REPUBLIC OF NAMIBIA REPORTABLE

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1838/2010

In the matter between

UNIVERSITY OF NAMIBIA	**1ST PLAINTIFF**
LAZARUS HANGULA	**2ND PLAINTIFF**
FILLEMON AMAAMBO	**3RD PLAINTIFF**
OSMUND DAMIAN MWANDEMBELE	**4TH PLAINTIFF**
BONIFACE SIMASIKU MUTUMBA	**5TH PLAINTIFF**
JOB JOHANNES JANSEN	**6TH PLAINTIFF**
ELLEN NDESHI NAMHILA	**7TH PLAINTIFF**
ALOIS ERNST FLEDERSBACHER	**8TH PLAINTIFF**

and

EVILASTUS KAARONDA	**1ST DEFENDANT**
TRUSTCO GROUP INTERNATIONAL (PTY) LTD	**2ND DEFENDANT**
MAX HAMATA	**3RD DEFENDANT**
PATIENCE NYANGOVE	**4TH DEFENDANT**

Neutral citation: *University of Namibia v Kaaronda (I 1838/2010) [2013] NAHCMD 4 (16 January 2013)*

Coram: SMUTS, J

Heard on: 5 - 16 November 2012

Delivered on: 16 January 2013

Flynote: Application for absolution in defamation action on grounds that it was not established that there was a reference to certain plaintiffs in a newspaper article – the test as to whether there is reference to plaintiffs restated.

JUDGMENT

SMUTS, J

[1] When the plaintiffs closed their case in this defamation action for damages, the two sets of defendants each applied for absolution from the instance.

[2] In the case of the first defendant, he sought absolution from the instance of the plaintiffs' claims against him. He did so on two bases, as I understood Mr S. Nkiwane who appeared on his behalf. He firstly contended that the plaintiffs had chosen a wrong cause of action against the first defendant in that their cause of action against him was that of iniuria and not defamation. In the second instance, he submitted that qualified privilege had been established and that absolution from the instance should be granted.

[3] The second to fourth defendants, represented by Mr R. Heathcote, SC, assisted by Mr P. Barnard, applied for absolution from the instance of the fourth, sixth and eighth plaintiffs' claims. The basis for the application was that those plaintiffs had not established that the defamatory words contained in the newspaper article in question were published of and concerning them.

[4] After the conclusion of argument, I briefly adjourned and then dismissed the first defendant's application with costs but reserved judgment in respect of the second to

fourth defendants' application by reason of the abundance of authorities which were referred to in oral argument which I needed to further consider before coming to a conclusion with regard to that application for absolution.

<u>First defendant's application for absolution</u>

[5] As far as the first defendant's application for absolution was concerned, I dismissed it because neither of the grounds referred to had in my view been established. The first ground, as I understood it, was that the plaintiffs' cause of the action was for an injuria and could not be defamation because there had not been publication. This was because the first defendant's letter complained of in the action had been addressed to the Chancellor of the university and that the matter was an internal university matter. At best for the plaintiffs, so Mr Nkiwane contended, they would have a cause of action for an injuria. In order to consider this and the other application for absolution, regard would need to be had to the pleadings themselves.

[6] The plaintiffs, which include the University of Namibia (UNAM) even though it does not seek any damages, complain that a letter addressed by the first defendant, the Secretary General of the National Union of Namibian Workers, to the founding President of the Republic of Namibia, who was then the Chancellor of UNAM was defamatory of the individual plaintiffs. That letter contended that the administration of the university under the leadership of the Vice-Chancellor, the second plaintiff, was beyond control to such an extent that it induced a sense of shock and dismay. It further contended that positions at UNAM were filled in an inappropriate manner by UNAM senior management. It also alleged that UNAM's senior management engaged in mischievous and corrupt practices and that its money had been misused. It also contended that UNAM's management had failed to account for about N$5 million which was lost and that the management had acted in a suspicious and dubious manner in relation into that money. It further contended that the stolen money was paid back from the coffers of UNAM which resulted in further deprivation for Namibians. It called for a

commission of enquiry and that those guilty should be suspended and discharged from office.

[7] The individual plaintiffs contended that the letter was wrongful and defamatory of them and that it was understood or intended to be understood that it inter alia imputed incompetence to them and that they were mischievous and corrupt, dishonest, not worthy of their positions and covered up theft.

[8] This letter subsequently received prominent coverage in an edition of the Informante newspaper in February 2010. It is alleged that the newspaper is published by the 2nd defendant, edited by the 3rd defendant and that the article is written by the 4th defendant. The newspaper article in its headline and in the body of the article suggested that the second plaintiff had squandered N$5 million and accused him of corruption. It also contended the second plaintiff and his senior management allegedly embezzled N$5 million intended for a masters programme in public administration at UNAM and that they had in a suspicious and devious manner chosen to pay back the N$5 million to the donors.

[9] I turn to the two separate applications for absolution. In the particulars of claim it is alleged that the first defendant had caused publication of his letter to the Chancellor and made it available to various persons whose names were unknown to the plaintiffs. The first defendant admitted that he authored the letter which was attached to the particulars of claim and stated that the Chancellor was the only intended recipient. Mr Nkiwane accepted in argument that at the very least the Chancellor's secretary was likely to have read the letter but nevertheless denied that there had been publication as required for defamation and that the plaintiffs' cause of action was at best for them of one injuria. This argument is not in my view sound.

[10] The fact that there was limited publication would not mean that the plaintiffs were confined to an action for injuria. The plaintiffs had been unable to establish any wider

publication of the letter than to the intended recipient and his office which included at least his secretary. But that would in my view amount to publication for the purpose of defamation. The fact that the plaintiff had in their particulars of claim asserted that there had been further publication (on the part of the first defendant) to persons unknown to them and that the this had not been established by the conclusion of their own case would not mean that further publication could not yet be established in this trial. But whether or not this is established, the fact remains there had been publication to the Chancellor and his office, as has been accepted by the first defendant. This would in my view amount to publication for the purpose of defamation.

[11] The second basis for the application for absolution on the part of the first defendant would appear to have been with reference to the defence of qualified privilege raised in the first defendant's plea. That is how I understood the argument advanced by Mr Nkiwane. But the plaintiffs had replicated to the plea of qualified privilege to the effect that the first defendant was not under any duty to have made the statements in the letter to the Chancellor and had no right to do so and that the statements had no foundation in evidence or fact and were not pertinent or germane to the alleged privileged occasion. The plaintiffs further contended that the statements were actuated by malice and that the first defendant had indirect or improper motives in making the statements and that they were untrue.

[12] The defence of qualified privilege and the replication to it are matters which would need to be determined in evidence. The first defendant bears the onus of establishing qualified privilege as pleaded. His defence has however not been established on the basis of the plaintiffs' evidence alone. I am thus not in a position to determine whether this defence is thus sound on the evidence thus far in the matter.

[13] It follows that this basis for absolution has not in my view been established and would not arise at this stage. The application for absolution based upon the defence of qualified privilege thus cannot at this stage succeed.

[14] It was for these reasons that I dismissed the first defendant's application for absolution with costs.

2nd – 4th defendants' application for absolution

[15] I turn now to the second to fourth defendant's application for absolution. As I have already said, it is based upon the contention that the fourth, sixth and eighth plaintiffs have not established that the article published by the second to fourth defendants refers to them. The full text of the article is as follows:

"University of Namibia, Vice Chancellor Professor Lazarus Hangula and his senior management allegedly embezzled N$5 million meant for the Masters Programme in Public Administration and are allegedly employing expatriates at the expense of equally or better qualified Namibians. The National Union of Namibian Workers (NUNW), Secretary General Evilastus Kaaronda who made the allegations also accused UNAM of unprocedurally employing people in senior management positions. Efforts to get a comment from UNAM proved fruitless as the university's public relations officer, Utaara Hoveka, said it was impractical for Informante to get a response from them yesterday (Wednesday) as they needed time to consult.

Hangula was said to be out of office until next week with his mobile going on voice mail. In his damning letter to Unam Chancellor and Namibia's Founding Father, Dr Sam Nujoma dated 4 February 2010, Kaaronda alleges NUNW "independently confirmed that the university management had failed to account for about N$5 million lost in the MPPA program".

"We are informed and have independently confirmed that the university management had failed to account for about N$5 million lost in the MPPA program. While some committed Namibians employed by the university including the director of this program had requested for a forensic audit so as to help bring those found wanting to book, the university management in a very suspicious and dubious manner only chose to pay back the money to the donor instead of heeding the advice of the director and others," Kaaronda wrote to Nujoma.

He further alleged that money used by the university management to pay back the stolen funds was allegedly taken from the coffers for the university short changing Namibian students in the process.

"It is apparent that the Vice Chancellor is either not interested to properly serve out people with the required sense of diligence and care," Kaaronda wrote.

In the same letter, Kaaronda states that the university recorded a deficit of approximately N$12 million in 2006 and the situation has been deteriorating ever since. Kaaronda claims Unam management has over the years continued building and constructing projects without subjecting them to tender. He also accused UNAM senior management of filling six senior positions without either advertising the vacant positions internally or externally.

"These positions are a) director: human resources b) director: estate services c) director: language centre d) director: UNAM central consultancy bureau e) UNAM legal advisor. Other two positions which were appointed in a similar fashion are shoes of special advisor to the vice chancellor and that of strategic planner. To further buttress out on administrative discretion used to achieve the wrongs ends, we wish to point out a case that relates to the Registrar of the University who in addition to his office responsibilities was appointed to act as the director of the Computer Centre, a position for which he is not trained or qualify to hold, "Kaaronda wrote.

The NUNW leader also queried why expatriate contracts are extended in contravention of the immigration requirements guiding appointments and retention of foreign workers.

"The Vice Chancellor has repeatedly overruled relevant committees of the university to promote expatriates of professors in situations where they failed to fulfil the university criteria as set out in the UNAM promotions policy."

UNAM Governing Council Chairperson, Filemon Amaambo refused to comment on the issue saying he was not comfortable conducting telephone interviews and that he does not respond to rumours. Kaaronda admitted writing the letter to the Founding Father after NUNW was approached by the Namibian National Teachers Union.

"Yes it's true we were approached by NANTU and we communicated our concerns to the Chancellor."

Acting Permanent Secretary in the Ministry of Education, Alfred Ilukena, said his office has not yet received or heard about the letter written to Nujoma or any of the allegations being levelled

against Hangula. The Founding Father's personal assistant John Nauta confirmed that comment on the issue saying he was out of the country last week."

[16] The fourth plaintiff is Professor O . D. Mwandemele, the Pro-vice-Chancellor: Academic Affairs and Research of UNAM. In the particulars of claim it is contended that he is a member of the management of UNAM. The sixth plaintiff is Mr JJ Jansen. He is the Bursar of UNAM. It is also contended that he is member of the management of UNAM. The eighth plaintiff is Mr A E Fledersbacher, the Registrar of UNAM. It is likewise contended in the particulars of claim that he is a member of management of UNAM.

[17] The particulars of claim allege in the introductory portion of paragraph 21 as follows:

> "The said edition of the newspaper in its headline (annexure B1) and the article (annexure B2) stated the following of second to eighth plaintiffs directly or by implication . . ."

[18] The sub-paragraphs of 21 then proceed to refer to what was stated in the article concerning the second plaintiff and UNAM's senior management and management. In the plea of the second to fourth defendants, the allegations in paragraph 21 are admitted. Despite this the application for absolution was made. Mr Heathcote SC then in argument applied on behalf of the second to fourth defendants to withdraw these admissions. He submitted that it was a legal question as to whether the article referred to the plaintiffs. Mr Heathcote also referred to the proposed pre-trial order agreed to by the parties in which it was stated that an issue which was not in dispute was that the second to fourth defendants had admitted that the article stated of the second to eighth plaintiffs what was alleged in paragraph 21 of the particulars of claim.

[19] Mr Heathcote submitted that the test as to whether there was a reference to the plaintiffs was a matter of construction and was a legal question and that a concession of law on the issue was not binding on his clients. He submitted that there could be no prejudice to the plaintiffs as a reference to them was not a matter which could be

established by evidence but is a legal question to be determined with reference to the terms of the article itself. Mr Heathcote then proceeded to refer to several authorities in support of the contention that there was not a reference to the plaintiffs for the purpose of a defamation action. I refer to those below.

[20] Mr Coleman, who appears for the plaintiffs, contended on the other hand that reference to the plaintiffs was sufficiently established by the reference to senior management and management of UNAM, even though none of the 4th, 6th and 8th plaintiffs had been referred to by name in the article. He also submitted that it was not open given to the 2nd to 4th defendants to withdraw their admissions in the pleadings in the manner in which they sought to do so. He submitted that a substantive application to amend would need to be brought and that the plaintiffs would have the right to re-open their case if such an amendment were to be granted. He submitted that it was a question of fact whether the plaintiffs had been referred to and that this had been admitted.

[21] As I point out below, the approaches of both counsel on the issue are not sound. The issue is neither solely one of law or fact but a combination of the two.

[22] Mr Coleman further submitted that the 2nd, 4th and 8th plaintiffs were all identified in the university's empowering legislation, the University of Namibia Act, 18 of 1992 ('the Act') and that the senior management of UNAM was not an amorphous indeterminate group as the office bearers of a union referred to in the Sauls[1] case relied upon by Mr Heathcote in argument.

[23] The test as to whether there is a reference to a plaintiff in a publication for a defamation action was referred to by this court[2], in quoting with approval a decision of

[1] Sauls and Others v Hendrickse 1992 (3) SA 912 (A).
[2] In Universal Church of the Kingdom of God v Namzim Newspapers (Pty) Ltd 2009 (1) NR 65 (HC) at par [19]

he then Appellate Division (of South Africa)[3] at a time when it was the highest court of appeal from this court as it was previously constituted, to the following effect:

> 'In every defamation action the plaintiff must allege, and prove, that the defamatory words were published of and concerning him. So too, in a case of so-called class or group libel, the plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof of and concerning him personally.'

> See also *Sauls and Others v Hendrickse* 1992 (3) SA 912 (A) at 918F - G.

> 'Hence, in determining whether the element of identification has been established, the only relevant question in every case is: would a reasonable person understand the words to refer to the plaintiff specifically? Factors to be considered in deciding the element of identification include the size of the class or group, the generality of the imputation and the extravagance of the accusation. It is necessary to caution that none of the factors referred to above is conclusive of the issue. As Lord Russell remarked in *Knuppfer*'s case supra AC 116 at 123, the nature of the defamatory statement and the circumstances in which it is published are crucial. Each case must, of course, be considered according to its own circumstances. See *per* De Villiers JP in *Bane v Colvin* 1959 (1) SA 863 (C) at 867B; *Knupffer*'s case supra AC 116 at 124.'

[24] This court in the Universal Church matter, with respect, correctly held, the test is objective and the actual intention of the defendants is irrelevant (save on issues of express malice and damages).[4]

[25] As I have already pointed at the article makes no specific reference by name to any of the 4th , 6th or 8th plaintiffs. It refers to UNAM's senior management at the outset and thereafter refers to UNAM's management. Mr Heathcote correctly in my view accepted that the subsequent reference to UNAM's management in the context of the

[3]South African Associated Newspapers Ltd and Another v Estate Pelser 1975 (4) SA 797 (A) at 810 B-C
[4]Supra at par 21

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article refers to UNAM's senior management which was referred to at the outset. The article thus refers to persons belonging to a class or group of senior management at UNAM. As was held in Sauls[5]:

> "To succeed in their action appellants must establish that the words complained of would lead an ordinary reasonable person acquainted with them to believe, on reading the statement, that such words referred to them personally. The test is, therefore, an objective one and the actual intention of the respondent is irrelevant. In *Knupffer v London Express Newspaper Ltd* [1944] 1 All ER 495 (HL) at 497F-G, Viscount Simon LC propounded a twofold test for a matter such as the present in the following words:
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> 'The first question is a question of law- can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him?'
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> It is common cause that the first question must be answered in favour of the appellants. What is in issue is whether the second question also falls to be so answered. Whether defamatory words used of or concerning a group will be taken to refer to every member of such group will depend in each case upon the precise words used seen in their proper factual matrix. The mere reference to a group *per se* will not be sufficient. A plaintiff must still prove that, as a member of such group, he was included in the defamatory statement – often a difficult matter, particularly when one is dealing with a group comprising a large or indeterminate number of persons. In *Knupffer's* case *supra* at 498 A Lord Atkins remarked:
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> 'The reason why libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact included in the defamatory statement: for the habit of making unfounded generalisations in ill-educated or vulgar minds: or the words are occasionally intended to be a facetious exaggeration.'
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> He went on to add (at 498C):
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> 'It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class.'

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[5]Supra at 918 G-H

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[26] The first component of the enquiry is thus a legal question capable of being determined on exception, namely whether the words are reasonably capable of referring to the plaintiffs. The second question upon which evidence can be led is one of fact - whether a reasonable person would regard the words as referring to the plaintiff. The first question being one of law would exclude evidence whilst the second being one of fact is one upon which evidence would be admissible.[6] But the question of a reference to the plaintiffs, embodying both questions, has been admitted in the pleadings.

[27] If plaintiffs are able to mount the first hurdle, then the second the enquiry as to whether the words were understood as referring to the plaintiff within a factual matrix is a factual issue upon which evidence may be led. [7] Burchell expresses the view that such evidence is not merely admissible to prove identification of the plaintiff, but is essential.[8] Burchell refers in this regard to what he terms as the classic question referred to by English counsel in the Knupffer matter (cited in Sauls above) and put to witnesses is "To whom did your mind go when you read that article?" [9] But, as is also stressed by Burchell, the ultimate test is objective and the court would not be bound to accept such evidence on this point.[10]

[28] Mr Heathcote submits that the plaintiffs do not pass the first hurdle which is a legal question, so I understood his submissions, and confines his argument to that issue. But can he do so in the face of the admission that the article referred to the plaintiffs in question? In my view not. That admission was unqualified and extended to both components of the enquiry. The admission did not merely constitute a concession of a legal issue, as Mr Heathcote contended, which could be withdrawn if considered to be incorrect. The admission was also directed at the second component of the enquiry which is a factual question upon which evidence could (and ordinarily should) be led.

[6] Burchell "The Law of Defamation in South Africa" (1985) at p 129 and the authorities collected there.
[7] See Burchell supra at 129 and footnote 14.
[8] Supra p 129
[9] Supra p 129, footnote 14
[10] Supra p 129

[29] The 2nd to 4th defendants would appear to have considered this aspect in agreeing at the trial conference that evidence upon this issue was not required. Mr Coleman is accordingly correct in contending that it was not open to the 2nd to 4th defendants to seek to withdraw their admissions on this issue in the way in which Mr Heathcote sought to do as the withdrawal of a legal concession. The plaintiffs do not agree to the amendment required in order to proceed with the application for absolution. In the absence of granting an antecedent amendment to withdraw the admission, the application for absolution is not competent in view of the admission. Given the factual nature of the second component of the enquiry, the plaintiffs would be entitled to amend their pleadings in the sense set out below and re-open their case if such an amendment were to be granted. As I repeatedly put to Mr Heathcote, if the defendants disputed the first component of the enquiry, then the course of action open to them was to except. They elected not to do so but instead pleaded to the allegation by admitting it, entailing an admission to both components of the enquiry.

[30] In the exercise of my discretion, I decline the amendment moved from the bar by Mr Heathcote given the unsound basis for it, negating the dual nature of the underlying issue – both legal and factual – admitted by those defendants. It is thus not open to them to seek an amendment on the basis of a concession of a legal issue incorrectly made (even though it was confirmed in pre trial proceedings) given the factual component to the enquiry. If those defendants would want to amend their plea to withdraw those admissions, a formal application to amend would be required, given the plaintiffs' objection to it, and the issues could then be considered. This is by no means a formalistic response to the application for absolution by reason of the admission of factual issues implicit in the admission which was expressly subsequently confirmed in the pre trial minute.

[31] But it would in any event seem to me that this application for absolution is premised upon a misreading of the authorities in the question and in particular of the

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Sauls case heavily relied upon by 2nd to 4th defendants and that, even if an amendment were to be granted, an application for absolution on the basis of the first component of the enquiry would seem to be misplaced.

[32] In the Sauls matter, the action concerned a statement made by the defendant, a politician, with reference to the then prevailing unrest situation in South Africa that it had been shown that office bearers of a union (NAAWU) "were involved behind the scenes in the unrest. . .". The plaintiffs in that matter were all office bearers of that union and contended that the statement was defamatory of them. The trial court absolved the defendant from the instant on the basis that the plaintiffs had not discharged the onus that the statement relates to them. The court of appeal upheld that decision. It referred to the fact that, unlike as in other cases, the words used did not expressly or by necessary implication amount to a defamatory imputation held to apply to every member of a group concerned (such as to a medical council,[11] a specific licencing board[12] or a company where it was held included a specific reference to every director[13]).

[33] What weighed with the court in Sauls was that the statement did not expressly or by implication refer to all the office bearers of the union. The court also referred the fact that the union was a national union which operated at national, regional and at a local level. The plaintiffs were at different levels according to their designations. But there was no evidence as to how many branches the union had throughout South Africa, how many office bearers at each branch and at the regional and national levels. The court concluded: "For all we know the overall number of office bearers in the Republic may be a very sizeable one. The statement refers to some of them". The court finally concluded that "A reasonable person reading the statement would have no grounds for connecting it with the appellants personally".[14]

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[11] Hertzog v Ward 1912 AD 62
[12] Young v Kemsley and Others 1940 AD 258
[13] Bane v Colvin 1959 (1) SA 863 (C)
[14] Supra at 920 A

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[34] This case is distinguishable from this matter on the facts. In this matter, all of the plaintiffs gave evidence of the top management of UNAM being a very small group comprising those persons referred to in the Act and appointed by the Council of the University under the Act. This is entirely unlike the position in Sauls where court found that the reference was to an indeterminate and potentially large number of office bearers.[15] The plaintiffs gave this evidence despite this aspect not being in issue by reason of the 2nd to 4th defendants' plea. The 4th, 6th and 8th plaintiffs all testified that they occupied their respective positions, specified in the Act, and were part of UNAM's top management. I again stress that this evidence was given without this aspect being in issue on the pleadings.

[35] Implicit in Mr Heathcote's argument is that evidence on the size of senior management and UNAM's structures was inadmissible because the question was a legal question which would only be determined upon the interpretation of a reasonable reader of the article. This is however incorrect and overlooks the dual nature of the enquiry and what was actually in issue in Sauls. The first leg of the enquiry – being the antecedent legal question as to whether the article is capable of referring to the plantiffs – was accepted as common cause as being answered in favour of the plaintiffs (appellants) in that matter. What was in issue was the second leg of the enquiry upon which no evidence had been led.

[36] This application for absolution would appear to be based upon a misreading of the approach of the court and of the facts and issues in Sauls. Smallberger JA, for that court expressly stated that there were no ". . . background facts or surrounding circumstances from which a person acquainted with appellants could reasonably have inferred that they were the office-bearers to whom the statement referred".[16] It would have been open to the plaintiffs to plead such facts, such the size of senior management and its

[15] Supra at 920 (C)
[16] Supra at 920 (A-B)

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structure in replication had this been denied in the plea. It follows that if leave is granted that the admissions in question are to be withdrawn, then it would be open to the plaintiffs to amend their pleadings and re-open their case. It would follow that the application for absolution cannot succeed for this reason alone.

[37] As to the first component of the enquiry – being the legal question as to whether the article is capable of referring to the 4th, 6th and plaintiffs, it would in any event seem to me that it would. They each contend in the particulars of claim that they are members of management and state the position which they occupy. The article refers to UNAM's senior management and its management. The plaintiffs allege that the words complained of directly or by implication refer to them. It would in any event seem to me that the article is capable of referring to them and that the antecedent legal question is to be answered in the affirmative, as was accepted in Sauls. The second question of fact which would in the absence of the admission in the plea then arise, namely, does the article in fact lead reasonable readers who know the 4th, 6th and 8th plaintiff to conclude that it referred to them. It was not necessary for the plaintiffs to have led evidence on this issue given the admission in question. But they all gave evidence on the size of UNAM's top management and their membership of it by virtue of their respective positions, as I have said, even though this was not in issue.

[38] If the 2nd to the 4th defendants apply to amend their plea to withdraw the admissions, the plaintiffs would have the opportunity to re-open their case to lead evidence on the issues raised by the withdrawal of the admissions in paragraph of the plea if such an amendment were to be granted. But it would in any event seem to me on pleadings that the first component of the enquiry relating being the legal question as to whether the article is reasonably capable of applying to the plaintiffs, should be answered in favour of the 4th, 6th and 8th plaintiffs. I express this view, even though it is not necessary for the purpose of this judgment, because it was fully canvassed in argument by counsel. Indeed Mr Heathcote's argument was that the 4th, 6th and 8th plaintiffs do not pass the first component of the enquiry – being the legal question as to

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whether the words are capable of referring to those plaintiffs but he proceeded to do so with reference to the approach of courts as to how the second component is to be answered. But, as I have said, it would seem to me that the article is capable of referring to those plaintiffs.

[39] It follows that the 2nd to 4th defendants' application for absolution from the instance is to be dismissed with costs. The costs in question include the costs of one instructed and one instructing counsel.

DF SMUTS

Judge

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APPEARANCE

PLAINTIFFS : G. Coleman

Instructed by AngulaColeman

1ST DEFENDANT: S. Nkiwane

Instructed by Tjitemisa & Associates

2nd to 4TH DEFENDANTS: R. Heathcote SC (with him P. Barnard)

Instructed by Van der Merwe-Greeff Inc.