

SOUTH AFRICA / JUDGMENT

Independent Newspapers Holdings Ltd and Others v Suliman (49/2003) [2004] ZASCA 57; [2004] 3 All SA 137 (SCA); 2005 (7) BCLR 641 (SCA) (28 May 2004) [2004] ZASCA 57

COURT

Supreme Court of Appeal

BEFORE

Marais, Scott, Mthiyane, Nugent, Ponnann

CASE / FILE NUMBER

49/2003

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IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 49/2003 In the matter between :

INDEPENDENT NEWSPAPERS HOLDINGS LTD First Appellant

RYLAND FISHER Second AppellantINDEPENDENT NEWSPAPERS CAPE LTD Third
AppellantALLIED MEDIA DISTRIBUTORS (PTY) LTD Fourth Appellantand

WALLEED SULIMAN Respondent

Coram: MARAIS, SCOTT, MTHIYANE, NUGENT JJA et PONNAN AJA Heard: 1 MARCH 2004

Delivered: 28 MAY 2004

Summary: Defamation – newspaper reports that plaintiff arrested as suspect in bombing of restaurant – defamatory but substantially true – publication of plaintiff’s identity and photograph prior to appearance in court not in public interest in particular circumstances – concurrent claims for impairment of dignity and violation of privacy – measure of damages. The order will be found in para [67].

J U D G M E N T

MARAIS JA/

MARAIS JA: [1] On Tuesday 25 August 1998 the city of Cape Town was, metaphorically speaking, rocked to the foundations when a bomb planted in a recently opened restaurant, Planet Hollywood, at the Victoria and Alfred Waterfront exploded. Two lives were lost and many were seriously injured. Considerable damage was done to the building in which the restaurant was situated. Understandably, there was immense public outrage and intense speculation about which persons or organizations might be responsible for the bombing.[2] On Friday 28 August 1998 the Cape Times newspaper published two articles, one in its early edition ('the country edition') intended for delivery to outlying areas and one in its later edition intended for delivery to subscribers and sale to purchasers in the Cape peninsula ('the peninsula edition'). These articles gave rise to the successful action for damages for defamation, impairment of dignity, and invasion of privacy which is before us on appeal with leave granted by this court. I shall refer to the parties as they were referred to in the action.[3] The plaintiff is Mr Walleed Suliman, a Muslim man who lives in Kenwyn, a suburb of Cape Town. The defendants were Independent Newspapers Holdings Limited (the proprietor of the Cape Times); Mr Ryland Fisher (editor); Independent Newspapers Cape Limited (publisher); and Allied Media Distributors (Pty) Limited (the newspaper distributor). I reproduce the text of the articles in the sequence in which the two editions appeared, first the country edition and then the peninsula edition. I shall also append to this judgment photocopies of the articles as they were published. The plaintiff is the person who features in the photograph, is referred to in the articles by his name, and is referred to in the statement as the 'male suspect' being held for further questioning.[4] The country edition: 'PULLED OFF PLANE' Bomb: Pagad trio Held at airport DETECTIVES PROBING Tuesday's horrific Waterfront blast yesterday arrested three Capetonians about to board an Egypt-bound flight at Cape Town International Airport. CHRIS BATEMAN, RHODA DAVIDS and WILLEM STEENKAMP report. 'POLICE made the arrests after receiving an anonymous tip-off. The three were being held overnight. It was reliably learnt that the tip-off included information that the trio – Walled Suleiman (sic), 32, his wife Gouwa Suleiman (sic), 31, both of Kenwyn, and their cousin Shanaaz Bayat, 30 of Belgravia – were bound for Egypt and that they might be linked to the bombing. Western Cape police spokesperson John Sterrenberg confirmed late last night that the two women would be charged under the Aliens Control Act in connection with passport offences. The "male suspect" was being held for further questioning, he added. The country's police operations chief, commissioner Andre Pruis told the Cape Times: "There is the possibility that they could be involved in the blast, but at this stage there is no evidence pointing to this." People Against Gangsterism and Drugs (Pagad) last night issued a press alert saying: "Pagad members pulled off the plane from pilgrimage and arrested." Furious Pagad lawyer Adiel Theunissen accused the police of blatant harassment and of "a witch-hunt targeting Muslims". Sterrenberg said the trio was stopped by the Aliens Control Unit at the airport after fault was found with one of their passports. The claim was strongly denied by Freeza Ryland, the mother of Shanaaz Bayat, who said her daughter had been overseas "many times before with no passport problems". More than 20 angry family members were seen railing against the arresting police at the airport, shouting that "this is unfair and against Muslims". Pruis said there was "no question of harassment of Muslims" and that police were merely following all possible leads – which included questioning all possible suspects. The three were taken to the Parow police station by,

among others, Waterfront bombing investigating officer Mike Barkhuizen. Pruiss and national Police Commissioner George Fivaz have remained in Cape Town to oversee the latest developments. Early last night they were receiving reports from the investigating team every 30 minutes. Meanwhile, two agents from the US Federal Bureau of Investigation (FBI) arrived in here early yesterday from Nairobi at the invitation of Fivaz to assist in the bombing probe. That brought the number of FBI personnel involved in the Waterfront investigation to four. The others are an agent stationed in South Africa and a legal expert flown in from the US. South African Interpol head David Bruce, who flew to Nairobi in a Lear Jet to fetch the two agents on Wednesday, said their arrival back in South Africa had been delayed by overflight problems in Zimbabwe and Botswana. He had been forced to contact the police commissioner in Botswana to arrange overflight rights, he said. The FBI agents visited the scene of the bombing yesterday morning, along with senior police officers and detectives. Police refused to name the agents or grant interviews with them, but the locally based agent told journalists at the Waterfront that their presence had been requested in the spirit of international co-operation – something which would benefit both South Africa and the United States, and without which “the winners are the bad guys”. He said also that the South African investigation team was doing “a very fine job”. Sterrenberg yesterday said police were still trying to reconstruct the bomb, but that it had already been firmly established that it had been a home-made device. Theunissen yesterday claimed that Pagad members being held at Pollsmoor Prison were being interrogated and tortured by police and the FBI agents. He said one Pagad member was booked out of the prison on Wednesday and apparently “interrogated and tortured” before being returned to the jail, and that the others were booked out by Peninsula Murder and Robbery Unit detectives yesterday. Theunissen, who did not want to name the prisoners, said the fact that their legal counsel was not informed of the questioning suggested foul play. “I find it strange that people who have lawyers are being taken out (of jail) without the lawyers being informed.” However, Sterrenberg said last night that only two prisoners – Mogomat Anwar Francis and Yusuf Salie, arrested following a pipe-bomb explosion in a bakkie late last month, which killed two other Pagad members – had been booked out yesterday for routine questioning in connection with that incident. The prisoners were welcome to lay charges if they had been mistreated, he said.[5] The peninsula edition: DEMO AT OMAR’S HOME Pagad outrage over bomb arrest DETECTIVES PROBING Tuesday’s horrific blast yesterday arrested three Capetonians about to board an Egypt-bound flight at Cape Town International Airport. CHRIS BATEMAN, RHODA DAVIDS, WILLIAM STEENKAMP and JUDY DAMON report. ‘Angry Pagad supporters gathered outside the Rylands home of justice Minister Dullah Omar late last night to protest against the arrests of three of their members. “If the community reacts, do not blame us If there’s going to be a war out there, we are not going to take responsibility”. “You must take responsibility” one man shouted. About 100 people, including G-force members, said that Omar had refused “to see justice done” and that he should stop interrogating innocent people. A helicopter hovered above, but there were no incidents of violence. Early this morning, Omar told the “Cape Times” that “I’ve completed my work and I won’t allow this to bother me. He said he viewed the Planet Hollywood attacks as a “very, very, serious matter” and said he hoped police would leave no stone unturned in the investigations. After receiving an anonymous tip-off, police arrested Walied Suleiman (sic), 32, his wife Gouwa

Suleiman (sic), 31, both of Kenwyn, and their cousin Shanaaz Bayat, 30, of Belgravia as they were about to board a flight to Egypt. The three were held overnight. Western Cape police spokesperson John Sterrenberg confirmed late last night that the two women would be charged under the Aliens Control Act in connection with passport offences. The “male suspect” was being held for further questioning, he added. The country’s police operations chief, commissioner Andre Pruis told the Cape Times: “There is the possibility that they could be involved in the blast, but at this stage there is no evidence pointing to this”. Furious Pagad lawyer Adiel Theunissen accused the police of blatant harassment and of “a witch-hunt targeting Muslims”. Pruis said there was “no question of harassment of Muslims” and that police were merely following all possible leads – which included questioning all possible suspects. The three were taken to the Parow police station by, among others, Waterfront bombing investigating officer Mike Barkhuizen. Pruis and national Police Commissioner George Fivaz have remained in Cape Town to oversee the latest developments. Last night they were receiving reports from the investigating team every thirty minutes. Meanwhile, two agents from the US Federal Bureau of Investigation (FBI) arrived in here early yesterday from Nairobi at the invitation of Fivaz to assist in the bombing probe. South African Interpol head David Bruce, who flew to Nairobi in a Lear jet to fetch the two agents on Wednesday, said their arrival back in South Africa had been delayed by overflight problems with Zimbabwe and Botswana. He had been forced to contact the police commissioner in Botswana to arrange overflight rights, he said. The FBI agents visited the scene of the bombing yesterday morning, along with senior police officers and detectives. Police refused to name the agents or grant interviews with them, but the locally based agent told journalists at the Waterfront that their presence had been requested in the spirit of international co-operation – something which would benefit both South Africa and the United States, and without which “the winners are the bad guys”. He said also that the South African investigation team was doing “a very fine job”. Sterrenberg yesterday said police was still trying to reconstruct the bomb, but that it had already been firmly established that it had been a home-made device. Theunissen yesterday claimed that Pagad members being held at Pollsmoor Prison were being interrogated and tortured by police and the FBI agents. He said one Pagad member was booked out of the prison on Wednesday and apparently “interrogated and tortured” before being returned to the jail. Others, he said, were booked out by Peninsula Murder and Robbery Unit detectives yesterday. Theunissen, who did not want to name the prisoners, said the fact that their legal counsel was not informed of the questioning suggested foul play. “I find it strange that people who have lawyers are being taken out (of jail) without the lawyers being informed.” However, Sterrenberg said last night that only two prisoners – Mogomat Anwar Francis and Yusuf Salie, arrested following a pipe-bomb explosion in a bakkie late last month which killed two other Pagad members – had been booked out yesterday for routine questioning in connection with that incident. The prisoners were welcome to lay charges if they had been mistreated, he said.’[6] The plaintiff’s particulars of claim as originally drawn on 9 June 1999 when he was not aware of the publication of the country edition contained the following allegations:’7 On 27 August 1998, and at Cape Town International Airport, Plaintiff, who was about to depart on a holiday to Egypt with his family, was arrested and detained by members of the South African Police Services, purportedly in connection with the explosion at the restaurant.THE REPORT8.

On 28 August 1998, and at Cape Town, within the area of jurisdiction of this Honourable Court:

8.1 A colour photograph of Plaintiff was published prominently and on the front page of the newspaper (“the photograph”),

8.2 The photograph, which spans four columns across and is nine column inches deep, depicts Plaintiff with his hands cuffed behind his back, and was accompanied by the following caption: “SUSPECT HELD: Walied Suleiman is led away by a policeman at Cape Town International Airport.” (“the caption”); 8.3 Prominently juxtaposed with the photograph on the front page, above the fold, an article was published as the main lead (“the article”) under the headline:

“Pagad outrage over bomb arrests” (“the headline”);

8.4 The introductory paragraph to the article reads as follows:

“DETECTIVES PROBING Tuesday’s horrific Waterfront blast yesterday arrested three Capetonians about to board an Egypt-bound flight at Cape Town international Airport”;

8.5 Midway through the article, and above the fold, a shaded box (“the box”) was published containing the following words:

“INSIDE Blast a terrorist attack – Qibla page 3 Support for bomb victims page 3 Political parties condemn blast page 5 Damage that’s difficult to repair page 19”

9. In addition to the foregoing, the article contained the following statements:

9.1 “He [the minister of Justice] said he viewed the Planet Hollywood attack as a ‘very, very, serious matter’ and said he hoped police would leave no stone unturned in the investigations.”;

9.2 “After receiving an anonymous tip-off, police arrested Walied Suleiman, 32, his wife Gouwa Suleiman, 31 both of Kenwyn, and their cousin Shanaaz Bayat, 30, of Belgravia as they were about to board a flight to Egypt.”; 9.3 “The three were held overnight.”; 9.4 The ‘male suspect’ was being held for further questioning ...; 9.5 “[Commissioner André] Pruis said there was ‘no question of harassment of Muslims’ and that police were merely following all possible leads – which included questioning all possible suspects.”; 9.6 “The three were taken to the Parow Police Station by, among others, Waterfront bombing investigating officer Mike Barkhuizen.”

10. ...11. ...

PLAINTIFF’S FIRST CLAIM

12. The report and its various components referred to Plaintiff and were individually and/or collectively per se defamatory of Plaintiff, alternatively, were intended by Defendants and were understood by readers of the newspaper to mean that Plaintiff;

12.1 had been arrested for causing the explosion at the restaurant;

12.2 was being investigated for causing the explosion at the restaurant;

12.3 was responsible for a terrorist attack on the restaurant;

12.4 was a suspected criminal and/or terrorist who may have caused a horrific blast in a public restaurant;

12.5 was about to flee the country in consequence of his commission of the said crime;

12.6 was a danger to the public and/or a flight risk, which necessitated him being handcuffed.

13. Publication and distribution of the report as aforesaid was unlawful and was intended by Defendants to defame Plaintiff and to injure him in his good name and reputation.

14. As a consequence of the aforesaid defamation Plaintiff has been injured in his good name and reputation and has suffered damages in the sum of R1 000 000,00.

PLAINTIFF'S SECOND CLAIM

15. The report, in describing and identifying Plaintiff as a person who had been arrested by members of the South African Police Services in connection with the explosion at the restaurant and carrying the further imputation that Plaintiff was responsible for such explosion, as set out hereinabove, has embarrassed, humiliated and degraded Plaintiff, lowered his self-esteem, impaired his dignity and mental tranquillity, and has, in addition, jeopardised Plaintiff's safety and livelihood and led to plaintiff's being socially ostracised by members of his community.

16. The report was published and distributed unlawfully and with the intention so to injure Plaintiff

17. As a direct consequence of Defendants' aforesaid conduct and the impairment of his dignitas, Plaintiff has suffered damages in the sum of R1 000 000,00.

PLAINTIFF'S THIRD CLAIM

18. Publication of the report, and distribution of the newspaper containing it, widely publicised the following private facts regarding Plaintiff and his private life, without Plaintiff's consent.

18.1 The South African Police Services regarded him as a suspect in connection with the explosion at the restaurant; 18.2 He had been arrested, handcuffed and detained overnight by the police; 18.3 The police intended to detain him for further questioning; 18.4 He was about to depart Cape Town for Egypt; 18.5 He was a member of Pagad, an organisation which the newspaper in its articles and commentaries frequently associated with bomb explosions in the Western Cape; 18.6 His photographic image.

19. In consequence of the said publication of the report the public became acquainted with the aforementioned private facts and concerning Plaintiff and was in addition able to identify Plaintiff by name as well as by sight.

20. As a result, Plaintiff's privacy and seclusion in his private life were infringed and his mental tranquillity was disturbed.

21. In publishing and distributing the report, Defendants acted unlawfully and with the intention that publication would have the aforesaid injurious consequences for Plaintiff.
 22. As a direct consequence of Defendant's aforesaid conduct and the infringement of Plaintiff's privacy and seclusion in his private life and the disturbance of his mental tranquillity, Plaintiff has suffered damages in the sum of R1 000 000,00.
 23. In the premises, Defendants are liable to pay to plaintiff the sum of R3 000 000,00 which, despite demand, they have failed to do.'
- [7] To this the defendants pleaded as follows: To the defamation claim, first a denial that the article was defamatory; (presumably alternatively) secondly, truth and public interest; thirdly, what has come to be known as the Bogoshi[1] defence; and fourthly, the protection of the right of free speech and the right to impart information conferred by s 16 of the Constitution. To the impairment of dignity claim, there was a general denial. To the invasion of privacy claim, there was a general denial coupled with an allegation that none of the facts allegedly wrongly disclosed in the article were private at the time of their publication.
- [8] Trial particulars were sought and furnished. Of particular relevance is the plaintiff's reply to the question whether any particular material portion of the article was false, and if so, which. The answer given was that it was not the plaintiff's case that any material portion of the article was false. To the question whether the defendants are alleged to have negligently and/or recklessly failed to take any reasonable steps prior to publishing the article and, if so, which, the
- reply was that the defendants unreasonably published details of and concerning the plaintiff and which identified him, viz his name, his age, his place of residence, and his photographic image.
- [9] Some two weeks later the plaintiff withdrew his previous answer to the first question referred to in para [8] and substituted for it the word 'no'. This was a somewhat enigmatic response for it was the plaintiff's answer to two separate questions. The first was whether any material portion of the article was false, and if so, which. The second was whether it was admitted that any material portions were true, and if so, which. I can only construe the reply 'no' to mean that the plaintiff was not positively alleging any falsity in the article but that he was not going so far as to admit its truth because it was for the defendant to prove the truth of the contents of the article. However, the additional particulars furnished did acknowledge the truthfulness of some parts of the articles, namely, 'that he, his wife Gouwa Suleiman and their cousin Shanaaz Bayat, were arrested by the police as they were about to board a flight to Egypt, and that they were detained in police custody overnight'.
- [10] On 10 August 2001, after learning of the existence of the country edition, the plaintiff gave notice of his intention to amend his particulars of claim. Apart from the consequential amendments resulting from the introduction of the publication of the country edition as a further ground of complaint, some other amendments to the particulars of claim were effected. The allegation that the plaintiff 'was arrested and detained by members of the

South African Police Services, purportedly in connection with the explosion at the restaurant' was deleted and substituted for it was the allegation that the plaintiff 'was arrested and detained by a member of the South African Police Services for allegedly having contravened the Identification Act, 72 of 1986, and the Aliens Control Act, 96 of 1991'. For convenience sake I shall refer to the alleged contravention of those two Acts as passport contraventions.

- [11] Amendments to the plaintiff's reply to the defendant's request for trial particulars were also effected. The enigmatic 'no' given in answer to the two questions referred to in para [9] was deleted and substituted for it were the following allegations:

"6.1 The first and second articles are false in the following material respects:

6.1.1 Neither Plaintiff nor his wife nor Shanaaz Bayat were arrested by detectives probing the explosion at 'Planet Hollywood';

6.1.2 The three were not arrested in connection with the explosion; and

6.1.3 None of the three were taken to the Parow police station by 'Waterfront bombing investigating officer Mike Barkhuizen'.

6.2 The true facts are that Plaintiff, his wife, and Shanaaz Bayat, were arrested by a member of the South African Police Services, Border Control Unit, in respect of alleged passport irregularities and the aforementioned Barkhuizen was not present when the three were taken to Parow police Station."

- [12] In their amended plea to the plaintiff's amended particulars of claim the defendants 'admitted that the reports were defamatory of the plaintiff' but did not say in what particular respect.
- [13] In further trial particulars provided by the plaintiff, he alleged that he was not informed at the time of his arrest that the reason for his arrest was his contravention of the two Acts referred to earlier and was told simply that he was being arrested for irregularities in his passport. He denied that the police had at some time prior to his arrest received an anonymous report that he was somehow linked to the explosion and that he, his wife, and Shanaaz Bayat were leaving the country for Egypt. He admitted only that the police had at some time prior to his arrest received an anonymous report that he might be linked to the explosion and that he was leaving the country.
- [14] After hearing the evidence adduced by the parties at the trial Selikowitz J upheld the plaintiff's claims and awarded him damages of R90 000,00 for the defamation and impairment of dignity combined and R10 00,00 for the invasion of privacy. The factual conclusions upon which the awards were based were broadly these. The learned judge was satisfied that the reasonable reader would have concluded that the plaintiff was arrested as a suspect in the Planet Hollywood bombing. He acknowledged that a reasonable reader would have appreciated that the plaintiff was only a suspect and had not been proved to have been

the perpetrator of the crime and that many suspects who become accused are thereafter acquitted, but considered that “the mere fact of being arrested as a suspect carries a stigma and the acquittal is often perceived to be for ‘technical reasons rather than for innocence’ and that the more serious the crime, the heavier the stigma.

- [15] As to the truth or untruth of the defamatory allegation, namely, that the plaintiff was arrested as a suspect in the bombing, he concluded that the defendants had ‘failed to establish the truth of the reports that the plaintiff was arrested as a suspect in the Planet Hollywood bombing’ and that ‘per contra, the evidence establishes that the objective truth remains that plaintiff was arrested for passport irregularities and not in connection with the Planet Hollywood bombing’. Furthermore, he found that the uncontroverted evidence was that the plaintiff was arrested by members of the border police and not by detectives probing the bombing. He found too that the plaintiff was not taken to the Parow Police Station by the bombing investigation officer, Mike Barkhuizen, but by the border police. All three of the allegations were therefore found to be false. The ultimate conclusion was that the defendants had ‘failed to prove, on a balance of probability, that the material defamatory allegations were substantially true’. That obviated, so the learned judge thought, the need to consider whether publication was in the public interest.
- [16] Turning to the Bogoshi defence, he found that the defendants did not act unreasonably in relating the plaintiff’s arrest to the bombing but that neither the statement that the plaintiff was a suspect in the bombing, nor that detectives probing the bombing had arrested the plaintiff, nor the statement that Barkhuizen had accompanied the plaintiff to the Parow police station were reasonably justified. However, he did not regard the use of the word ‘arrest’ rather than ‘detain’ to have been unreasonable. He said, correctly, in my view, ‘when the police are seen to detain a person, handcuff him and remove him then it seems to me – in the context of the reports here – to be splitting hairs to ask whether he has been properly described as having been detained or arrested’.
- [17] Holding that it was inherent in the Bogoshi defence that it would still have to be shown that publication of the defamatory material, if it had been true, would have been in the public interest, he concluded that it would not have been in the public interest to reveal the identity of the plaintiff at a time when he had not yet been charged or brought before a court. He said: ‘In weighing the harm which can result from the premature disclosure of the detainee’s identity in a case such as this as against a delay in informing the public of the detainee’s identity until he is brought before a court, there seems to me to be an overwhelming tilt in favour of the individual.’ The Bogoshi defence was therefore rejected.
- [18] The claim for impairment of dignity was dealt with by holding that although there was overlapping of the claim with the claim for defamation, the former claim could be maintained but had to be limited to the harm caused by the peninsula edition because the plaintiff had never been aware of the country edition until nearly three years after the event. The defences of truth and public benefit and the Bogoshi defence, in so far as they might be applicable to this claim, were rejected for the same reasons as they were rejected when

considering the claim for defamation. When awarding damages for this impairment of dignity the learned judge merged the award with his award for defamation and it is not possible to isolate to what extent the ultimate award was increased by doing so. The invasion of privacy claim was upheld.

- [19] In any defamation suit the logical starting point is what the words complained of mean, more particularly, whether they convey the defamatory meaning which the plaintiff seeks to place upon them. In answering that question a court discards its judicial robes and the professional habit of analysing and interpreting statutes and contracts in accordance with long established principles. Instead it dons the garb and adopts the mindset of the reasonable lay citizen and interprets the words, and draws the inferences which they suggest, as such a person would do. It follows that meticulous attention to detail, an alertness to and awareness of the subtle nuances in meaning of words, a full appreciation of the influence of context, and a reluctance to draw inferences when they are not soundly based and fully justifiable and amount to no more than speculation, cannot be expected. The law reports are replete with reminders of the looseness of thought and low level of concentration with which even an eminently reasonable member of society may read newspaper reports.
- [20] Yet there must be a limit to the allowances which a court should make in a claimant's favour when engaged in the notional exercise postulated. A defamatory meaning should not be attributed to an isolated part of a newspaper report if the rest of the report would show that it is not justified. A claimant should not be permitted to base his case upon the reaction of readers who do not bother to read the whole of the article even although a part of it has attracted their attention precisely because of its potential to lower the esteem in which society holds him. In saying this I am aware that judges have drawn attention to the propensity of readers to 'skim' reports in newspapers but I do not understand that to mean that they must be taken to have entirely ignored everything in a report which they skim, other than that part or those parts of it which, if viewed in isolation, would constitute defamatory material. Why should the writer or publisher of an article the whole of which is intended to be read and, if read, would plainly not be defamatory be held liable for defamation because there may have been lazy or careless readers who chose to focus only upon a particular sentence in it. I am also aware that headlines are what attract readers to an article but that does not mean that one may ignore an accompanying headline. However, 'those who print defamatory headlines are playing with fire'.[2]
- [21] I approach the question of what the articles and the photo and the caption conveyed having read them in their entirety. In providing the answer I shall confine myself to the meaning of those parts of the articles which are potentially defamatory or relevant to the question of whether they are defamatory.

[22] The country edition:

It conveyed:

1. That detectives engaged in investigating the bombing arrested the plaintiff, his wife and his cousin (all of whom were named) on Thursday 27 August 1998 when they were about to board a flight bound for Egypt, and they were being held overnight by the police;
2. That they were associated with Pagad and that the arrests were made after an anonymous tip-off to the police that they were bound for Egypt and that they might be linked to the bombing;
3. That the two women would be charged with passport offences;
4. That the plaintiff (the 'male suspect') was being held for further questioning, as a suspect in the bombing;
5. That all three were taken to Parow police Station by, inter alia, Mike Barkhuizen, the Waterfront bombing investigating officer;
6. That South Africa's police operations chief, Commissioner André Pruis, told the Cape Times that there was a possibility that they could have been involved in the blast but that, at that stage, there was no evidence pointing to that.
7. That the plaintiff and his companions had been stopped by the Aliens Control Unit at the airport after fault was found with one of their passports;
8. That the mother of Shanaaz Bayat (the plaintiff's cousin) denied that her daughter's passport was not in order and that she had travelled overseas many times before without experiencing problems with her passport;
9. That a large number (20) of family members at the airport had angrily protested at the arrests and alleged that it was unfair and discriminating against Muslims;
10. That Commissioner Pruis had responded by saying that there was no intention of harassing Muslims and that the police were merely following all possible leads which included the questioning of all possible suspects.
11. That Commissioner Pruis and National Police Commissioner George Fivaz had remained in Cape Town to oversee the latest developments and that since early the previous evening they had been receiving reports from the investigating team every 30 minutes.

I do not regard the headings to the article, namely, "Pulled off plane" and 'Bomb: Pagad trio held at airport' as conveying anything different from the meaning conveyed by the body of the article.

[23] The peninsula edition:

With minor exceptions (the omission of the content of the ‘tip-off’; the reaction of the 20 family members at the airport; and the denial by the mother of Shanaaz Bayat that her passport was not in order) the article conveyed the same information and meaning as that I have attributed to the country edition. However, there was prominence given to the attitude of Pagad to the arrests and it was made clear that Pagad regarded the trio as innocent and the arrests as nothing more than blatant harassment and indicative of a witch-hunt targeting Muslims.

[24] The next question which needs addressing is which, if any, aspects of the articles and photo are defamatory according to the plaintiff, and whether they are indeed defamatory in the light of the meaning which the court has found has to be given to the articles. The plaintiff’s first submission is that the articles convey to the public that he is indeed the bomber or responsible for the bombing. That submission is, in my view, untenable. It was also correctly so regarded by the learned judge a quo. The articles make it quite plain that the plaintiff is no more than a suspect and that the basis for his status as such was only an anonymous ‘tip-off’ to the police that he ‘might’ be involved in the bombing and was on the point of leaving the country. Indeed the articles expressly state that Commissioner Pruis had said that while the possibility existed that the plaintiff could have been involved in the blast, there was no evidence that he had been involved. Any suggestion that the possible readiness of readers to draw inferences of actual guilt because of a belief that the police do not arrest for questioning people on suspicion of involvement in crime unless there is evidence sufficient to warrant prosecution and conviction (in itself an unsustainable proposition which, if true, would always result in the equating of a statement that a person is suspected by the police of committing a crime with a statement that the person has committed the crime) would be misplaced in the light of what was actually published in these articles. It was made abundantly clear that although the plaintiff was viewed as a suspect by the police, there was no evidence linking him to the blast.

[25] The trial judge found that the reasonable reader would expect and believe that the police would not have arrested a person whom they did not ‘seriously and upon reasonable grounds consider to have played a part’ in the bombing. That is of course still not the equivalent of saying that he had committed the crime. Moreover, while the existence of suspicion on the part of the police is an entirely subjective matter, the grounds for their suspicion are objective in their nature and may vary from slender grounds through many gradations to the status of cast-iron grounds. A ‘tip-off’ from a source objectively well-placed to have access to the information supplied and which has proved to be consistently reliable in the past may be the only ground for the suspicion but it would still rank as a reasonable ground for suspicion even although no evidence, or no admissible evidence, was available to prove guilt. Sight should not be lost of the fact that the grounds for arrest for questioning as a suspect are often less cogent than grounds for a successful prosecution and a reasonably well-informed reader should be alive to the distinction. Such a reader is not entitled to assume that the grounds upon which a suspect has been held by the police for questioning are so strong that an inference of guilt is justified. Comparison with the facts and the approach of the different law lords who participated in the hearing of *Lewis and Another v*

Daily Telegraph Ltd and Associated Newspapers Ltd[3] is instructive.

- [26] The issue was whether publication of a statement that officers of the City of London Fraud Squad were ‘inquiring into the affairs of the [R. Co.] and its subsidiary companies’ was libellous. The plaintiff (the chairman of the R. Co.) pleaded that the statement meant that he had been guilty of fraud or was suspected by the police of having been guilty of fraud or dishonesty in connection with R. Co’s affairs. The majority of the learned law lords held that the statement was not capable of conveying that the plaintiff was guilty of fraud or dishonesty but that suspicion could be inferred from the fact of the inquiry being held. Lord Hodson said: ‘It may be defamatory to say that someone is suspected of an offence, but it does not carry with it that that person has committed the offence, for this must surely offend against the ideas of justice, which reasonable persons are supposed to entertain.’[4] Lord Reid, after remarking that some people are unusually suspicious and some are unusually naïve and that one has to try to envisage people between those two extremes and see what is the most damaging meaning that they would put upon the words in question, said: ‘What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot.’[5]
- [27] Lord Devlin was at pains to emphasise that while it is not correct to say as a matter of law that a statement of suspicion imputes guilt, it can be said as a matter of practice that it very often does so because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis.[6] Implicit in this is that there can be no rule of law about this and that it is a question of fact whether the statement conveys more than a mere suspicion. He also said: ‘When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to the judge that he ought to dissect the statement before he submits it to the jury. But if, on the other hand, the distinction clearly emerges from the words used, it cannot be ignored.’[7] [My emphasis] He too held that the statement complained of was not capable of meaning that the plaintiff had been guilty of fraud or dishonesty. Lord Jenkins concurred with Lord Reid.[8]
- [28] Lord Morris of Borth-y-Gest differed. He considered that the statement was capable of meaning that the plaintiff had been guilty of fraud or dishonesty and that the trial judge was right in leaving it to the jury to decide whether that was indeed the meaning which the ordinary reader would have attributed to the statement.[9] In my respectful view, the learned law lord took too indulgent an approach to the question of what possible meanings could reasonably be placed upon the statement and the justification given by him for that approach is unsound.[10] Speculation about why a newspaper chooses to publish a particular statement is of little, if any, help in deciding what the statement means. To speculate yet again about the reader’s speculations as to what lay behind the decision to publish the statement and then to use the results of that speculation to justify placing a

particular meaning upon the words used is, in my opinion, a futile and impermissible approach which is potentially productive of random and irrational results.

- [29] Whether the reasonable reader postulated by English law is the same kind of reader which the law of South Africa postulates remains a question. The adoption by many South African courts[11] over the years of the test propounded by Lord Atkin in *Sim v Stretch*, [12] namely, 'Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally', [13] indicates that he is. Some controversy exists about the attributes of a 'right-thinking' person. Some might regard them as superior to those of the notional reasonable person so familiar in our jurisprudence. [14] For myself, I have no doubt that sound legal policy should not require a court hearing a defamation suit to ascertain the meaning and effect of words by reference to the meaning and effect that would be attributed to them by anyone other than the well-known notional reasonable person in the particular circumstances. Anything less would be unfair to the publisher of the statement who is sought to be held liable; anything more would be unfair to a plaintiff who bears the onus of establishing both the meaning of the words used and the defamatory nature of that meaning. In the former case it would subject the publisher to liability for less than reasonable interpretations of published matter; in the latter case it would require a plaintiff to establish more than that reasonable readers would attribute a particular meaning of a defamatory nature to the matter. The same considerations apply, so it seems to me, to the suggestion [15] that one test should be applied when ascertaining the meaning of the words used and another more intellectually and ethically rigorous test when deciding whether the ascertained meaning is indeed defamatory. In my view, neither logic nor sound legal policy requires the application of two different criteria to these questions.
- [30] Applying that test, the answer seems plain. The meaning of the articles, in broad, was that the plaintiff was associated with Pagad; that he was suspected by the police investigating the bombing of being implicated in the bombing because of an anonymous tip-off that he might be so implicated and was about to leave the country; that he had been arrested at the airport for that reason and was detained overnight for questioning by the police investigating the bombing after being taken to the Parow police cells by the investigating officer; that Commissioner Pruis had said that while there was a possibility that he might be involved in the bombing, there was no evidence pointing to that; and that he had been stopped at the airport by the Aliens Control Unit after fault was found with one of the passports of the trio named in the articles.
- [31] As to the sting of the articles or, in other words, their defamatory nature, I have no doubt that it lies in the allegation that the plaintiff, a Pagad associate, had been arrested and so prevented from flying out of South Africa for Egypt because, as a result of a tip-off, he was suspected of complicity in the bombing. To say of a man that he has been arrested and detained in custody by the police for questioning as a suspect in the commission of a serious crime is, in my view, defamatory. It remains so despite an accompanying statement that the police regard him as a suspect only because of an anonymous tip-off that he, an associate of

Pagad, might be involved in the bombing and was about to leave the country for Egypt, and that there was no evidence pointing to his involvement.

[32] Defamation is of course an injuria to one's fama or reputation. I think that it is inevitable that some damage is done to the reputation of a person when the public is told, before a decision to charge him with a serious crime has been taken and before he has appeared in court, that he is under arrest on suspicion of committing that crime. It is true that in South Africa there is a constitutionally entrenched presumption of innocence until the contrary is proved. However, the harsh reality of the situation is that even mere suspicion, to put it at its lowest, raises doubts in the mind of those to whom it is communicated as to whether the hitherto unsullied reputation which the person enjoyed continues to be deserved or whether it should now be regarded as undeserved. To say that which imperils the continued existence of a person's good reputation and causes people generally to doubt the integrity of that person even though they may not be certain the doubt is justified, is to adversely affect to at least some degree his or her reputation. That the doubt may be temporary and ultimately transient because of the subsequently established innocence of the person concerned cannot cure the loss of esteem which that person endures pending the establishment of his or her innocence.

[33] In the case of Lewis[16] the House of Lords appears to have accepted that it is defamatory to say that a person is suspected by the police of fraud and dishonesty. In the same case in the Court of Appeal it was explicitly so held by Holroyd Pearce L J.[17]

[34] Truth and public benefit:

The plaintiff's approach to the question of truth was to isolate certain of the statements made in the articles and to argue that, because the evidence showed them to be false, it followed that the defendants had failed to prove that the defamatory statements published by the defendants were true or substantially true. The approach would have been understandable if each of the isolated statements said to be false constituted a separate, distinct, and different defamatory allegation against the plaintiff. But I fail to understand how that approach can be appropriate when the isolated statements are not separate and distinct defamatory statements each conveying a different defamatory meaning, but simply elaborations of fact designed to bring home the one and only defamatory meaning of which the articles read as a whole are capable.

[35] To illustrate: If it is said in a letter to the press that a person committed rape in 2003, murder in 1975 and theft in 1970, and when sued, the publisher fails to prove that murder and rape were committed but does prove that theft was committed, the plaintiff is entitled to say that while the allegation that he committed theft is true, the allegation that he committed the other two crimes of violence is untrue and he should be compensated for those unjustifiable defamatory allegations. But where the complaint is that it was falsely alleged that the plaintiff had been arrested upon a charge of murder and that the arresting officer was a member of the murder and robbery unit of the police it cannot avail the plaintiff, if it is established that he was arrested for murder, to say that the evidence shows that he was not

arrested by a member of that squad but by a member of the dog unit; that the report is therefore false in that respect; and that therefore the defendant has failed to prove the truth or substantial truth of the report of which the plaintiff complains.

- [36] It seems quite obvious in the latter example that whoever arrested the plaintiff is irrelevant to the defamatory sting of the article. It is a peripheral fact which, even if it had been left out, or even if it had been corrected, would have made no difference whatever to the defamatory import of that part of the article which was true.
- [37] In the present case, as I have already said, the defamatory aspect of the articles is that the plaintiff was regarded by the police as a suspect in the bombing, was prevented from leaving South Africa and was held for questioning in that regard by police investigating the bombing. The answers to such questions as whether he was formally arrested initially on passport charges; whether, if he was, that was merely a pretext resorted to to ensure that he would not be able to complain if questioning of him as a suspect in the bombing led to a conclusion that he was innocent and should be released; and whether it was Barkhuizen, the officer investigating the bombing, who took him to Parow Police cells, add nothing to nor subtract anything from the defamatory allegations which exist in the articles. The truth or falsity of these statements is wholly peripheral to the question whether or not the defamatory allegations were true or untrue.
- [38] I have no hesitation in finding that the defamatory aspects of the articles were true. The following facts are substantiated by overwhelming evidence. The police investigating the bombing set out to apprehend the plaintiff as a suspect as a result of a 'tip-off' from a source who had proved to be reliable in the past. The suspicion was genuine and not feigned. The border police at the airport were advised of the desire of the police investigating the bombing to apprehend the plaintiff and prevent him from leaving South Africa for Egypt. They were prepared to assist in achieving that objective. They did in fact do so, first, by detaining him and secondly, by taking advantage of a subsequently appearing ground (passport irregularities) for arresting him. Despite Barkhuizen's own doubts about the existence of sufficient evidence to justify an arrest, he continued to regard him as a suspect on the strength of the 'tip-off' communicated to him by Director Knipe. Indeed, Barkhuizen procured his removal from Parow Police cells to the Bellville South Police cells for the express purpose of questioning him as a suspect in the bombing. He exploited the arrest of the plaintiff by the border police by using their detention of the plaintiff to achieve the very purpose which those investigating the bombing had set out to achieve, namely, to prevent the plaintiff from leaving South Africa and to detain him in custody for interrogation as a suspect in the bombing.
- [39] It is equally clear that the whole aim of the police was to let it be known to the public, first, that they were not sleeping on the job and were making progress in the investigation; secondly, that they had apprehended a suspect in the bombing and prevented his departure from South Africa on a flight to Egypt; and, thirdly, that he was being held in custody for interrogation as a suspect in the bombing. To that end, the police advised the media of an

imminent arrest for that specific purpose so that publicity would be given to the arrest. They subsequently confirmed, when asked for confirmation, that the plaintiff was being held and interrogated as a suspect in the bombing. They released his name and downplayed the passport offences.[40] The arrests for alleged passport offences were quite adventitious and were obviously intended to achieve two purposes: first, to enable the border police to check the passports; secondly, to enable the police investigating the bombing to question the plaintiff while he was in custody in his capacity as a suspect in the bombing. It is quite plain that the arrest in the sense of taking him into police custody was as much for the one purpose as the other. That is borne out by the failure of the border police to use immediately their computer link in order to check the passports (as they could have done) and by the utterance of one of the border policemen, 'Ons het hom' when the plaintiff was arrested. He was arrested before anything was known about possible passport irregularities.[41] The plaintiff too regarded himself as having been detained (arrested) for the bombing and continued to believe it right up to the amendment of his pleadings shortly before the trial commenced. Director Knipe's evidence was unequivocal: if Barkhuizen had not seen to it that the plaintiff was prevented from leaving South Africa that night he (Knipe) would have proceeded to the airport and, come what may, arrested him on suspicion of involvement in the bombing. In the light of all this it cannot be said that the defamatory aspect of the articles was untrue. It was proved on a balance of probability to be true and the learned trial judge was wrong in coming to a contrary conclusion. Reliance on the Bogoshi defence is therefore in relation to this particular aspect of the case unnecessary.[42] That brings me to the question of public benefit or interest – a troublesome aspect of the case. The criterion allows for considerable elasticity in its application and is woefully unhelpful in failing to provide any indication of what is meant by public benefit or interest. It is true that what is interesting to the public is not necessarily the same as what it is in the public interest for the public to know but that leaves unanswered how to distinguish the two. It seems obvious that what it is in the public interest for the public to know may not in fact be interesting to the public and that what the public finds interesting it may not be in the public interest for the public to know.[43] Prurient or morbid public curiosity, no matter how widespread, about things which are ordinarily regarded as private or do not really concern the public cannot be the test. Nor can the fact that there is a legitimate public interest in a particular topic such as the prevention of crime and the apprehension of offenders mean that any information of any kind which is relevant to that topic may be published with impunity.[44] In considering the question of public benefit or interest there is obviously a potential clash between constitutionally entrenched rights: the rights to dignity and privacy on the one hand and, on the other, the right of freedom of the press, of expression, and of receiving or imparting information. None of these rights should be regarded as permanently trumping the others in the sense that there is a pre-ordained and never shifting order of priority to be assigned to each of them. The weight to be assigned to each of them in a given situation will vary according to the circumstances attending the situation. It is not a question of 'balancing' the conflicting rights in order to achieve equilibrium between them; it is a matter of ad hoc assessment of what weight should be assigned to the respective rights in the particular

circumstances of the case and giving precedence and effect to the right which weighs most heavily in such a manner as will impair the countervailing right as little as reasonably possible. It is important to appreciate the distinction between a case such as this in which the two rights under consideration are both equally constitutionally entrenched rights and a case in which only one of the two rights is so entrenched. It is in the latter class of case, not the former, in which s 36(1) of the constitution becomes relevant. However, in the former class of case difficult questions of proportionality arise.[18][45] I doubt that it can never be in the public interest or for the public benefit for the media to name a suspect and publish a photograph of him or her before any court appearance. The crime or offence of which the person is suspected may be of such a kind that the public may be entitled to be informed of his or her identity even before any appearance in court so that they can steer clear immediately of the person until guilt or innocence has been established, or so that the person's continued discharge of a high profile public office which requires the incumbent to be, like Caesar's wife, above even suspicion, may be temporarily suspended pending the outcome of an investigation.

- [46] Some examples of offences I have in mind are a person who practises as a medical doctor but who is suspected of not being qualified or registered to do so as the law requires or a judicial officer who is suspected of serious crime. There is danger to the public at large inherent in the first example and persons who consult that person or who may be minded to do so should perhaps be alerted to that so that they can make up their own minds whether or not they wish to steer clear of the person until the question is resolved. In the second example there may be no more danger to the public than exists in the case of any other person suspected of a similar crime but the nature of the public office which the person is required to discharge is such that public confidence in its discharge will be undermined if the person continues to discharge it while under a cloud of suspicion of having done that which the State has empowered him or her to punish others for doing. I wish to make it quite clear that in posing these examples I am not deciding that it would be in the public interest to name the suspects in these examples before a formal charge has been laid and an appearance in court has occurred. I mention them only to point to some distinctions which differentiate one type of case from another and may (I put it no higher) result in different conclusions as to whether or not an early disclosure of the identity of the suspect is in the public interest. There are also of course cases in which the police specifically enlist the aid of the media in tracking down a suspect whose whereabouts are unknown.[47] That said, I think that the consequences of a premature disclosure of the identity of a suspect can be so traumatic for and detrimental to the person concerned when he or she may never be charged or appear in court and is, in fact, innocent, that greater weight should be assigned to the protection of the constitutional right to dignity and privacy and the common law right of reputation, than to the right of the press to freely impart information to the public. It is not as if the press will be permanently deprived of the right to identify the suspect. Once he or she appears in court his or her identity may be disclosed with impunity. In the meantime the press are at liberty to inform the public of what it is clearly in the public interest to

know, namely, that an unnamed suspect has been arrested and questioned by the police in connection with the commission of a crime. But, generally speaking, and subject to the considerations I have mentioned in paras [45] and [46], I do not believe it is in the public interest or for the public benefit that the identity of a suspect be made known prematurely. [48] It is so that in this particular case a horrendous crime which created huge public alarm had been committed. But the seriousness of the crime alone cannot be the touchstone as to whether or not it is in the public interest to prematurely name a suspect. Nor is there anything in the nature of the crime other than the apparent unconcern of the perpetrators about who might be killed or injured by the bombing which takes the matter any further. It is true that these factors certainly heighten the legitimate public interest which will exist in knowing whether progress has been made in the investigation by the police and whether any arrests have been made. But they do not create or heighten a need for the public to know the identity of any suspects whom the police may decide to question.[49] The plaintiff was not a person with a high public profile. He did not hold a public office of any kind. He was merely another citizen. There was no evidence linking him with the blast. He was only being questioned about the matter and no decision had been taken to charge him with the bombing. As a fact, the decision to reveal his identity was not made because those responsible for the decision considered it to be in the public interest in the legal sense but because his identity had already been disclosed in television news reports and was therefore thought to be in the public domain. However, that subjective belief is not relevant. The test of public interest or benefit is objective.[50] The photograph of the plaintiff requires special consideration in this context. It is a criminal offence under s 69 of the South African Police Services Act 68 of 1995 for any person to publish, without the written permission of the National or Provincial Commissioner, a photograph of any person who, inter alia, is suspected of committing an offence and who is in custody pending a decision to institute criminal proceedings against him or her. The object of the prohibition is manifest: it is to avoid any subsequent trial of that person being compromised or prejudiced by a premature photographic disclosure of the identity of the suspect. If that is regarded as an important enough interest to warrant parliament providing statutory protection of it, it leaves little, if any, room for the conclusion that it is in the public interest to publish such a picture without such permission and at a time when the person concerned is no more than a suspect and has neither been charged nor appeared before a court.[51] It is not necessary to consider whether there is any scope for the application of the principles laid down in the case of *Bogoshi* to the requirement that public interest or benefit exist. A bona fide subjective belief in the existence of public interest or benefit without reasonable grounds for the belief could obviously not avail a defendant. But what the position would be if there was much to be said for a conclusion that publication would be in the public interest but not quite enough to justify the conclusion, it is not necessary to decide because the decision to publish the plaintiff's identity was not based on a belief that it was in the public interest to do so. In any event, I am not convinced that the *Bogoshi* principles are of any application to the public interest or benefit aspect of the defence of truth and public benefit. *Prima facie*, they are not. None of the defences to the claim for damages for defamation have been made out and

the plaintiff is entitled to appropriate damages. To that subject I shall return.[52]

Impairment of dignity: Whatever doubt may have existed in the past as to whether dignitas was a separate and distinct right of personality which merited independent recognition and protection, there is no longer any doubt. The matter is now placed beyond contention by virtue of the constitutional entrenchment of a right to dignity which inheres in every person. [19] Overlapping is bound to occur whenever a defamatory statement is made which is at one and the same time an affront to the person's dignity. Some maintain that every injuria (including those relating to corpus and fama) adversely affects dignitas. It is not necessary to decide whether that is always so; it is sufficient to acknowledge that it will often be so.[53] In many ways the problems which arise in deciding whether separate awards of compensation for defamation and affront to dignity should be made are similar to those which arise in the criminal law in relation to the splitting of charges. In the present case it is inappropriate to attempt to assess in monetary terms what solatium should be given for the affront to dignitas and what should be given for the damage to fama. The learned judge exercised a proper discretion in awarding a lump sum to cover both. The infractions of those two rights were so intertwined that any attempt to compensate for each of them separately would have been attended by a substantial risk of compensating twice for what was essentially one delictual act, namely, the unlawful publication of the plaintiff's identity in articles defamatory of him. To the appropriateness of the quantum of the award I shall revert.[54] It is necessary to correct an observation made by the learned judge in dealing with the claim for impairment of dignity. He said that publication of the country edition had to be ignored because the plaintiff never knew of its publication until three years later. That does not derogate from the fact that he ultimately came to know that three years before a large number of people who read that edition suspected him of being the sort of person who had no claim to any dignity, namely, a common murderer. That he did not know that at the time does not mean that, objectively regarded, he was not subjected to indignity in the eyes of the public. He was. That he only learnt of it ex post facto and suffered from the knowledge then does not deprive him of a remedy.[55]

Invasion of privacy: It is also no longer open to doubt that an action for damages for invasion of privacy exists in our law. Whether it is really an independently existing injuria in its own right or whether it is a species of affront to dignitas is of little importance. The point is that invasions of privacy are forbidden by the Constitution and the common law and are actionable.[20]

- [56] Here again there may be overlapping of injuriae. Invasion of privacy can take many forms. Some may involve no publication of defamatory statements or material, such as, for instance, 'peeping Tom' cases. Others may be part and parcel of a defamatory publication as, for example, a statement that a person has blackmailed a medical practitioner because he failed to diagnose timeously that the person was suffering from cancer. The allegation of blackmail is destructive of fama; the allegation that the person suffers from cancer is not but it is an intrusion upon the right of privacy. In this example, there is no overlapping of the two injuriae. But where a published statement accuses a person of being addicted to pornography (a defamatory statement) the invasion of privacy is so inextricably enmeshed

with the assault upon fama that the assessment of compensation for the assault upon fama will necessarily entail an evaluation of the impact upon both the public and the plaintiff of the publication of the fact (if it is true) that the person is addicted to pornography. To treat the invasion of privacy as a separately actionable delict in such a situation is akin to what would be an impermissible splitting of charges in the criminal law.[57] It is not necessary to decide whether the very institution of a separate claim for damages for invasion of privacy in circumstances such as those in the last-mentioned example is permissible. It is sufficient to say that where such a situation arises, it will seldom, if ever, be possible to quantify separately from the damages which ought to be awarded for the defamation, the damages which ought to be awarded for the concomitant invasion of privacy and, generally speaking, no such attempt should be made. Just as in the case of a concomitant affront to dignity, the damages (if any) should be merged into one globular amount.[58] In the present case the most serious invasion of privacy complained of is the publication of the facts and circumstances of the plaintiff's arrest as a suspect. Those are not, in my opinion, private matters. It was a publicly performed arrest in a crowded airport. The fact that he was suspected by the police of involvement in the explosion and was detained for questioning in that connection is not information which was intrinsically private to him. [59] The remaining disclosures of allegedly private matters of which the plaintiff complains are the publication of his name and photograph, that he was a member of Pagad, and that he was about to depart from Cape Town to Egypt. The publication of his name and photograph and that he was a member of Pagad is so inextricably part of the facts which are relied upon to support the claim for defamation that no additional actionable breach of the plaintiff's rights can be said to have occurred. The same applies to the disclosure of the intended flight to Egypt, if it is to be given a sinister connotation. If it is not, then it is not, in my opinion, private information of a kind which the law should regard as worthy of protection. As Prosser puts it: 'The ordinary reasonable man does not take offence at mention in a newspaper of the fact that he has returned home from a visit or gone camping in the woods, or given a party at his house for his friends.'[21] In my view, this claim should have failed. [60] To sum up on the merits of the claims, defamation was established in the sense set out in para [30] of this judgment, so was the affront to dignity inherent in the defamation; the claim for invasion of privacy was not made out. Contrary to the finding of the learned trial judge, the truth of the defamatory aspect of the articles was proved and there was no recklessness on the part of those responsible for the publication.[61] Damages: In the light of these findings the damages awarded require reassessment. The trial judge's finding that aspects of the defamatory parts of the articles were not true and were recklessly made, would obviously have influenced his assessment of the damages. Moreover the third claim should not have been upheld. This court is therefore at large to reassess the damages to be awarded for the defamation and accompanying affront to dignity.[62] That it was a serious case of defamation and affront to dignity I have no doubt. But the case is complicated by the fact that by the time the articles appeared the plaintiff had already been named in national television broadcasts as having been arrested as a suspect in the bombing. While that does not render lawful the repeated publication of that defamatory statement by the defendants,

one must bear in mind that publication took place only to the readers of the Cape Times and that many of them are likely to have already been aware of the television broadcasts. The additional damage done to the plaintiff's reputation by the republication is what must be compensated for. To quantify the damages as if the Cape Times had been the first offender and therefore responsible for all the harm caused countrywide to the plaintiff's reputation would be unrealistic and amount to making it pay for the sins of others. Nor can one ignore the fact that many readers of the Cape Times were probably already aware of the facts published by it. Some allowance, however difficult its quantification may be, has to be made for that.[63] I think it is also relevant that the context in which that part of the articles which has been found to be defamatory appears is strongly sympathetic to the plaintiff, expresses the outrage at his arrest of a significant sector of the public and, most importantly, reveals that, objectively regarded, there was no evidence linking him to the bombing. These are mitigating factors.[64] Having regard to the general level of awards of damages for defamation and associated injuria in South Africa over the years and taking into account the concomitant diminution in the value of money, I consider that an award of R50 000,00 as combined compensation for the claims for defamation and affront to dignity would be appropriate.[65] Costs: The defendants have achieved some success on appeal. It cannot be described as insubstantial. The plaintiff could have abandoned a part of the award for claims 1 and 2 and the whole of the award for claim 3. It did not and that obliged the defendants to appeal even if only to achieve that partial success. On the other hand, the defendants sought on appeal to deprive the plaintiff of the whole of the judgment in its favour including the favourable costs order. The plaintiff was obliged to oppose the appeal to prevent that happening and has succeeded to a substantial extent in doing so. In these circumstances it would not be fair to dub either the plaintiff or the defendants as the losers in the appeal. They have all achieved substantial success. To order one side to pay the costs of the other would not be appropriate. It would be fairer to order them each to pay their own costs of appeal.[66] There is no reason to interfere with the order made in respect of the trial costs. The costs of the applications for leave to appeal are another matter. There is no good reason why the plaintiff, having unsuccessfully resisted the applications, should not bear the costs of the applications.[67] It is ordered: (a) That the appeal is upheld and that the order of the court a quo is set aside and substituted by the following order: 'Judgment for the Plaintiff against Second, Third and Fourth Defendants jointly and severally, the one paying the other to be absolved, on claims 1 and 2 in the sum of R50 000,00 with mora interest on such sum at the rate of 15,5 per centum per annum from 15 June 1999 to date of payment, and costs of suit which shall include the costs of two counsel but shall exclude the costs of counsels' appearance and the attorneys' attendance at court on one day of the trial. Each of the parties shall bear his/its own costs of such day. Claim 3 is dismissed. No order as to costs is made in respect of Claim 3.' (b) That the court a quo's order that the appellants pay the costs of the application made to it for leave to appeal is set aside and that the respondent pay the costs of both the application for leave to appeal in the court a quo including the costs of two counsel and the application to this court for leave to appeal. (c) That each of the parties pay his/its own costs of appeal. ____ R M MARAIS JUDGE OF APPEAL SCOTT JA) MTHIYANE JA)

CONCUR

NUGENT JA:[68] I agree with the order that is proposed by Marais JA but I regret that I do not agree with all the reasons for his

conclusion.

- [69] The freedom of the press is protected by s 16(a) of the Bill of Rights, which comes against the background of a considerable history in this country of the suppression of the truth. Consistent with venerable democratic traditions the protection of press freedom recognises that society is generally best served by having access to information rather than by having it concealed.[22] Any inroad upon that protection will be countenanced by law only if, and to the extent that, the inroad is both reasonable and justifiable in an open and democratic society based upon human dignity, equality, and freedom, values that are themselves protected,[23] taking into account the factors that are referred to in s 36(1) of the Bill of Rights. [70] The traditional requirement of our law that the publication of substantially true defamatory matter is lawful only if its publication is in the public interest falls to be applied in that context for the Bill of Rights embodies a system of objective, normative values for legal purposes.[24] In my view the protection that is afforded to press freedom must mean that it will generally be in the public interest for truthful matter to be published except where its suppression is justified by the considerations referred to in s 36(1).
- [71] That also accords with the approach that has been taken under the common law. In *Graham v Ker* (1892) 9 SC 185 at 187 De Villiers CJ said that '[a]s a general principle, I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known.' The learned chief justice went on to qualify that general statement by excluding from its ambit the publication of material that serves no purpose but to rake up old scandals, [25] and it has also been qualified to exclude material that is essentially private.[26] I have little doubt that those limitations receive further support today from the protection that is accorded to dignity and to privacy – though we are reminded by s 36(1) that any limitation must be confined to what is reasonable and justifiable for the protection of other protected rights – but in my view the general principle that he enunciated is a salutary starting point for the enquiry.
- [72] If the defamatory material that is in issue in this appeal was indeed substantially true then I can see no proper grounds upon which the appellants were precluded from publishing a part of it, namely, the respondent's identity. (I am not referring to the publication of the respondent's image, which is prohibited by s 69 of the South African Police Services Act 68 of 1995, but to the identification of the respondent by name). The arrest of a person, particularly on a serious charge, is always a matter of public concern, and in my view that applies no less to the identity of the person who is the subject of the arrest. No doubt a person who is placed under arrest might feel that his or her dignity and privacy has been invaded when the arrest is made known but that occurs whenever an unsavory truth concerning a person is published. I do not think that the protection that is afforded to

dignity or privacy – which are themselves capable of being limited – constitutes reasonable and justifiable grounds for suppressing the truth in such circumstances. As pointed out by Wessels JA in *Johnson v Rand Daily Mails*: [27] ‘Why do we allow a defendant to justify at all, “Because,” in the words of LITTLEDALE, J., in *McPherson v Daniels* (10 B. & C. p. 272), “it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess.” To say of a person that he or she has been arrested does not generally amount to an imputation of guilt, and I do not see that the doubt that is thereby cast upon his or her reputation is premature: the statement does no more than to reflect the temporary but contemporaneous state of that reputation. [28] And while it is true that a newspaper may with impunity disclose the identity of an arrested person once that person has appeared in court (because it is then protected by the privilege that attaches to reports of court proceedings) I do not think that assists to resolve the anterior question whether it is in the public interest to make the disclosure in the absence of that special protection.

- [73] The position is quite different where the defamatory material is not true. As pointed out by Cory J in *Hill v Church of Scientology of Toronto* (1995) 126 DLR 4th 129 (SCC) 159-60 (cited with approval in *National Media Ltd & Others v Bogoshi* [29] and *Khumalo v Holomisa*: [30] ‘False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to the healthy participation in the affairs of the community. Indeed they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. . .’ That is also consistent with the common law in this country. There are nevertheless circumstances in which even untrue defamatory matter is protected but in my view none of those circumstances arise in the present case.
- [74] In my view the defamatory matter that is in issue in this case was indeed untrue and it is for that reason that its publication was unlawful. The material was published the morning after the respondent was arrested. The article that was published in the early (country) edition concerned the circumstances of the arrest. By the time the later (peninsula) edition was published the story had moved on: the arrest of the respondent provided the foundation for an article that was directed to the reaction to the respondent’s arrest. What was central to both articles, however, was the statement that the respondent had been arrested. [75] The cause of the respondent’s arrest was not expressly stated in either of the articles. However, the juxtaposition of the photograph of the respondent being led away in handcuffs with the caption ‘SUSPECT HELD’, the byline reading ‘DETECTIVES PROBING Tuesday’s horrific Waterfront blast yesterday arrested three Capetonians about to board an Egypt-bound flight at Cape Town International Airport’, the box referring to other stories relating to the bombing, and the headlines (in the country edition the headline was ‘BOMB: PAGAD TRIO HELD AT AIRPORT’ while in the peninsula edition the headline was ‘PAGAD OUTRAGE OVER BOMB ARRESTS’), when read together with the text in each case, would have left the reasonable reader of ordinary intelligence in no doubt that the respondent was arrested in connection with the bombing. [76] When it is said of a person that he or she has been arrested in connection with a particularly odious bombing I do not think that the statement

is justified by proof that the person was indeed arrested, but only in connection with a passport irregularity, and that the police then exploited the opportunity to question the person because they suspected that he or she might possibly have been involved in the bombing (which is what the truth was in the present case). Proof of those facts, whether viewed separately or together, does not seem to me to meet the sting of the defamatory allegation. The ordinary meaning of the language that is used in a publication includes what the reader would infer from it. In *Argus Printing & Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) 20F-J Corbett CJ said the following: '... [T]he reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply. As it was put by Lord Reid in *Lewis and Another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 (HL) at 154E-F: 'What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.' And in *Jones v Skelton* [1963] 3 All ER 952 (PC) Lord Morris of Borth-y-Gest, citing *Lewis's* case, stated (at 958F-G): 'The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. . . .'[77] The inference that a reasonable reader would draw from the statement that a person has been arrested in connection with an offence will necessarily depend upon the context in which it is made.[31] I agree with Marais JA (and the learned judge in the court a quo) that such a statement, without more, does not ordinarily carry the imputation that the arrested person is guilty of the offence. As pointed out by Mason J in the High Court of Australia in *Mirror Newspapers Ltd v Harrison* [1982] HCA 50; (1982) 42 ALR 487 (HC of A) 492: 'As we have seen, there is now a strong current of authority supporting the view that a report which does no more than state that a person has been arrested and has been charged with a criminal offence is incapable of bearing the imputation that he is guilty or probably guilty of that offence. The decisions are, I think, soundly based, even if we put aside the emphasis that has been given to the process of inference on inference that is involved in reaching a contrary conclusion. The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted.'

[32] But I agree with the learned judge in the court a quo that the reasonable reader would infer at least that the police believe that reasonable grounds exist for suspecting that the arrested person committed the offence for which he or she was arrested. Not since the repeal of s 29 of the Internal Security Act 74 of 1982 in 1993[33] has it been the law in this country that the police may arrest a person for no reason but to question him or her in connection with an offence. A person may ordinarily be arrested by the police only if he or she is suspected, on reasonable grounds, to have committed an offence,[34] and a person's freedom from arrest without just cause is also protected by s 12(1) of the Bill of Rights. I think that the reasonable reader can be taken to know that, and will construe the statement accordingly.[35] The assertion in the body of each of the articles (the fifth paragraph of the country edition and the thirteenth paragraph of the peninsula edition) that Commissioner Pruiss had said that '[t]here is the possibility that they could be involved in the blast, but at this stage there is no evidence pointing to this' does not seem to me to negate the effect of what was proclaimed so loudly in the material that preceded it. The absence of actual evidence is not inconsistent with the existence of reasonable grounds for suspecting that a person has committed an offence.[36] But in any event I do not think that the average reader would have understood the statement by Pruiss (assuming that the reader ever reached it) to negate the unambiguous inference in the introductory portions of the articles, for they would surely have asked why the respondent was then arrested if the police did not believe that reasonable grounds existed for doing so. I do not think that liability for a defamatory assertion can ordinarily be escaped merely by also making a contradicting assertion (if it was contradicting in this case) somewhere else in the publication. Naturally, a newspaper article must be read as a whole, but that is because words often take their meaning from the context. I do not think that means that a defamatory statement that requires no contextual setting to be given its proper meaning is necessarily negated by also asserting the contrary. In my view the dominant impression that readers would have been left with after reading both articles, notwithstanding what was reported to have been said by Pruiss, was that the respondent was arrested in connection with the bombing, and that carried with it the natural inference that the police believed that reasonable grounds existed for suspecting that the respondent was implicated in the bombing. [78] To make that statement of a person is in my view defamatory for in the eyes of ordinary right thinking people his or her hitherto unblemished character will at least be placed in doubt by such an assertion albeit that the diminution in reputation might only be temporary.[37] A statement to that effect seems to me to be analogous (though perhaps less serious) to a statement that a person has been charged with a serious offence, of which Colman J said the following in *Hassen v Post Newspapers (Pty) Ltd & Others* 1965 (3) SA 562 (W) 562 at 565D-E: 'In my view the reasonable, normally intelligent, right thinking member of society, when he hears that a man known to him has been charged with a crime, will withhold final judgment on that man. But, temporarily at any rate, the news will tend to lower that man in his estimation, and diminish his willingness to associate with him.' But to say of a person that he or she has been arrested in connection with an offence is in my view also more damaging than to say merely that the police questioned him or her in connection with the offence because they believed that he

or she might possibly be implicated, for no doubt the police question many people when they are investigating the commission of an offence. It is all a question of degree. [79] The defamatory statement in the present case was that the respondent was arrested in connection with the bombing, which carried the natural inference that the police believed that reasonable grounds existed for suspecting that he was implicated in the commission of the offence, and that was what was required to be justified. Whether it was capable of being justified merely by proof that the respondent was arrested in connection with the bombing, or whether it was necessary to establish in addition that the police indeed believed that reasonable grounds existed for suspicion, is not necessary to decide.[38] In both respects the appellants failed. The respondent was not arrested in connection with the bombing: he was arrested because his passport was suspected to be irregular. Moreover, reasonable grounds did not exist for suspecting that the respondent was implicated in the bombing (I do not think that undisclosed information from an anonymous source can be said to constitute reasonable grounds justifying an arrest) nor did the police believe they did, which is precisely why they refrained from arresting him on those grounds. Perhaps the respondent would not have been arrested for the passport irregularity if the police had not wanted to question him in connection with the bombing but in my view that does not meet the sting of the defamatory statement. If that was the truth then no doubt the appellants were free to publish those facts but it did not justify the truth being distorted. The fact that Inspector Knipe was willing to resort to an unlawful arrest if that had been necessary to enable the respondent to be questioned before he left the country also does not seem to me to take the matter further when that is not what occurred. [80] The appellants also sought – albeit tentatively – to rely upon the defence that is foreshadowed in Bogoshi’s case. I am not at all sure that the nature of the statement in the present case is such that its publication is required to be protected even if it is untrue (see Bogoshi, 1211D-1212J) but in any event the appellants, who bear the onus, have not established that reasonable steps were taken to avoid publishing what was in fact untruthful.

- [81] For those reasons I agree with the learned judge in the court a quo that the publications were defamatory of the respondent and were unlawful. But I agree with Marais JA that the damages that were awarded were excessive. I have already pointed out that the defamatory statement did not impute that the respondent was guilty but merely cast temporary doubt upon his hitherto good character. Moreover, the respondent was released from arrest that very afternoon and he took the opportunity to announce that fact at a press conference. I also agree with Marais JA that the respondent’s privacy was not invaded, and that the harm to his dignity is properly to be taken into account in the assessment of the damages for defamation, generally for the reasons that he has given, subject to what I have said earlier in this judgment, and I agree with his approach to the question of costs. [82] For those reasons I agree with the order that is proposed. _____ R W NUGENT JUDGE OF APPEAL PONNAN AJA) CONCURS

- [1] National Media Ltd & Others v Bogoshi 1998 (4) SA 1196 (SCA).[2] So said Lord Nichols in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 at 74C-D. Lord Bridge said: 'Whether the text of a newspaper article will, in any particular case, be sufficient to neutralize the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralize it but also on the manner in which the whole of the relevant material is set out and presented. But the proposition that the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines, is to my mind quite unacceptable in the light of the principles discussed above.' (At 72H-73B). Cf *Leon v Edinburgh Evening News Limited* 1909 SC 1014.[3] [1963] 2 All ER 151 (HL). [4] At 167H.[5] At 155F.[6] At 173 I-174A.[7] At 173H.[8] At 157C.[9] At 163D-E.[10] At 163E-164B.[11] See the numerous cases cited at p96, note 85 by Burchell, *The Law of Defamation in South Africa*. [12] [1936] 2 All ER 1237 (HL). [13] At 1240. [14] Burchell, *The Law of Defamation in South Africa*, p 96. [15] Jansen JA in *SA Associated Newspapers Ltd en 'n ander v Samuels* 1980 (1) SA 24 (A) at 30 and *Demmers v Wyllie* 1980 (1) SA 835 (A) at 840. [16] [1963] 2 All ER 151 (HL). See too the observations of Colman J in *Hassen v Post Newspapers (Pty) Ltd and others* 1965 (3) SA 562 (W) at 564 D-565H. [17] [1962] 2 All ER 698 (CA) at 713. [18] Cf *Campbell v MGN Limited* [2004] UKHL 22, a decision (as yet unreported) of the Appellate Committee of the House of Lords rendered on 6 May 2004. See, in particular, paras 12, 20, 55, 84-86, 103-126, 138-142 and 167. See too *Khumalo and others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at 417-419 and Professor J Neethling's article, 'Indringing in privaatheid en die openbare inligtingsbelang', TSAR 2003 3 568 at 572. [19] S 10 of the Constitution 1996. [20] S 14 of the Constitution 1996. The circumstances of this case do not necessitate an enquiry into the question 'whether there are now two potential delictual actions for invasions of privacy – a common law action and a constitutional action – or whether the common law action should subsume the constitutional action without creating a new delict'. The question is debated by Professor David McQuoid-Mason in his article, 'Invasion of privacy: common law v constitutional delict – does it make a difference?', 2000 *Acta Juridica* 227. [21] Prosser, *Law of Torts*, 4 ed (1971) at 811. [22] *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA) 1207I-1208G; 1210G-H. [23] Sections 9, 10 and 12 of the Bill of Rights. [24] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 54. [25] See too *Lyon v Steyn* 1931 TPD 247; *Patterson v Engelenburg & Wallach's Limited* 1917 TPD 350 356-7. [26] *Groenewald v Homsby* 1917 TPD 81. [27] 1928 AD 190 at 206.
- [28] Cf *Mirror Newspapers v Harrison* [1982] HCA 50; (1982) 42 ALR 487 (HC of A) 494 in which Mason J said that it was 'unquestionably ... in the public interest' to publish the mere fact that someone has been arrested and charged for an offence (in contradistinction to the imputation that the person is guilty).

- [29] Footnote 1 at 1209G.[30] [2002] ZACC 12; 2002 (5) SA 401 (CC) 421C-D.[31] Cf Ross McConnell Kitchen & Co (Pty) Ltd v John Fairfax & Sons Ltd (1980) 2 NSWLR 845 paras 25 and 26; [32] See too: Lewis v Daily Telegraph Ltd [1964] AC 234 (HL)
- [33] That section, amongst others, was repealed by Act 206 of 1993.
- [34] See, for example, Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 818G-H.[35] See Mason J's view, obiter, to that effect in Harrison's case, above, at 493.
- [36] Duncan v Minister of Law and Order, above, 819G-821E.[37] Even to say no more than that there is suspicion that a person might have committed an offence has been said in other jurisdictions to be capable of giving rise to a defamatory imputation: Lewis v Daily Telegraph Ltd,above; Ainsworth Nominess (Pty) Ltd v Hanrahan [1982] 2 NSWLR 823; Sergi v Australian Broadcasting Commission [1983] 2 NSWLR 670; Whelan v John Fairfax & Sons Ltd [1988] 12 NSWLR 148.
- [38] Cf Cadam & Others v Beaverbrook Newspapers Ltd [1959] 1 QB 413 (CA) 422; Stern v Piper [1997] QB 123 (CA) 134F; Shah v Standard Chartered Bank [1999] QB 240 (CA); Gatley, above, para 11.6.

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