REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF  **NAMIBIA**

JUDGMENT

Case no: I 4081/2011

In the matter between

TUHAFENI HANGULA **PLAINTIFF**

and

TRUSTCO NEWSPAPERS (PTY) LTD **1st DEFENDANT**

THE EDITOR OF THE INFORMANTÉ NEWS PAPER **2ND DEFENDANT**

Neutral citation: *Tuhafeni Hangula v Trustco Newspapers (Pty) Ltd (I 4081/2011) [2012] NAHCMD 77 (November 2012)*

Coram: **Smuts, J**

Heard on: 8-11 and 16 October 2012

Delivered on: 26 November 2012

Flynote: Defamation action – defences of truth and public interest and reasonable publication raised and discussed. Trustco International Ltd v Shikongo 2010(2) NR 377 (SC) applied. Quantum of N$50, 000 awarded.

ORDER

(a) Judgment is granted against the defendants, jointly and severally, in the amount of N$50, 000.

(b) The defendants must pay interest on this sum from date of this judgment to date of payment at the rate of 20% per annum.

(c) The defendants are to pay the plaintiff's costs, jointly and severally. Those costs include the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

[1] The plaintiff in this defamation action is the Deputy Commissioner General of the Correctional Service (the second in charge of the Prisons) within the Ministry of Safety and Security. He sues the defendants, the publisher and editor of a weekly newspaper known as the Informanté for N$500 000 in damages. This claim arises from a report concerning him published in its issue of 1-7 December 2011.

The report

[2] That issue carried a banner headline in prominent lettering on its front page to the following effect: "Prisons Deputy helps bank-fraudster escape." The large lettering used in the headline was accompanied by a photograph of the plaintiff in his uniform. In much smaller font and as part of the headline, readers are referred to page 3 where the text of the article is to be found.

[3] On page 3, a further prominent headline features in capital letters "The great escape". Below it appears another headline but in smaller print, stating "'Hangula freed card-cloner' – accomplice" The text of the article states:

"The ringleader and first accused in a record N$1.5 million bank card cloning fraud case, Amirthalingam Pugalnanthy, a Sri Lankan national (also known as Shiva) was allegedly granted free passage to flee Namibia in February 2009 after paying a N$150,000 bribe to Prisons Deputy Commissioner Thuhafeni Hangula.

The suspect, who was out on bail of N$200,000 at the time was, reportedly escorted by two police officers in a vehicle with a government registration number to the Noordoewer border post in the South on 21 February 2009, a day after he last reported to the Katutura police station.

Anselem Wisdom Chikezie, a known Nigerian wheeler-dealer currently serving a three-year jail term at the Windhoek Central Prison for drug possession, says he had arranged a meeting between Pugalnanthy and Hangula in December 2008 at the Kalahari Sands Hotel to discuss the details of the escape plan and the costs involved. Hangula, who is not new to controversy and still in the employ of the Ministry of Safety and Security, had then promised the Nigerian N$20, 000 commission if the deal succeeded.

Pugalnanthy and Chikezie met Hangula again mid February of 2009 in Okuvare Street behind the Wanaheda police station in the capital. “That’s when Puglnanthy handed Hangula N$150, 000 wrapped in a Markams shopping bag,” says Chikezie.

The Prison’s second in charge would have promised to arrange police officers and transport to take the Sri Lankan out of the country. A week later, on 20 February, Pugalnanthy was allegedly transported as planned to the Noordoewer border post between Namibia and South Africa to cross over to freedom.

After three days on the run, the Sri Lankan would have telephoned Chikezie from South Africa to inform him that he had arrived safely. Another few days later, the fugitive apparently contacted Chikezie from London to inquire whether he could organise bail for his three co-accused Sri Lankans at the Windhoek Central Prison. Chikezie said he refused to render his services as he was still awaiting his N$20, 000 from the Prison Chief.

“Until to this day, I still call Hangula begging for my share. Look, here I have his number,” said a fired up Chikezie and showed Informanté the cell phone number of the Deputy Commissioner. The authenticity of the number could be confirmed by Informanté.

When Informanté contacted the prison's chief, Hangula flatly denied the allegations: "I was never bribed nor involved in arranging anything for that culprit. I could never engage in such activities, it's the same as selling my country," said a seemingly Hangula.

Pugalnanthy was arrested in 2007 along with six others- three Sri Lankans, a British, a Singaporean and a Namibian national- on charges of fraud and forgery in connection with the duplication (cloning) of bank and credit cards to the tune of N$1.467 million. He bailed himself out for N$200,000 in December 2008.

Informanté contacted police spokesperson, Deputy Commissioner Silvanus Nghishidimbwa to inquire the where about of Pugalnanthy's passport. "I can confirm that his Sri Lankan passport is still with the Namibian police in Windhoek" said Nghshidimbwa.

At the group's first appearance in the Windhoek High Court, the seven suspects were charged with 1032 counts of theft and 474 counts of forgery. The Sri Lankan nationals remain behind bars after several attempts of being granted bail failed.
Informanté also has it on good record that the Sri Lankans formed part of a larger network of operatives spread around the glove with the aim of channelling funds to the Sri Lankan rebel group Tamil Tigers through the cloning of automatic teller machine (ATM) cards.

The Tamil Tigers (LTTE) are a militant secessionist movement of Sri Lanka's Tamil group that caused havoc on the island state at the southern-most tip of India since 1975 but was defeated by the Sri Lankan army in 2009."

The pleadings

[4] In the plaintiff's particulars of claim, it is contended that the prominent headline on the front page was published maliciously, negligently, unreasonably and out of context of the story carried on page 3 quoted above. It was further contended that the prominent headline was crafted in such a way as to convey, as a fact, that the plaintiff had assisted a bank fraudster to escape. Even though the plaintiff's denial of this allegation was reported in the body of the article on page 3, it was contended that the headline reduced that denial to nothing.

[5] It was also contended that the article contained defamatory matter by alleging that the plaintiff had assisted a bank fraudster. It was alleged in the particulars of claim that the defamatory statement concerning the plaintiff was aggravated because it was false, and because the crafting of the headline indicated the issue as a fact, and that it followed a series of defamatory articles by the newspaper concerning the plaintiff and that no reasonable and sufficient steps were taken to verify the allegations.

[6] In the defendant's plea, publication was admitted. It was further stated in the plea that the article, read as a whole together with the headline, would convey that the plaintiff had been accused by a certain Anselem Chikezie of assisting a prisoner to escape for reward. But it was denied that the statements concerning the plaintiff were defamatory. That denial was not persisted with in this trial. Two alternative defences were raised which essentially constitute the dispute between the parties. These defences were in the first instance truth and public benefit. The further defence was that of reasonable publication.

[7] It was admitted that the newspaper carried reports concerning a charge of rape made against the plaintiff by a colleague and a report concerning an allegation that the plaintiff had falsified his qualification and that an investigation had been initiated into this alleged misconduct. It was further pleaded that a reporter of the newspaper, Mr Edson Haufiku had received information that a prisoner, Mr Chikezie, had information concerning an irregularity relating to the prison and that Mr Haufiku subsequently interviewed Mr Chikezie at the Windhoek Central Prison. Mr Chikezie then conveyed the allegations which were contained in the report. It was further pleaded that the second defendant, the editor, referred the allegation to the Anti-Corruption Commission (ACC). The plea further alleged that Mr Haufiku accompanied Mr Chikezie to the offices of the ACC where the latter was interviewed. It was further stated that Mr Haufiku had three further consultations with Mr Chikezie before finalising his report. At one such consultation, Mr Chikezie provided the plaintiff's cell phone number to Mr Haufiku. This subsequently proved to be correct. It was further pleaded that the ACC investigated the

matter and that Mr Haufiku put the allegations to the plaintiff and his response was set out in the report. It was alleged that Mr Haufiku had acted reasonably and without negligence and in good faith in writing the report and that the second defendant as editor had acted reasonably in publishing it.

[7] The defendants also denied the plaintiff's damages.

Defendants' concerns about a fair trial

[8] In course of case management, the parties were directed to file the evidence in chief of their witnesses in affidavit form prior to the commencement of the trial. When the trial commenced, the defendants provided affidavits of Mr Haufiku and the editor, Mr N. Nangolo. The plaintiff on the other hand had merely provided what was termed an unsworn witness statement together with annexures.

[9] At the commencement of the trial Mr A. Corbett, who represented the defendants, objected that the plaintiff had not complied with the court order requiring the exchanging of evidence in chief in affidavit form. He then expressed "concerns" that the defendants would not have a fair trial as a consequence.

[10] Mr Denk, who represented the plaintiff, stated that the plaintiff would not be called at the outset, in view of the defences raised by the defendants which each attracted an onus. Mr Denk recorded that the plaintiff would reserve the right to give evidence in the rebuttal after the defendants' case. Mr Corbett however persisted in his "concerns" as to the defendants' rights to a fair trial being breached in the circumstances.

[11] The fundamental common law right of litigants to a fair trial is now firmly entrenched in Article 12 of the Constitution. Upon enquiry, Mr Corbett was not able to pinpoint quite how his clients' right to a fair trial would be breached in these particular circumstances. Upon further enquiry, he was also not able to propose any steps to

remedy his concerns. I made it clear that if the defendants were to allege that they were not able to receive a fair trial for any reason which would be apparent at the outset, then it should be raised and the trial would not continue until the issue is addressed. Mr Corbett did not object to the trial proceeding. Not being in a position to appreciate how the defendants' rights to a fair trial would be violated in the circumstances, I directed that the matter proceed.

The evidence

[12] The plaintiff then called only one witness, Commissioner Hamukwaya, the officer in charge at the Windhoek Central Prison. He was required to produce prison records which he did and referred to. The tenor of his evidence, based upon the prison records, was that Mr Chikezie was in prison in December 2008 (at the time of a meeting in town referred to in the article). The plaintiff then closed his case.

[13] The defendants called five witnesses. These were the second defendant, Mr Nangolo, Mr Haufiku, the reporter and author of the article, Mr Chikezie, the primary source of the article, Mr Plaatje of MTC and Mr C.M. Nyambe, Director: National Examinations and Assessment in the Ministry of Education.

[14] The plaintiff however gave evidence in rebuttal and called another prison officer, Mr Kamati from the Windhoek Central Prison.

[15] Mr Nangolo gave evidence that, as editor of the newspaper, he had been involved in the finalisation of the article in question. He had referred the allegations to the ACC and testified that the ACC was still looking into the matter. He had also attended a meeting with Mr Chikezie (together with Mr Haufiku) and had discussed the report with Mr Haufiku. He expressed the view that the newspaper had been reasonable in publishing the report. When cross-examined, he stated that he considered it sufficient that the plaintiff had been given the opportunity to respond to the allegations and to then report his denial of the allegations, even if the publication of the allegations themselves

would be defamatory. All that was required, according to him, was to afford a person in the position of the plaintiff the opportunity to respond and to publish that response. It would appear from his approach that if a denial or other response was provided, the publishing of the allegations themselves even if lightly defamatory, would not be actionable.

[16] When this was raised with Mr Corbett in argument, he correctly conceded that such an approach is plainly unsound. As I point out below, inclusion of a denial in respect of a defamatory allegation would not of its own amount to reasonable publication and a defence to a defamation action.

[17] When Mr Nangolo was confronted with the date contained in the article for the meeting between Mr Chikezie and the plaintiff at the Kalahari Sands Hotel, which according to Mr Hamukwaya's evidence would have been at a time when Mr Chikezie was in prison, Mr Nangolo acknowledged that the date was wrong. He said that he had established that the year stated in respect of this meeting was incorrect and should have been 2009 instead of 2008. He had concluded this after the evidence of Mr Hamukwaya had been given.

[18] Mr Haufiku gave evidence along the lines of the defendants' plea. He testified that he had met Mr Chikezie on four occasions and had lengthy interviews with him, he also acknowledged that the date of the meeting between the plaintiff and Chikezie contained in the report was incorrect. The report should have stated December 2009 instead of December 2008. He confirmed that the cell phone number for the plaintiff given to him by Mr Chikezie in fact turned out to be the plaintiff's number. He also testified that he had called the plaintiff concerning the allegations and had reflected his denial in the report. Mr Haufiku conceded that the prominent headline on the front page was not a fair reflection of the report, given the impression created by it that the plaintiff had, as a fact, assisted the escape of the fugitive from justice rather than representing this as an allegation.

[19] Mr Chikezie said that he had met the plaintiff in the centre of town outside the main branch of First National Bank. He recognised him from the period he had spent in prison awaiting trial and before being released on bail. He approached the plaintiff, stating that he wanted to discuss a business deal with him in private. He said that he gave the plaintiff his cell number. The plaintiff took his number but did not supply Mr Chikezie with his own number. Mr Chikezie testified that the plaintiff subsequently contacted him and that he then had a meeting with him in the vicinity of the Kalahari Sands Hotel where he told the plaintiff that a friend needed help to escape from Namibia. He said the plaintiff enquired if his friend had money. When this was confirmed, said he would revert. Mr Chikezie said that the plaintiff called him on his cell phone and they agreed to meet at Wanaheda, Katutura. They proceeded to meet there with a certain Pugalnanthy who was awaiting trial for a large scale credit card or bank fraud involving an amount well in excess of N$1 million. In the course of the meeting, Mr Chikezie said that it was agreed that the plaintiff received N$150 000 to secure Pugalnanthy's escape from Namibia and that the plaintiff agreed to pay N$20 000 of the sum to Mr Chikezie as a form of commission, although this term was not used by him in his evidence.

[20] Mr Chikezie testified that Pugalnanthy subsequently fled the country (although he said it was in 2010 and not 2009 as set out in the report) and that the latter had telephoned him afterwards from South Africa to inform him that the plaintiff had arranged the escape by means of a government vehicle being driven by two police officers to the South African border. Under cross-examination, Mr Chikezie contradicted his version in some respects. He had stated that he had called the plaintiff several times demanding his money (N$20 000) but to no avail and that he had also sent him text messages which had resulted in the plaintiff calling him. This was contradicted by Mr Plaatje from MTC, called by the defendants, who gave evidence with reference to the MTC call records of both cell numbers. These records showed that Mr Chikezie had sent a single text to the plaintiff's number on 21 July 2010 and that the plaintiff had made a single brief cellular call to Mr Chikezie's number a few minutes later. There were no further records of calls or text messages between the numbers, despite Mr

Chikezie's claim of several calls and text messages (and at least two calls, crucial to his version in respect of the two meetings, to hatch the plans for the alleged scheme).

[21] Mr Chikezie also contradicted himself in cross-examination concerning the location of the alleged meeting between plaintiff, Pugalnanthy and himself where the money was allegedly handed over. He also did not impress me as a witness. Apart from these contradictions, he proceeded to embroider upon his version at times with matter which would not appear to have been disclosed to Mr Haufiku or Mr Nangolo. He also demonstrated scant regard for the law. He gratuitously admitted committing further crimes of illicit drug dealing while out on bail awaiting his trial. He also testified as to his own unreliability by stating that the reason why the plaintiff would need to pay him a commission as opposed to Pugalnanthy was that if the latter had done so he would have not seen him again (and perform his side of the "bargain").

[22] Mr Nyambe gave evidence that an investigation concerning the authenticity of the plaintiff's senior secondary school certificate had reached an advanced stage. He said that the certificate was not authentic when compared with the records of the examinations for which the plaintiff had sat. He stated that the records of those examinations would not have resulted in the issuing of the certificate in question by reason of the fact that the typing exam was not written at the higher lever reflected in the certificate. If the correct level were to have been reflected, thus would not result in the plaintiff qualifying for the "certificate". According to the records of the Ministry, the plaintiff did not qualify for the certificate. He stated that the matter was in the hands of the police.

[23] After the defendants closed their case, the plaintiff gave evidence in rebuttal. He acknowledged that he had met Mr Chikezie in the centre of town but at a different location to that stated by Mr Chikezie. He could not recall the date. He stated that Chikezie had approached him about being paid an informer's fee when he had assisted with the combating of smuggling contraband into the Windhoek Central Prison by informing on other inmates. He said that he would look into the matter and they

exchanged cell numbers. He confirmed that he had made a single call to Mr Chikezie's cell phone after receiving a text from him. In this call, he had stated that he was busy and could not meet up with him to follow up the enquiry. He subsequently met him at prison when Mr Chikezie wanted to meet with him to discuss grievances. He said that he could not do so and informed Mr Chikezie to direct his grievances to the officer in charge of the prison.

[24] The plaintiff emphatically denied the allegations made by Mr Chikezie and said he would never have involved himself in such unlawful activities.

[25] The plaintiff stated that he received his senior secondary certificate from the Ministry of Education. He did not however give evidence as to which subjects he had written and at what level and did not contradict Mr Nyambe's evidence on that score. Nor was he cross-examined on those issues.

[26] The plaintiff also called Mr Kamati of the Windhoek Central Prison concerning a note which Mr Chikezie had written. He confirmed that Mr Chikezie had been an informer on contraband smuggled into the Windhoek Prison but said that informers did not receive money for providing such information.

The parties' submissions

[27] Although Mr Corbett correctly conceded that the publication of the article is per se defamatory of the plaintiff's character, there was a difference between his approach and that of Mr Denk, on behalf of the plaintiff, in respect of the effect of the headline. Mr Corbett conceded that the initial impression created by the headline was that the plaintiff had as a fact assisted the bank fraudster to escape. But he submitted that this would be dispelled by reading the headline on page 3 together with the article itself. He submitted that there would be no merit in the plaintiff's approach in merely relying upon the front page and that the headline conveyed false information.

[28] Although the plaintiff did in both his pleadings and the submissions advanced on his behalf, make much of the headline, the plaintiff also claimed that the article itself was defamatory and that the reporting of allegations of that nature concerning the plaintiff, even though there were denials, constituted a defamation. Both parties referred me to a recent judgment of the Supreme Court of Appeal in South Africa were Nugent, JA with reference to applicable English authority, lucidly summarised the position as follows[1]:

"[13] In deciding whether the statements I have outlined are defamatory the first step is to establish what they impute to the respondents. The question to be asked in that enquiry is how they would be understood in their context by an ordinary reader.[8] Observations that have been made by our courts as to the assumptions that ought to be made when answering that question are conveniently replicated in the following extract from a judgment of an English court:[9]

'The court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'

[14] Much has been made of the unqualified statement in the headline that the respondents 'spied', which conveys in its ordinary meaning that the respondents 'kept watch [on their comrades] in a secret or stealthy manner', that they 'kept watch [on them] with hostile intent', that they 'made stealthy observations with hostile motives'.[10] But words that are used in a newspaper article must not be read in isolation – the ordinary reader must be taken to have read the article as a whole albeit without careful analysis. A clear expression of the reason underlying that rule is to be found in *Charleston v News Group Newspapers Ltd,*[11] in which the question whether a defamatory headline, isolated from the text of the article, is capable of founding an action for defamation, was confronted directly by the House of Lords. It held that

[1]Tsedu and Others v Lekota and Another 2009(4) SA 372 (SCA) at par 13-15 (footnotes excluded)

the adoption by the law of a single standard for determining the meaning of the words – the standard of the ordinary reader – necessarily leads to the conclusion that it could not found an action. Lord Nicholls of Birkenhead expressed it as follows:[12]

'I do not see how, consistently with this single standard, it is possible to carve the readership of one article into different groups: those who will have read only the headlines, and those who will have read further. The question, defamatory or no, must always be answered by reference to the response of the ordinary reader to the publication.'

But he warned against the idea that a poisonous headline may be published with impunity provided only that an antidote is administered in the text when he went on as follows:[13]

'This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element of which is the layout of the article. Those who print defamatory headlines are playing with fire. The ordinary reader might not be expected to notice curative words tucked away further down in the article. The more so, if the words are on a continuation page to which a reader is directed. The standard of the ordinary reader gives a jury adequate scope to return a verdict meeting the justice of the case.'

[15] Even if the article was read only fleetingly I think that the imputation in the headline that the respondents had spied (in the ordinary sense of the word) would soon have been dispelled when the reader commenced reading the text and any lingering doubts would have been put to rest once the article had been read to the end. The ordinary reader would have been struck immediately by the qualification in the first paragraph that the so-called spies had been 'unwitting'. Naturally that was a contradiction in terms – spying, by its nature, cannot be unwitting – but we are not concerned with the quality of the writing. We are concerned with the impression that the words would have left on the mind of the reader. In my view the ordinary reader would have known from the first paragraph alone, and it would have been confirmed by the facts related thereafter, that the respondents had not acted with the state of mind that I have mentioned".

[29] Adopting this approach, it would seem to me that the defamatory allegations contained in the report are compounded by the poisonous headline.

[30] Mr Corbett correctly accepted that once publication of defamatory matter had been established, then the defendants would have the onus to establish their defences of truth and public interest and reasonable publication, given the presumptions which arise upon publication. This has been put beyond doubt by the Supreme Court in *Trustco Group International Limited and Others v Shikongo*[2]. I turn to the defences raised.

Truth and public benefit

[31] Mr Corbett contended that the defendants had discharge the onus upon them and established the truth of the article and that its publication was for the public benefit. At to the latter component of the enquiry, there was understandably little debate. That is because, if the defendants could establish the truth of the article, then it would plainly have been in the public interest to have published the article. The plaintiff occupies a very senior position in Correctional Services and the exposure of an act of such alleged corruption on his part to assist someone to escape justice against payment of a large sum would clearly be in the public interest.

[32] The question thus was whether the defendants have established the truth of the article. In their bid to do so, the defendants relied heavily – and virtually solely – upon the testimony of Mr Chikezie. But as I have already said, he was a singularly unreliable witness. His version as published was, on the face of it, somewhat improbable. It would be unlikely that the second in command of the prison services would engage an awaiting trial suspect charged with a serious crime – for which he was subsequently convicted – and agree to a scheme with him and another suspect in a public place, receive the sum of N$150 000 there, and agree to provide the means for the suspect to flee his trial. A further unlikely component to the story as conveyed to Mr Haufiku was that the plaintiff would secure two police officers (and not prison officers) in a government vehicle as the means whereby the bank fraud suspect would be assisted to flee the country.

[2] 2010(2) NR 377 (SC)

[33] During cross-examination, contradictions emerged in Mr Chikezie's unlikely story, as I have pointed out.

[34] In the course of the cross-examination, he also freely and gratuitously admitted committing the further crime of dealing in drugs whilst on bail awaiting trial. It was quite clear from his evidence that he had little regard for the law. His testimony was unreliable and he did not impress me at all as a witness.

[35] I found it surprising that at the close of the case, Mr Corbett submitted that the defendants had established the truth of the allegations contained in the report concerning the plaintiff. In support of this contention, he referred to the plaintiff merely making a bald denial of the allegation and with not much of his version put in cross-examination to Mr Chikezie. I fail to see how this can affect matters at all. It is difficult to understand what more than his unequivocal denial needed to be put to Mr Chikezie. There were after all no specific dates referred to in respect of the meetings for the plaintiff to have stated that he was elsewhere at that time.

[36] Mr Corbett also criticised the plaintiff's testimony concerning his meeting with Mr Chikezie in that he could not remember precise date of the meeting but suggested in his statement at the time that it had been in 2011. After Mr Plaatje's evidence that there was a text message from Chikezie to the plaintiff on 21 July 2010, the plaintiff then in his testimony indicated that the meeting must have been in 2010. I do not consider that this single aspect is material. It is but one factor. (If anything, the defendants had greater difficulties with the dates given for events in the report.)The evidence of Mr Plaatje certainly tends to support the version of the plaintiff rather than that of Mr Chikezie. The plaintiff's version is also supported by the fact that Mr Chikezie was an informer at the prison and had sought to be paid for providing information which had led to a substantial reduction in the flow of contraband into the prison, a fact acknowledged by Mr Chikezie. It is far more probable that he would have contacted the plaintiff to secure payment as

an informant than as he precursor to the uncorroborated unlawful and corrupt activity attributed to the plaintiff by Mr Chikezie.

[37] Mr Corbett also submitted that the plaintiff's credibility was undermined in respect of his evidence which he tendered concerning Mr Nyambe's testimony on the plaintiff's senior certificate not being authentic. Whilst it emerged that the certificate would not appear to be authentic and that it was unsatisfactory for him not to have dealt with aspects raised by Mr Nyambe's evidence concerning one of the subjects he had written at a level not reflected in his certificate, I accept that the plaintiff did not emerge well on this specific issue. But it was entirely secondary in the context of his claim concerning the defamatory contents of the article published about him relating to his allegedly corrupt part in assisting an awaiting trial accused to escape the reach of the courts.

[38] Taking into account the evidence of Mr Chikezie and that of the plaintiff, it is clear to me that the defendants have dismally fallen short in establishing the truth of the allegations in the report. To suggest, as Mr Corbett does in his written and oral submissions, that the gist of the article is objecting the true in as much as the report published allegations which were made by Mr Chikezie and that these were conveyed to Mr Haufiku. But this would not however establish that the gist of the allegations themselves was in fact true - the enquiry raised by this defence. Nor does that affect the matter at all as I indicate below with reference to the repetition rule. Indeed, the defendants fell markedly short of establishing on a balance of probabilities the truth of the allegations concerning the plaintiff.

Reasonable publication

[39] This defence, which has developed in other jurisdictions was authoritatively accepted as part of the law of Namibia by the Supreme Court in Trustco Group International Limited and Others v Shikongo[3] in following terms:

[3] Supra at par53-54

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

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

[55] In Bogoshi, the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach is consistent with the establishment of a defence of reasonable publication and should be adopted".

[40] This defence was further explained by the Supreme Court in the following way:

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

[41] The issue of public interest as a component of this defence would likewise not be in issue for the same reasons stated in respect of the defence of truth and public benefit. It would clearly have been in the public interest for the media to expose corrupt dealings of the kind alleged in the report on the part of the plaintiff.

[42] The question which then arises is whether the publication of the article was reasonable on the part of the defendants. The Supreme Court in the *Trustco* matter explained the nature of the enquiry in the following terms:

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

[76] The Code of Ethics of the Society of Professional Journalists states that:
'Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:

— test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.

— diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.

— identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.

— always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.

— make certain that headlines, news teases and promotional material, photos . . . and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

. . .

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

. . .

— avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. . . .'

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

[43] I turn to the conduct of Mr Haufiku in writing the story and the decision on the part of the editor to publish it in determining whether the publication was reasonable in the circumstances.

[44] Mr Haufiku's evidence was that his interviews with Mr Chikezie were in essence the sole source for the allegations against the plaintiff. But he and Mr Nangolo made much of the fact that the issue was reported to the ACC and that the ACC would appear to have investigated those allegations. Mr Haufiku also referred to the fact that the cellular number for the plaintiff provided by Mr Chikezie turned out to be correct. He also pointed out that Mr Chikezie had consistently stuck to his version on all four occasions when he canvassed the allegations with him. Both he and Mr Nangolo also referred to the inclusion in the report of the plaintiff's denial of the allegations and the ephatic terms of that denial. Mr Nangolo however went further and would appear to have testified that publication of defamatory matter concerning a person would no longer be defamatory if an opportunity was given to the person to deny the allegations and the denial was published. This is of course entirely incorrect. It serves to show that Mr Nangolo as

editor applied a manifestly incorrect approach to the important judgment he is to bring to bear on the matter as to whether to publish allegations which are defamatory.

[45] It is well settled that what is known in English law as the repetition rule is clearly part of our common law. As was spelt out by Nugent, JA in the Tsedu – matter[4]:

> "A newspaper that publishes a defamatory statement that was made by another is as much the publisher of the defamation as the originator is. Moreover, it will be no defence for the newspaper to say that what was published was merely repetition....[5]

That court further explained the repetition rule with reference to English authority to mean:

> "If you repeat a rumour you cannot say it is true by proving that the rumour existed, you have to prove that the subject matter of the rumour is true."

[46] It was clear from the evidence of Mr Haufiku that there was no attempt to obtain any objective verification of the other aspects of Mr Chikezie's version. Even the date of the actual escape of the bank fraud suspect, which was not in dispute and was wrongly stated, was not checked. There was no attempt to investigate how he was transported and successfully left the country on a specified date at a specified border post. Whilst enquiries at the border post may have proven difficult, they were not even attempted. Nor was any enquiry attempted with the police as to the identity of officers who had allegedly accompanied him and concerning the use of government vehicle. The need to make such enquiries may also indicate a further reason why it would have been prudent and responsible for the reporter and editor to await the investigation of the issue by the ACC, given the powers of investigation vested in that body.

[47] Not only should there have been some further investigation on the part of the reporter but it would seem to me that he should have been alerted to the need for further verification before publication especially because of the inherent improbability of the plaintiff, as deputy head of prisons, engaging two police officers who would not fall

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[4]Supra

[5]At par [5], p374. See also Curistan v Times Newspapers Ltd [2008] 3 All ER 923 (CA) at 926

under his direct command – to transport a suspect awaiting trial for the purpose of escaping justice. A further improbable part of Mr Chikezie's account was with reference to the means of transport itself being a government vehicle (the term GRN being used) and not a police vehicle (or even prisons vehicle for that matter). It was put to Mr Chikezie in that context, and conceded by him, that government and police vehicles had different registrations. He stuck to his version of the vehicle being government registered (GRN) as opposed to having a police registration. The editor and reporter should thus have been alerted to the improbability of the plaintiff, being deputy head of prisons, making use of police officers in a government registered motor vehicle – as opposed to a police motor vehicle - for the purpose of conveying the bank fraud suspect to a border post in order to escape the justice system. Given command structures, these details disclosed to the reporter should have alerted him to the need for verification of Mr Chikezie's allegations.

[48] The reporter and editor should have approached the inherently improbable version of a person convicted for a serious crime with more caution. The need for objective and independent verification of key elements of his allegations thus became more imperative. The only verification of an element of his version was the plaintiff's cell number. But this is an entirely peripheral aspect and does not go to the crucial components of the allegations of corrupt conduct on the part of the plaintiff.

[49] The mere fact that the ACC investigated the allegations would also not of itself provide any corroboration. It is after all the statutory duty of the ACC to investigate allegations of corruption and especially those of such serious proportions levelled against plaintiff when such allegations are reported to it. There was no evidence by either the reporter or the editor that the investigation had borne any fruit or had yielded anything further. On the contrary there was the evidence of a fruitless search for a mobile phone which was supposed to have had some form incriminating evidence of the plaintiff's involvement at the alleged meeting with Mr Chikezie and the suspect. When this search proved to be fruitless, the need for corroboration of Mr Chikezie's version became more compelling in the circumstances.

[50] In short, the reporter and editor were confronted with allegations by a convicted prisoner against the Deputy Commissioner-General of Prison which were inherently improbable. Not only were they improbable but there were potential internal inconsistencies to them such as the deputy head of prison making use of police officers who transported Pugalnanthy in a government registered vehicle to the South African border – as opposed to a police or prisons registered vehicle. Yet the allegations were published without any corroboration of any component of the allegations of the scheme and without any attempt to make any enquiry about the police officers or the transport or await the outcome of investigation by the ACC for corroboration of any element of Mr Chikezie's account. The cell number confirmation did not verify any component of the "escape" and corruption allegations but rather that he had come into possession of that number. That was in my view plainly insufficient confirmation to render the publication of the report as reasonable

[51] The failure to even attempt any enquiry (let alone diligent enquiry) about the policemen and transport together with the failure to await the outcome of the ACC enquiry or at least some corroboration of the allegations in that enquiry in my view each flies in the face of sound journalistic practice. The cumulative effect of these failures in the context of an inherently improbable story with potential internal contradictions in my view renders the publication of it as unreasonable, and plainly in conflict with responsible journalism.

[52] It further follows that the plaintiff has then established that the defendants acted wrongfully in publishing the report concerning him. The question which follows is the quantum of the plaintiff's damages.

Quantum

[53] The plaintiff's claim is for damages in the sum of N$500, 000. In his closing submissions, Mr Denk on his behalf, however submitted that an award of N$100, 000

would be appropriate. He referred in this regard to an award of that size being the outcome in the Trustco Group International Ltd v Shikongo[6].

[54] In support of this claim, Mr Denk referred to the prominence and wording of the headline in bold colour lettering with a photograph of the plaintiff in uniform displayed with it. Mr Denk referred to the admitted fact that Informante has a wide circulation and readership in Namibia. The plaintiff's elevated position (as second in command of prisons) was also referred to. Mr Denk also pointed out that there had been no apology. What he did not point out is that there had instead been an unsuccessful reliance upon the defence of truth and public interest. The plaintiff however did not give evidence as to his damages as his evidence was in rebuttal. There was thus little evidence as to injured feelings and the impact of the report upon him in his chosen career. On the contrary there was a brief reference in his cross-examination to the prison authorities not taking Mr Chikezie's allegations seriously, as was emphasised by Mr Corbett.

[55] Mr Corbett's heads of argument did not deal with quantum, but rather focussed on the two defences raised. In his oral submissions, he correctly pointed out with reference to authority that defamation actions should not be viewed as "a road to riches". He also argued that the plaintiff's claim was disproportionately high and referred to the approach of the Supreme Court in the Trustco matter. He also correctly pointed out that the plaintiff had not pleaded aggravation by the publication of a subsequent article not referred to in the pleadings. The particulars of claim contended that there had been aggravation because of prior articles – with specific reference to the claim of falsifying his senior certificate. The evidence presented on that issue however tended to show that the certificate had been falsified because it was not authentic. If anything, that evidence would have had the opposite impact on the claim by tarnishing the plaintiff's reputation. Mr Corbett did not however rely upon this evidence in this context and I shall not take it into account as far as reputation is concerned. Certainly aggravation with reference to prior articles was not established.

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[6]Supra

[56] In assessing what damages are appropriate, there are several factors to be taken into account and then to weigh these in the context of other awards of damages recently made by the courts. Factors which are relevant include the seriousness of the defamation involving the imputation of palpably illegal and corrupt conduct on the part of the deputy head of prisons. Then there is the prominence of the report with its acknowledged unfair banner headline splashed across the front page of the newspaper with the plaintiff's photograph. But I also take into account the unequivocal denial in the report by the plaintiff, the fact that the allegations were hardly taken seriously by his superiors and that nothing further occurred after the explanation which he provided straight afterwards. There was also no evidence of subjective injury felt by the publication of the article. Nonetheless the defamation was serious.

[57] I also take into account the awards recently made by courts in Namibia. In Trustco, the Supreme Court reduced the trial court's award of N$175, 000 to N$100, 000 in respect for what was characterised as a very serious defamation of the then Mayor of Windhoek. The Supreme Court did so by stressing the difficulty in establishing a proportionate relationship between the vindication of reputation on the one hand and determining a sum of money as compensation on the other with reference to apposite authority.[7] The court proceeded to reduce the award after a survey of recent awards made by this court in three other matters. In taking the awards in each of those matters into account as well as the reduced award in Trustco, it would seem to me that an award in the sum of N$50, 000 is appropriate in all the circumstances of this case.

[55] Both sides accepted that a costs order should include the costs of one instructing and one instructed counsel.

[56] I accordingly make the following order:

(a) Judgment is granted against the defendants, jointly and severally, in the amount of N$50, 000.

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[7]Dikoko v Mkhatla 2006 (6) SA 235 (CC) per Sachs, J in par [110]

(b) The defendants must pay interest on this sum from date of this judgment to date of payment at the rate of 20% per annum.

(c) The defendants are to pay the plaintiff's costs, jointly and severally. Those costs include the costs of one instructed and one instructing counsel.

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DF SMUTS

Judge

APPEARANCE

PLAINTIFF:	A Denk Instructed by Sisa Namandje & Co. Inc.
DEFENDANT:	A Corbett Instructed by Engling, Stritter & Partners