurisdiction because Swaziland News also pleads that the court must choose what law to apply, either the law of eSwatini or the South African Law. The question of which law to apply lies closely with the issue of jurisdiction because the law that is applied will ultimately also determine the effectiveness of the court's order.

[49] In this instance, Swaziland News pleads that in terms of the *lex loci delicti commissi*, "...defamation occurs where the (allegedly) defamatory words are read or heard." [21] It is common cause that the articles were published over the internet. As I have said, the nature of the internet (and social media) is that content can be read virtually everywhere in the world.

[50] If the enquiry is whether this court has jurisdiction to adjudicate over defamation committed by publication on the internet, the answer is whether there is "...an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that

jurisdiction." [22]

[51] In this instance, the articles were published by Swaziland News on a website hosted by the third respondent, all of whom are domiciled in South Africa. Mr Dlamini says that he finds himself in hiding in South Africa and admits that he wrote the articles. Even if

he was not in South Africa when he wrote the articles, the publication of the defamatory articles was complete upon publication

of the articles by Swaziland News on the website hosted by the third respondent. The publication of the articles shows Mr. Dlamini and Swaziland News's intent to publish what they did concerning the Minister and those who he purports to represent.

[52] *IRD Global Limited v The Global Fund to fight AIDS, Tuberculosis and Malaria*[23] dealt with the publication of a defamatory statement over the internet. The court held that: "A basic principle in our law of jurisdiction is that of effectiveness. A court must be able to give effect to its judgment....."[24]

[53] If the respondents are interdicted, this court will be in a position to act should the respondents offend the order this court may grant. This court will therefore be able to give effect to its order if granted. Therefore, this court has jurisdiction to adjudicate the dispute as this court will be in a position to enforce the interdict sought by the Minister.

Defamation

[54] 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. 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 then raise a defence which rebuts unlawfulness or intention.[25]

[55] *Holomisa v Argus Newspapers Ltd*[26] dealt with an article that was published in a newspaper concerning a political office bearer. The following was said concerning

defamation:

"The right to claim damages for defamation is rooted in the protection South African law accords more generally to the rights of personality. This goes back to Johannes Voet and to the Roman sources he relied upon, in particular the title in Justinian's Digest "concerning deliberate wrongs and defamatory articles" (de injuriis et famosus libellis) (Digest 47.10): see Nasionale Pers, Bpk v Long 1930 AD 87 at 99. Voet, writing in late seventeenth century Holland, produced a commentary on the title. The most influential commentary on and exposition of Voet (see the remarks of Corbett CJ in Argus Printing and Publishing Co Ltd and others v Esselen's Estate

1994 (2) SA 1 (A) at 23D-I) is that of Melius de Villiers (The Roman and Roman-Dutch Law of Injuries – A Translation of Voet Book 47.10 with Annotations (1899)):

"The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries [injuriae] are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character for moral or social worth to which he is entitled amongst his fellow-men; by dignity that

valued and serene condition in his social and individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.

The rights here referred to are absolute or primordial rights; they are not created by, nor dependent for their being upon, any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character or [of?] moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right.”

[56] In determining whether a publication is defamatory, a two stage inquiry must be undertaken. The first inquiry is to determine the meaning of the words in the publication as a matter of interpretation and the second inquiry is whether the meaning of the words of in the publication is defamatory.[27]

[57] Having regard to the content of the articles individually and in their totality, I have no doubt that the articles defame the persons mentioned therein. The articles, read in their totality and considered objectively impairs the character, moral and social worth

of those persons mentioned in the articles. The articles prejudice the respect and esteem of those mentioned in the articles amongst

their fellow men and women and are humiliating in their content. There persons’ valued and serene condition in their social and individual lives may have been violated.

[58] I turn to the question whether the articles were intentionally published and with what intention. The respondents do not dispute

that the articles were published. There can be no doubt that the respondents intended to publish the articles and communicate the

content therein to Swaziland News’s audience whether on its social media platform or on its website.

[59] If a statement is defamatory, intention to injure is presumed. In *Khumalo and Others v Holomisa*[28], the intention to defame was considered. It was said:

“[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 *Pakendorf*'s case had failed to recognise the importance of freedom of expression and, in particular, the important role the mass media perform in a democratic society. He concluded that:

"If we recognise, 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." (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 absence 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." (at 1214C-F).

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."

[60] Swaziland News says that the eSwatini Government did nothing to prove that the information in the articles was false. From *Khumalo*[29], it is clear that an onus rested upon Swaziland News to prove that the information was true but even if it was false, that Swaziland News was not negligent in publishing the articles. This Swaziland News did not prove.

[61] In *Economic Freedom Fighters and Others v Manuel*[30], in respect of media defendants, the court said:

“If untrue defamatory material was published in circumstances where it was reasonable to publish those particular facts in that particular way at that particular time the media were afforded a new defence of reasonable publication. This rebutted the prima facie unlawfulness of the publication. Whether publication was reasonable would involve an assessment of a number of factors, including the reliability of the source and the steps taken to verify the information. It goes without saying that it would have to be shown that they were satisfied that the information was true.

[62] Save to say that Swaziland News need to protect its sources, absolutely nothing further is said by Swaziland News over the reliability of their sources and the steps they have taken to verify the information upon which the articles were based. Some of the information may be true but, despite its possible truth, the manner in which these facts were presented and the comment on the facts, true or false, constituted the sting complained of by the Minister and the eSwatini Government.

Were the articles justified?

[63] Further defences available to Swaziland News are those arising from the objective factors surrounding the articles – truth, privilege, fair comment and other forms of justification.[31]

[64] But for two instances, Swaziland News does not claim that the statements are true. What Swaziland News appears to raise the defence of reasonable publication. I say appears to raise the defence of reasonable publication because Swaziland News does not label its defence this way. What Swaziland News, in addition to its grounds of opposition set out above, do is to attempt to elaborate on its grounds of opposition by setting out certain background facts. These background facts include: a brief description of the eSwatini Government’s human rights abuses, the internal criticism against and dissatisfaction with the rule of the King and the international

criticism of the violation of the right to freedom of expression and other human rights in eSwatini.[32]

[65] In *Economic Freedom Fighters*[33], the Supreme Court of Appeal to dealt with the defence of reasonable publication. The Supreme Court of Appeal said:

“In formulating the defence of reasonable publication, Hefer JA had regard to developments in Australia and the United Kingdom as well as a statement of the law in the Netherlands. Internationally the law has moved on since then. For example, he referred to the decision of the Court of Appeal in the UK in Reynolds. The appeal from that judgment was heard after the judgment in Bogoshi and referred to it in a comprehensive survey of the approach taken in the United States, Canada, India, Australia, South Africa and New Zealand to issues of the media's liability for defamation in regard to public figures, political expression and the requirement of reasonable care in publishing defamatory matter in respect of such public figures. Given that these judgments were based on widely differing constitutional provisions, local statutes and developments of the common law from widely differing bases, it is no

surprise that in the leading speech for the majority Lord Nicholls of Birkenhead concluded that the solutions were not uniform and each was not without its critics in its home country. In regard to the Court of Appeal's decision on which Hefer JA had placed some reliance it was said that its 'formulation of three questions gives rise to conceptual and practical difficulties and is better avoided'.

[50] The end result was that the House of Lords in Reynolds declined, by a narrow majority, to create a new category of occasions when privilege derives from political information alone. It held that the existing defence of qualified privilege was sufficiently flexible to accommodate the problems encountered by the media in reporting on matters of public concern, whilst giving appropriate protection to reputation. Lord Nicholls said that in determining whether the occasion on which publication occurred was privileged, a range of matters ought to be taken into account, of which ten were mentioned as illustrative only, namely:

- '1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.” (Endnotes omitted)

[66] I have considered the content of the articles as a whole against the factors listed above. The allegations against the eSwatini Government and especially, the King are serious and explicitly defamatory upon a mere reading thereof. What the King and his government does is of course of public concern and should be reported on subject thereto that the reports are fair and balanced. The source of the information in the articles are not disclosed by Swaziland News. The timing of the articles coincided with the public uprising in eSwatini. No comment was sought from the eSwatini Government prior to the publication of the articles. The tone of the articles was extremely critical and stated as fact. No balanced view was given. The articles were not independent and constituted the most

severe criticism against the King and the eSwatini Government. The timing of the articles, coinciding with the public uprising, was clearly aimed at or had the potential or indeed did fuel the perpetrators of the uprising and clearly sought to gain support for the dissidence.

[67] Having regard to the factors to be considered in order to determine whether the articles were reasonable, I conclude they were not. To the extent that Swaziland News sought to rely, albeit not set out explicitly that the articles were reasonable, I find that the articles were unreasonable. No defence is established by Swaziland News in this regard.[34]

[68] I find that the publication of the articles was unlawful as Swaziland News did not establish any of the established grounds of justification. Swaziland News has overreached in respect of its freedom of speech right. Swaziland News has gone too far. Even with the most liberal interpretation of the Code, Swaziland News transgressed what is accepted as journalistic ethics. I am mindful that a transgression of a particular ethical rule in the Code may not necessarily be unlawful but, considering that the Code may be seen as the conviction of the community insofar as it relates to fair journalism, and having regard to the provisions of the South African and Swaziland Constitutions, Swaziland News's conduct is unlawful.

Standing

[69] Swaziland News challenges the Minister's standing to approach the court on the eSwatini Government's behalf. Swaziland News alleges that the persons mentioned in the articles could have approached court for the relief on their own behalf. Swaziland News further alleges that a government cannot be defamed and that the Minister is not before court in his personal capacity and therefore he cannot be suited.

[70] The Minister counters Swaziland News's challenge over locus standi by relying on the Minister's allegation that he acts in his representative capacity. In the eSwatini Government's heads of argument, the eSwatini Government relies on the provisions of sub-sections 38(c) and (d) of the South African Constitution. Section 38 of the South African Constitution reads:

"Enforcement of rights.—Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

[71] The Minister alleges that his and those who he purportedly represents’ right to dignity have been infringed by Swaziland News.[35] The first requirement for a reliance upon section 38 of the South African Constitution is therefore satisfied.

[72] The eSwatini Government argues in its heads of argument that the Minister, in terms of sub-section 38(c) of the South African Constitution acts on behalf of the eSwatini Government of which the Minister is a member or on behalf of the eSwatini Government which constitutes a group or class of persons. In addition, the eSwatini Government argues that the Minister acts in terms of sub-section 38(d) in the public interest. Neither the Minister nor the eSwatini Government has made out such a case in the eSwatini Government’s

founding papers. Even when considering the totality of the facts that are relied upon by the Minister (or the eSwatini Government), without the Minister or the eSwatini Government expressly saying so, no is a case made out by the Minister or the eSwatini Government for a reliance upon sub-sections 38(c) and (d) of the South African Constitution.

[73] Locus standi is both about procedure and substance. Procedure would have demanded that the Minister be cited separately from his representative capacity. Procedure cannot trump substance. In any event, the Minister says that any reference to “applicants” includes himself in his personal capacity and in his representative capacity.[36] There is therefore no substance in Swaziland News’s challenge to the Minister’s standing in his personal capacity.

[74] With regards to those who the Minister purportedly represent, the Minister himself says that each of those persons have standing to have approached this court. The Minister is correct but they did not. Nothing prevented them from doing so.

[75] Insofar as the King is concerned, the Minister relies on the Swaziland Constitution, more particularly, section 10 thereof. It reads:

“The King and iNgwenyama shall be immune from –

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.”

[76] Section 10 of the Swaziland Constitution does not prevent the King from approaching court for relief. The section bars the King from being taken to court in his own country. The eSwatini constitution constitutes municipal law. That law does not apply in South Africa. Therefore, nothing prevented the King from approaching this court for relief on his own behalf. It is not that the King

would be remediless without the Minister acting on his behalf.

The interdict sought

Did the Minister (and those he purports to represent) establish a right worthy of protection?

[77] An interdict is an appropriate remedy for protection against defamation. In *Economic Freedom Fighters and Others v Manuel*[37] it was said:

“Where defamation is established and the defences to a claim for an interdict are shown on the papers to be without substance, the grant of a final interdict is permissible.”

[78] The Minister is seeking a permanent interdict. The requirements for a permanent interdict is a clear right, a reasonable apprehension of irreparable harm; and no other satisfactory remedy.

Clear right

[79] The Minister says as follows:

“The respondents’ publication of the offensive article[s] is unlawful and/or wrongful and published with the intent to defame various Ministers and/or public officers and/or royal family member [sic]. It further seeks to defame the Head of State and the Government.”

“The defamatory statements remain in circulation and continue to cause reputational harm to the Head of State, the royal family, the Government, and others within the Government.”[38]

[80] The Minister approaches this court in his own name and also in his representative capacity. None of the articles refer to the Minister. One article refers to the Minister’s spouse. In this article it is said that the Minister’s spouse “...looted R 200 000.00 from funds as allowance for one international trip”. The Minister was not defamed. Perhaps his spouse was. None of the Minister’s personal rights were infringed. Therefore, the Minister has not established an infringement of his personal rights and is not entitled to interdictory relief.

[81] Insofar as the King and other officials of the eSwatini Government are concerned, I am of the view that the King and the other officials have not established a clear right. No evidence was brought to court about the effect of the statements in the articles on them. To put it differently, they have not put forth any evidence how they were affronted because “Someone who is not affronted by a publication and who does not feel humiliated will not sue for defamation. That is why the award of damages compensates ‘the plaintiff for injured feelings and for the hurt to his or her dignity and reputation.’ As F P van den Heever J once said, ‘an action on defamation has several purposes: to kill libel, to recover a solatium for injured

feelings and to recover a penalty from the slanderer'.[39]

[82] The King and the other persons purportedly being represented by the Minister must be non-suited. Therefore, in respect of the Applicant and those he purportedly represents, I need not consider the other requirements for an interdict. I nevertheless, and, the event that I am wrong in the aforesaid finding, deal with the other requirements for an interdict.

Reasonable apprehension of irreparable harm

[83] The papers show that the eSwatini Government has a reasonable apprehension of irreparable harm. It is clear that Swaziland News has

no intention to resist from publishing defamatory statements over the Minister. This is fully demonstrated by Swaziland News's

conduct to continue with its unlawful conduct notwithstanding the eSwatini Government's letters and the issuing of this application.

No other remedy

[84] The eSwatini Government satisfies the requirement of no other remedy. The ongoing unlawful conduct of Swaziland News will not fit a claim for damages because when will the Minister's claim be complete or should he institute a claim every time Swaziland News defames him, or should he wait for a few instances of defamation and then institute multiple claims? The only remedy available to the Minister is an interdict.

[85] To the extent that this court has a discretion in granting an interdict, I also consider convenience. Inasmuch I appreciate that

granting the interdict in prayer 1 of the Amended notice of motion, may delay Swaziland News to publish, they are, by granting the interdict, only forced to comply with what the Code requires. I agree with the Minister's contention that the Code is norms and standards that society finds acceptable. Swaziland News will be forced to act responsibly. Media freedom is not an absolute right.

Declaratory relief: Constructive contempt of court and Terrorism

[86] The Minister, in addition, also seeks declaratory relief in paragraph 2 of the amended order prayed for.

Terrorism

[87] The acts complained of by the Minister constitutes a crime. In terms of section 179(2) of the Constitution of South Africa, the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions

incidental to instituting criminal proceedings.

- [88] Whether a crime is committed and whether to institute criminal proceedings is a matter that falls within the competence of the National Director of Prosecutions.
- [89] To declare that the respondents “....have committed acts of terrorism under sections 2 and 3 read with the definition of terrorist activity in section 1 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act no 33 of 2004 by publishing false allegations against King Mswati of eSwatini and the soldiers and police of the Eswatini government in the articles of 25 November 2022 and 13 November 2022 in relation to the terrorist activities of the organization known as the Swaziland International Solidarity Forces described in those articles” would not only offend the principle of separation of powers but also convict the respondents without a fair trial. This relief must therefore be dismissed.

Constructive contempt

- [90] In respect of the constructive contempt of court declaratory order that the eSwatini Government seeks, the Minister in his heads of argument, relies upon Consolidated Fish Distributors (Pty) Ltd v Zive and Others[40] for its contention that Swaziland News is in constructive contempt of court.
- [91] In Virtual Benefit Solutions Tech (Pty) Ltd v Koekemoer and Others[41] it was decided that constructive contempt is only committed where a party acts maliciously to frustrate the ability of a court to decide an issue that it has not yet been able to determine.
- [92] When Swaziland News continued to publish about the eSwatini Government subsequent to the eSwatini Government’s attorney’s
- letters and after Swaziland News had notice of application, the eSwatini Government’s cause has already matured.
- [93] Nothing that was done by Swaziland News could frustrated the ability to decide the issue of the defamation already committed. Swaziland News did not deliberately frustrate the order the court would probably make. What Swaziland News demonstrated was that it would continue despite the eSwatini Government’s challenge. Swaziland News did not maliciously frustrate the ability of the court

to decide the issues in this application. Therefore, the relief sought in this regard must also fail.

Costs

- [94] The Minister was unsuccessful. There is no reason why the Minister should not be ordered to pay costs. Save for the respondents’ heads of argument that was filed on behalf of all the respondents, the third respondent did not participate in these proceedings. The third respondent is not entitled to costs. I have resolved to award counsel’s costs on Scale C due to the complexity of the matter.
- [95] In the premises, I made the following order:

- (a) The application is dismissed.
- (b) The applicant is ordered to pay the first and second respondents' costs including the costs consequent upon the employment of Senior Counsel to be taxed in accordance with Scale C as contemplated in sub-rule (3) of the Uniform Rule 67A.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 13 August 2024 DATE OF JUDGMENT: 27 September 2024

APPEARANCES

For the Applicant: Adv GD Harpur SC Instructed by Savage, Jooste & Adams Inc. For the Respondents: Adv Myron Dewrance SC Adv Basni Rowjee Instructed by Gardee Godrich Attorneys

- [1] King Mswati III is defined as “the King” in the Swaziland Constitution.
- [2] Para. 3.1 of the founding affidavit at p. 11.
- [3] 2002
- (4) SA 294.
- [4] (CCT 39/21) [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) (22 September 2022) para 49.
- [5] Id note 3.
- [6]
- [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA); 2007 (2) SACR 493 (SCA).
- [7] Para. 51 of the replying affidavit at p. 367.
- [8] The Notice of Motion was filed on 22 November 2023.
- [9] At pages 444 to 447.
- [10]
- [1996] ZASCA 107; [1996] 4 All SA 675 (A).
- [11] Adopted by the Press Council of South Africa and the Interactive Advertising Bureau South Africa adopt the following Code for print and online media.
- [12] “The media shall: 1.1 take care to report news truthfully, accurately and fairly; 1.2 present news in context and in a balanced manner, without any intentional or negligent departure from the facts whether by

distortion, exaggeration or misrepresentation, material omissions, or summarization; 1.3 present only what may reasonably be true as fact; opinions, allegations, rumours or suppositions shall be presented clearly as such; 1.4 obtain news legally, honestly and fairly, unless public interest dictates otherwise; 1.5 use personal information for journalistic purposes only; 1.6 identify themselves as such, unless public interest or their safety dictates otherwise; 1.7 verify the accuracy of doubtful information, if practicable; if not, this shall be stated; 1.8 seek, if practicable, the views of the subject of critical reportage in advance of publication, except when they might be prevented from reporting, or evidence destroyed, or sources intimidated. Such a subject should be afforded reasonable time to respond; if unable to obtain comment, this shall be stated; 1.9 state where a report is based on limited information, and supplement it once new information becomes available; 1.10 make amends for presenting inaccurate information or comment by publishing promptly and with appropriate prominence a retraction, correction, explanation or an apology; 1.11 prominently indicate when an online article has been amended or an apology or retraction published and link such to that text, while the original article may remain; 1.12 not be obliged to remove any article which is not unlawfully defamatory; and 1.13 not plagiarise. 2. Independence and Conflicts of Interest The media shall: 2.1 not allow commercial, political, personal or other non-professional considerations to influence reporting, and avoid conflicts of interest as well as practices that could lead readers to doubt the media's independence and professionalism; 2.2 not accept any benefit which may influence coverage; 2.3 indicate clearly when an outside organization has contributed to the cost of newsgathering; and 2.4 keep editorial material clearly distinct from advertising and sponsored events. 3. Privacy, Dignity and Reputation The media shall: 3.1 exercise care and consideration in matters involving the private lives of individuals. The right to privacy may be overridden

by public interest; 3.2 afford special weight to South African cultural customs concerning the protection of privacy and dignity of people who are bereaved and their respect for those who have passed away, as well as concerning children, the aged and the physically and mentally disabled; 3.3 exercise care and consideration in matters involving dignity and reputation, which may be overridden only if it is in the public interest and if: 3.3.1. the facts reported are true or substantially true; or 3.3.2. the reportage amounts to protected comment based on facts that are adequately referred to and that are either true or reasonably true; or 3.3.3. the reportage amounts to a fair and accurate report of court proceedings, Parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum; or 3.3.4. it was reasonable for the information to be communicated because it was prepared in accordance with acceptable principles of journalistic conduct; or 3.3.5. the article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party;

[12] "The media shall:

1.1 take care to report news truthfully, accurately and fairly;

1.2 present news in context and in a balanced manner, without any intentional or negligent departure from the facts whether by

distortion, exaggeration or misrepresentation, material omissions, or summarization;

1.3 present only what may reasonably be true as fact; opinions, allegations, rumours or suppositions shall be presented clearly as such;

1.4 obtain news legally, honestly and fairly, unless public interest dictates otherwise;

1.5 use personal information for journalistic purposes only;

1.6 identify themselves as such, unless public interest or their safety dictates otherwise;

1.7 verify the accuracy of doubtful information, if practicable; if not, this shall be stated;

1.8 seek, if practicable, the views of the subject of critical reportage in advance of publication, except when they might be prevented from reporting, or evidence destroyed, or sources intimidated. Such a subject should be afforded reasonable time to respond; if unable to obtain comment, this shall be stated;

1.9 state where a report is based on limited information, and supplement it once new information becomes available; 1.10 make amends for presenting inaccurate information or comment by publishing promptly and with appropriate prominence a retraction, correction, explanation or an apology;

1.11 prominently indicate when an online article has been amended or an apology or retraction published and link such to that text, while the original article may remain;

1.12 not be obliged to remove any article which is not unlawfully defamatory; and

1.13 not plagiarise.

2. Independence and Conflicts of Interest The media shall:

2.1 not allow commercial, political, personal or other non-professional considerations to influence reporting, and avoid conflicts of interest as well as practices that could lead readers to doubt the media's independence and professionalism; 2.2 not accept any benefit which may influence coverage;

2.3 indicate clearly when an outside organization has contributed to the cost of newsgathering; and

2.4 keep editorial material clearly distinct from advertising and sponsored events.

3. Privacy, Dignity and Reputation

The media shall:

3.1 exercise care and consideration in matters involving the private lives of individuals. The right to privacy may be overridden

by public interest;

3.2 afford special weight to South African cultural customs concerning the protection of privacy and dignity of people who are bereaved and their respect for those who have passed away, as well as concerning children, the aged and the physically and mentally disabled;

3.3 exercise care and consideration in matters involving dignity and reputation, which may be overridden only if it is in the public interest and if:

3.3.1. the facts reported are true or substantially true; or

3.3.2. the reportage amounts to protected comment based on facts that are adequately referred to and that are either true or reasonably true; or

3.3.3. the reportage amounts to a fair and accurate report of court proceedings, Parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum; or

3.3.4. it was reasonable for the information to be communicated because it was prepared in accordance with acceptable principles of journalistic conduct; or

3.3.5. the article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party;

[13] The law of the place where the delict was committed.

[14] The proper law.

[15] Para. 162 of the answering affidavit at page 178.

[16] Para. 119 of the answering affidavit at 170.

[17] Para. 121 of the answering affidavit at 171.

[18] Para. 126 at 172.

[19] Para. 127 at 172.

[20] Para 36 of the answering affidavit p. 147.

[21] Para 37 of the answering affidavit p. 148.

[22] Bid Industrial Holdings (Pty) Ltd v John Francis Roderick Strang and Others [2007] ZASCA 144;

[2007] SCA 144 (RSA); [2008] 2 All SA 373 (SCA); 2008

(3) SA 355 (SCA) para 56.

[23] (504/2023) [2024] ZASCA 109 (4 July 2024) para 13.

[24] Para 13 of IRD Global Limited.

[25] See: Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 CC.

[26]

[1996] 1 All SA 478 (W) at p 487.

[27] Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 38.

[28] (CCT53/01)

[2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002) para 20.

[29] Ibid 45.

[30] 711/2019)

[2020] ZASCA 172; [2021] 1 All SA 623 (SCA) ; 2021 (3) SA 425 (SCA) (17 December 2020) para. 65.

[31] See: Suid-Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A) and Pakendorf en Andere v De Flamingh 1982 (3) SA 146 (A).

[32] Summary found in para 6 of the answering affidavit p.139.

[33] Id note 28.

[34] See: UDM and Another Id 4.

[35] Section 10 of the South African Constitution.

[36] Para 3.1 of the founding affidavit p. 11.

[37] (711/2019)

[2020] ZASCA 172; [2021] 1 All SA 623 (SCA) ; 2021 (3) SA 425 (SCA) (17 December 2020) para 88.

[38] Paras 24 and 25 of the founding affidavit at p 30.

[39] Le Roux and Others v Dey (44/2009) [2010] ZASCA 41; 2010 (4) SA 210 (SCA) ; [2010] 3 All SA 497 (SCA) (30 March 2010) para 23.

[40] 1968

(2) SA 517 (C) at 523.

[41] (2023/082132) [2023] ZAGPJHC 1065 (22 September 2023).

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