REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2047/2010

In the matter between:

1.1.1.1. **DR RIHUPISA JUSTUS KANDANDO**
1st PLAINTIFF

INSTITUTE FOR CLINICAL BIOCHEMISTRY **2nd PLAINTIFF**

and

NAMIBIA MEDICAL CARE **1st RESPONDENT**

HARDIE VAN WYK **2nd RESPONDENT**

Neutral citation: *Kandando v Namibia Medical Care* (I 2047/2010) [2013] NAHCMD 86 (4 April 2013)

Coram: Schimming-Chase, AJ

Heard: 8 July 2011, 25-29 July 2011, 16-20 April 2012, 23-25 April 2012, 9 August 2012

Delivered: 4 April 2013

Flynote: Defamation – What constitutes – Defendants publishing notice in *Die Republikein* alleging that first plaintiff, a clinical biochemist, was practising under false pretences as a medical doctor and *inter alia*, committing a criminal offence contrary to the relevant legislation - Court holding that statement of

defamatory of first plaintiff.

Defamation – Onus of proof – Once defamation proved, rebuttable presumptions come into play - Defendants having full *onus* to prove defences raised.

Defamation – Defences – Truth and public benefit – It is lawful to publish a defamatory statement, provided the publication is for the public benefit – The defendant must prove that the statement is substantially true – This does not require proof of each and every fact relied upon.

Defamation – Defences – Privilege – Defendant must show social interest, relationship between parties, relevance of statement to situation.

Defamation – Defences - Reasonable publication – In appropriate circumstances a non media defendant may raise the defence of reasonable publication on the basis of a person's right to freedom of speech enshrined in Article 21 of the Constitution - The same principles listed in Trustco Group International Ltd and Others v Shikongo 2010 (2) NR 377 (SC) apply.

Summary: The defendants published a notice in *Die Republikein* alleging that the first plaintiff, a qualified and duly registered clinical biochemist was practising under false pretences as a medical doctor as he consulted on the basis of attentive diagnosis, prognosis and especially pathology services which he attempted to claim from medical aid funds. It was further alleged the first plaintiff was not a medical specialist in the field of pathology, that he acted in contravention of section 17 of Act 10 of 2004, that his qualifications allowed him to practice on the level of clinical biochemistry in an accredited laboratory and that he was not entitled to use the title "medical doctor" nor was he permitted to claim under the auspices of "general practitioner" and "specialist pathologist".

The first plaintiff alleged that he had been defamed as the allegations in the notice were understood by readers of the notice in the newspaper to mean that he was dishonest, not qualified to practice as he did and that he was committing a criminal act. The first plaintiff also alleged that the contents of the notice were false and that since publication of the notice he was unable to carry out his

profession as a clinical biochemist. In addition to the first plaintiff's claim for damages to his reputation and dignity in the amount of N$500,000.00 he further claimed special damages in an amount of N$153,732.83 comprising an investment ceded to a banking institution as security for a loan advanced to second plaintiff, arrear rental, chemical reagents, school fees and an insurance premium. The second plaintiff also claimed loss of income as a consequence of the defamatory publication in the amount of N$3,5 million.

The defendants admitted that the statement was intended to convey to the reader exactly what its contents contained but denied that the statement was unlawful. The defendants relied on the defences of truth and public benefit, qualified privilege and reasonable publication. With regard to the defence of reasonable publication the defendants submitted that an appropriate case had been made out for this defence to be applied to non-media defendants.

Held, the statement was defamatory of the first plaintiff. On the evidence, the defendants were unable to show that the statement was either substantially true, or that what was conveyed to the public, namely that the first plaintiff was practising as a medical doctor under false pretences and committed a criminal offence was to the public benefit in the circumstances. The defendants failed to prove their right to communicate the defamatory matter, in relation to the extent of the contents of the publication, or the public's right to receive the communication. Thus the statement was not reasonably germane and relevant to the privileged occasion. The privilege was exceeded in that the statement went far beyond what was necessary to have been communicated in order to be reasonably germane and relevant.

Held, as to the defence of reasonable publication in light of the constitutional right to freedom of speech, there was no reason why the defendants should not be permitted to rely on this defence as non-media defendants, as the question was left open in Trustco Group International Ltd and Others v Shikongo 2010 (2) NR 377 (SC), and it is well established that the list of possible defences to a defamation action is not exhaustive. However the defendants failed to prove that the publication was reasonable. In fact, the publication was also considered

negligent and interfered unreasonably with the first plaintiff's right to dignity.
Held, further, as regards the first plaintiff's claim for damages for injury to his dignity and reputation, relying on the principles set out in Buthelezi v Poorter 1975 (4) SA 608 (W), the first plaintiff was awarded damages in the amount of R40,000.00. As regards the first plaintiff's second claim for special damages, it was clear that apart from the claim for chemical reagents (which the first plaintiff was not entitled to because the second plaintiff was not licensed to operate a medical laboratory in terms of the Hospital and Health Facilities Act) the losses were all expenses that would have been incurred by the first plaintiff in any event, and quite irrespective of the notices. These expenses would have been paid by the generation of income by the second plaintiff. The first plaintiff's claim for special damages was accordingly dismissed. As regards the second plaintiff's claim for loss of income in the amount of N$3,5 million it was apparent from the evidence as well as the testimony of the defendants' expert (the plaintiffs' correctly conceding that their expert's evidence did not assist the court in any way) that there was a clear lack of causation because the second plaintiff's services failed to add value. Once an illness or disease had been detected through the first plaintiff's tentative diagnosis, treatment by a medical practitioner was required. More importantly the evidence showed that the second plaintiff was at the inception of the notice already in a precarious financial situation. Thus the second plaintiff's claim for loss of income was also dismissed.

ORDER

(a) The first and second defendants are ordered to pay the amount of N$40,000.00 to the first plaintiff in his personal capacity, jointly and severally, the one paying the other one to be absolved, for damage to his reputation and dignity as a result of the defamation.

(b) The defendants are ordered to pay the first plaintiff's costs in respect of the defamation.

(c) The first plaintiff's claim for patrimonial loss in the amount of N$153,732.00 is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

(d) The second plaintiff's claim for loss of income in the amount of N$3,5 million is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an action for damages instituted by the plaintiffs against the defendants jointly and severally, the one paying the other to be absolved for the total amount of N$4,153,732.83. The action is based in defamation, resulting from the publication of a notice by the defendants in *Die Republikein* newspaper on Friday, 16 October 2009.

(c) The notice is repeated in its entirety.

"**NMC**
NAMIBIA MEDICAL CARE

Urgent NMC Notice

Clinical biochemist practises under false pretences

It has come to the attention of Namibia Medical Care that 'Dr' Rihupisa Justus Kandando, a clinical biochemist is practising as a medical doctor whereby he consults on the basis of attentive diagnosis, prognosis and especially pathology services which he attempts to claim from medical aid funds. Mr Kandando is not a medical specialist in the field of pathology and acts in contravention of Section 17 of Act No 10 of 2004.

> His qualifications allow him to practise on the level of clinical biochemistry in an accredited laboratory. Namibia Medical Care wishes to inform its members and the general public that Mr Kandando is not entitled to use the title 'medical doctor' and is further not permitted to claim under the auspices of 'general practitioner' and 'specialist pathologist".
>
> No claims submitted for payment to 'dr' Kandando will be entertained by Namibia Medical Care medical aid fund as the fund rules do not provide for payment of this nature.
>
> For further information please contact the Principal Officer of NMC, Mr Hardie van Wyk at 061 233575."

(d) It is common cause that this notice was published with the assistance of legal advice.

(e) It is not in issue that *Die Republikein* is a widely read and widely circulated newspaper. It is a daily newspaper published in the Afrikaans language. The notice was published in English. The evidence of Mr Cyril Lowe who was the Group Marketing Manager at Democratic Media Holdings and whose duties at the time included acting in a supervisory capacity of all DMH publications including *Die Republikein*, was that *Die Republikein* is distributed nationwide in Namibia. It appears from Monday to Friday and consists of editorial content, land news, features and advertising material. He further testified that the average of newspapers sold at the time when the notice was published was 17,231 copies sold. In addition Mr Lowe testified that *Die Republikein* has a fairly constant readership and that more copies of that newspaper are sold on a Friday than on week days.

(f) The plaintiffs allege in their amended particulars of claim that the allegations contained in the notice were wrongful and defamatory of the first plaintiff in that they were intended to mean and were understood by readers of the newspaper and the plaintiffs' customers to mean that:

(a) (a) the first plaintiff was dishonest;

(b) the first plaintiff was not qualified to practice as he did; and

(c) the plaintiff was committing a criminal act.

(g) These allegations were made with specific reference to the notice which stated in particular the following of the first plaintiff:

(a) that he is practising under false pretences;

(b) that he is practising as a medical doctor;

(c) that he consults on the basis of attentive diagnosis, prognosis and especially pathology services which he attempts to claim from funds;

(d) that he is not entitled to use the title 'medical doctor' and is further not permitted to claim under the auspices of 'general practitioner' and 'specialist pathologist';

(e) that the rules do not provide for payment of his services.

(h) The plaintiffs further pleaded that the above allegations were false, and since publication of the notice he has been unable to carry out his profession as a registered clinical biochemist at second plaintiff (a close corporation solely owned by first plaintiff), as a consequence of which the first plaintiff was injured in his profession as a clinical biochemist because members of the public removed their custom from him.

(i) The first plaintiff claimed damages to his reputation and dignity in the amount of N$500,000.00, and further claimed special damages in an amount of N$153,732.83 made up and arrived at as follows:

(a) N$61,413.38 investment ceded to Bank Windhoek as security for a loan advanced to second plaintiff;

(b) N$28,396.00 arrear rental;

(c) N$15,000.00 for office furniture;

(d) N$24,644.45 for chemical reagents;

(e) N$16,820.00 for school fees;

(f) N$7,459.00 PPS premiums.

(j) The second plaintiff also claimed damages as a consequence of the defamatory publication on the basis that customers of the second plaintiff's business and members of the public discontinued dealing with the first plaintiff in his profession as a clinical biochemist, and the second plaintiff thus suffered loss of income in the amount of N$3,500,000.00.

(k) The defendants admitted the publication of the notice as well as what it stated of the plaintiff as set out in the particulars of claim mentioned above. They however denied that the publication was defamatory. They denied that the allegations made against the first plaintiff contained in the notice were false. In amplification of this denial the defendants pleaded that the first plaintiff was not registered to be a medical practitioner in terms of section 17 of the Medical and Dental Act, 10 of 2004 ("the Act"), nor was he regarded to be so registered in terms of section 64 of the Act, and further that the first plaintiff nevertheless for gain consulted on the basis of attentive diagnosis, prognosis and especially pathological services, which acts he was forbidden to perform in terms of section 33(1)(b), alternatively section 17(2) of the Act. Furthermore, they pleaded that the plaintiff was not registered as a pathologist in terms of the applicable regulations. Thus the defendants relied on the defence of truth and public benefit, pleading that the contents of the notice were substantially true, and publication thereof to the public benefit.

(l) In this regard the defendants pleaded that the notice was intended to be

understood by readers of the newspaper to mean that insofar as the first plaintiff was practising as a medical doctor, the first plaintiff was dishonest, was not qualified to practice as he did and was committing a criminal act.

(m) The defendants also raised the defence of qualified privilege and pleaded that:

(a) the defendants as a medical aid fund and as its principal officer respectively had a duty to inform the public of the matters raised in the notice;

(b) the public had a right to receive such information;

(c) the contents of the notice were germane to public health care.

(n) The defendants also relied on the constitutional right to freedom of speech contained in Article 21(1)(a) of the Constitution, and pleaded that the notice was published by them pursuant to the exercise of the common law, alternatively their constitutional right to freedom of speech by reason of the facts set out in the above paragraph and thus was a reasonable publication in the circumstances.

(o) I now deal with the relevant factual background leading to the publication of the notice including the manner in which the first plaintiff became registered as a clinical biochemist upon his return to Namibia. The history of this matter is quite extensive, though most of the factual issues are not in dispute. In dealing with the factual background, I will also deal with the relevant legal framework in which the parties operate, as well as certain factual aspects which are in dispute where relevant.

(p)

(q) The first plaintiff as part of his tertiary education obtained a Higher National Diploma in Applied Science at Manchester Polytechnic in 1987 after approximately 2 years study there, after which he obtained a Diploma of Higher Education and Biological Science at the Polytechnic of Wolverhampton in 1989.

He then completed a post graduate diploma in Clinical Laboratory Science at the University of Leeds in 1991, after which he completed his Masters Degree in Clinical Biochemistry at the same University in 1992. He obtained a doctorate in Philosophy at the University of Surrey in 1998. The plaintiff in this regard testified that the Master's Degree Programme in Clinical Biochemistry is in essence a degree open to both medical graduates as well as scientific graduates.

(r) After his studies in Wolverhampton the first plaintiff returned to Namibia from exile where he worked at the Ministry of Health and Social Services for six months as a medical laboratory technician. After completing his Masters Degree in Leeds he worked as a senior forensic analyst at the Ministry of Home Affairs for two years where he was involved in setting up Namibia's First Forensic Laboratory. After completing his Phd in 1998, the first plaintiff returned to Namibia to commence employment at the University of Namibia in the Faculty of Agriculture and Natural Resources in the Department of Food Science and Technology from 1998 to 2004. During the last two years of his tenure, the first plaintiff headed that Department.

(s) On 6 October 2003, the first plaintiff attempted to register as a clinical biochemist through the Ministry of Health and Social Services and the Registrar of the Medical and Dental Council. However, at the time there was no provision in the repealed Medical and Dental Professions Act, 21 of 1993 for the profession of clinical biochemistry. This 'profession' was only catered for in the Act which came into operation on 1 October 2004.

(t)

(u) After the Act came into operation the first plaintiff renewed his application. As there were no specific guidelines in the Act on the registration and in particular the scope of practice of clinical biochemistry, the Registrar of the then Interim Medical and Dental Council sought guidance from the Health Professions Council of South Africa, after which, the first plaintiff was for the first time registered through the Interim Medical and Dental Council under the Act as a "Clinical Biochemist (Chemical Pathology and Immunology"), and was authorised to practice as such on 4 April 2005 for the year ending 31 December 2005. The

first plaintiff renewed his registration as a clinical biochemist for the years 2006, 2007, 2008, 2009, 2010 and up till 31 March 2011. The first plaintiff was also given the Registration Number CB001, being the first clinical biochemist on the Register.

(v)

(w) I pause to deal shortly with the relevant certificates issued by the Interim Medical and Dental Council and later the Medical and Dental Council of Namibia. Up until 2007, the first plaintiff was simply registered as a clinical biochemist (Chemical Pathology and Immunology). Between April 2007 and 2009 the first plaintiff's registration certificates only contained the term "Clinical Biochemist". With effect from 1 July 2010, the first plaintiff was registered as a "Clinical Biochemist Specialist". When questioned about these differences the Registrar of the Medical and Dental Council, Ms Ena Barlow explained that it may have been an oversight, as there were no standard certificates and the certificates were developed over time.

(x)

(y) With regard to the registration certificate effective from 1 July 2010, Ms Barlow testified that the Regulations relating to the Scope of Practice of a Clinical Biochemist in particular, the Regulations relating to Minimum Requirements of Study for Registration as a Clinical Biochemist and the Regulations relating to Registration of Clinical Biochemists and Clinical Biochemist Interns, Registration of Specialities and Additional Qualifications, Maintaining of Registers of Clinical Biochemists published under section 59 of the Act were only published on 16 June 2010, after the notice which is the subject matter of this action was published. In these regulations the Minister of Health and Social Services *inter alia* prescribed the qualifications and the minimum requirements for specialist registration which the first plaintiff, according to the Medical and Dental Council had complied with. I deal with these regulations in more detail below.

(z)

(aa) Although the first plaintiff only started practising fully as a clinical biochemist on 1 July 2009, apart from maintaining his registration, the first plaintiff also arranged for the registration and incorporation of the second plaintiff in 2004. Subsequent to the registration of the second plaintiff, the first plaintiff

during 2005 applied to the Namibian Association of Medical Aid Funds (NAMAF) for inclusion of his profession and services as a clinical biochemist as an expense that could be claimed from medical aid funds. Following various submissions by first plaintiff, NAMAF, through its Affordability of Medical Services Committee (of which the second defendant was a member at the time) on 19 October 2005 recommended that first plaintiff could claim reimbursement for services rendered as a clinical biochemist under the same tariffs as those used by clinical pathologists for reimbursement for services rendered. It is common cause that the clinical pathologists on which tariff the first plaintiff was permitted to claim for services rendered as a clinical biochemist by NAMAF, are all registered medical doctors.

(bb) Following an application to NAMAF, the second plaintiff was also allocated a practice number. The registration of this practice number was for purposes of identifying claims submitted to Namibian Medical Aid funds for the proper administration and processing of medical aid claims in terms of the Medical Aid Funds Act[1].

(cc)

(dd) In the correspondence from NAMAF addressed to the second plaintiff, it was informed that all medical aid funds had been notified of the practice number, and further that the procedure codes applicable to his discipline, the number 069 should be used on its claims to funds for reimbursement for services rendered. The 069 code in these Tariffs were the tariffs applicable to pathologists / doctors.

(ee) I pause to point out that NAMAF is a statutory body established in terms of the Medical Aid Funds Act, for *inter alia* the control, promotion, establishment, development and functioning of medical aid funds in Namibia. The association consists of all registered medical aid funds in Namibia. For each discipline in the medical practice, NAMAF publishes benchmark tariffs. They are termed formally the Namibian Benchmark Tariffs for General medical and Surgical Services. The benchmark tariffs are NAMAF's recommended tariff guide to Namibian medical aid funds for the reimbursement of claims. The codes for

[1]Act 23 of 1995.

various disciplines in general, and for medical and surgical services are contained in these tariffs, which enable the various practitioners to claim a portion of the fees they charge for services rendered from medical aid funds. The tariff is also only a guideline, and it is not mandatory for private medical aid funds, such as the first defendant, to accept each and every claim lodged by any practitioner for services rendered. In this regard, it is pertinently stated in the Benchmark Tariffs that the Schedule of Tariffs in no way constitute an agreement between any party. The first defendant also has its own Rules under which it operates.

(ff)

(gg) On 1 August 2006, the first plaintiff, armed with his registration as a clinical biochemist (Chemical Pathology and Immunology), the letter from NAMAF indicating the relevant codes in the Benchmark Tariffs that he could use to claim for services rendered, as well as the registration of the second plaintiff as a close corporation, applied via the second plaintiff to the Ministry of Health and Social Services for a license to operate two facilities in terms of section 31 of the Hospitals and Health Facilities Act, 36 of 1994. [2] The two facilities were a consultation room and medical laboratory respectively.

(hh) The second plaintiff's application was initially refused on the grounds that the proposed facility did not meet the basic standards. On 11 January 2007, the second plaintiff lodged a similar application and it was issued a license to operate a "consulting room – Clinical Biochemist", from 6 February 2007 to 5 February 2008. During 2008, the second plaintiff applied for a renewal of his license. The license was not recommended for renewal, and the second plaintiff was formally requested to rectify a significant number of shortcomings before his facility could be licensed as a laboratory. On 19 February 2009 the second plaintiff applied for a renewal of his license to operate a consulting room only. In this application, the second plaintiff addressed the shortcomings highlighted by

[2] Section 31 of that Act provides that no person shall establish, conduct or maintain a private health facility, or offer consultations to or engage in the treatment of patients or render any health service at such private health facility without obtaining a license in respect of such health facility, or continue or maintain such private health facility after expiry of such license unless that license has been renewed.

the Ministry as follows: "facility for consultation purpose, analytical component to be inspected once the Ministry has someone to do that as per initial application." The second plaintiff was accordingly issued with a license to operate a consulting room – Clinical Biochemist from 6 February 2009 to 7 February 2010. It is important to note at this stage that from the evidence, it is clear that the second plaintiff was never issued a license to operate a laboratory, despite the first plaintiff's prevarication on whether or not, in his mind, he felt he was indeed permitted or licensed to operate a laboratory, or to perform certain analytical tests such as urine tests in his consulting rooms.

(ii) The first plaintiff then commenced practice as a clinical biochemist through the second plaintiff at the Katutura Medical Centre on 27 June 2009.

(jj) Before dealing with events that occurred subsequent to 27 June 2009 leading to the publication of the said notice, it is necessary to briefly set out the legal framework that operated at the relevant time, with reference to the various certificates and licenses issued to the first and second plaintiffs, because as part of the defences raised by the defendants it was alleged that the first plaintiff operated outside the ambit of the applicable legislation, which *inter alia* resulted in publication of the notice.

(kk) Up and until 1 October 2004, when the Act came into operation, the legislation governing the practice and scope of practice of the medical and dental profession was the Medical and Dental Professions Act, 21 of 1993, and the regulations published in terms of that Act, which included Regulation 197 comprising the Rules Relating to Improper Conduct or Misconduct by a Medical Practitioner dated 8 November 2002, Regulation 237, relating to the Qualifications Entitling Medical Practitioners to Registration, published on 29 October 1999 and Regulation 238 relating to the Registration of Medical Practitioners, Specialities and Medical Interns published on 29 October 1999

(ll) The Act repealed the Medical and Dental Professions Act, 1993 ("the repealed Act"), which did not include or define the profession of a clinical biochemist. In particular and in contrast to the repealed Act, the Act provided for

and for the first time defined a clinical biochemist as "a person registered as such in terms of the Act or regarded to be so registered in terms of section 64". Section 17(2) of the Act provides *inter alia* that no person is entitled to practice within Namibia the profession of clinical biochemist unless he or she is registered in terms of the Act to practice the profession concerned.

(mm) In particular, section 17(2) of the Act provides as follows:

> "Unless otherwise provided in this Act … no person is entitled to practise for gain any profession, the practice of which mainly consists of:
>
> (a) the physical and mental examination of persons;
>
> (b) the diagnosis, treatment or prevention of physical defects, illnesses, diseases or deficiencies in persons;
>
> (c) the giving of advice in regard to the defects, illnesses, diseases or deficiencies referred to in paragraph (b);
>
> (d) the prescribing or providing of medicine or any artificial denture or other dental applicable in connection with the defects, illnesses, diseases or deficiencies, as the case may be, referred to in paragraph (b);
>
> (e) the prescribing, compounding or dispensing of a medicine for consumption by any human; or
>
> (f) the rendering of pharmaceutical care;
>
> unless that person is registered by the Council for such purpose."

(nn) At the time the first plaintiff started practising as a duly registered clinical biochemist (during June until end August 2009) there were no regulations dealing with the scope of practice of a clinical biochemist until 16 June 2010 (after the notice was published) when regulations dealing with *inter alia* the scope and practice of a clinical biochemist were published in Government

Notice 124 of 2010. The relevant regulations provide as follows:

(a) "Scope of practice of a clinical biochemist

2 For the purposes of the practising of his or her profession, a clinical biochemist may perform the following acts relating to development and application of biochemical principles, procedures and techniques involving human tissue or body fluids or excretion in the case of an in vitro investigation, regarding the diagnosis and treatment of diseases and the monitoring of health –

(a) consultation with the patient or other registered persons relating to the development and application of those biochemical principles, procedures and techniques; and

(b) the

(i) interpretation, consultation and advising relating to the information obtained as a result of of;

(ii) quality control relating to;

(iii) teaching, training and research relating to;

the acts so performed."

(b) "Registrable specialities

8 (1) For the purpose of section 31(1)(b) of the Act, a doctorate, or a Master of Science Degree in Clinical Biochemistry is a speciality that may be registered, subject to the compliance with these regulations, in the name of the Clinical Biochemist.

(2) The standard of education, tuition and training provided by an educational institution in respect of a post graduate qualification relating to a speciality prescribed by subregulation (1) must be

adequate and satisfactory, in the opinion of the council.

(3) The qualification referred to in subregulation (2) must entitle the applicant to registration in the country where he or she obtained that qualification, as a specialist clinical biochemist in the speciality to which that qualification relates."

(c) "Conditions applicable to the practising of a speciality

10 A specialised biochemist –

(a) must confine his or her practice to the speciality registered in his or her name;

(b) ...

(c) may examine and conduct tests on a patient referred to him or her by that medical practitioner in the referral.

(d) Must report to the medical practitioner who referred the patient to him or her as prescribed by paragraph (c), the result of the tests conducted by him or her on that patient; and

(e) ..."

(oo) In regard to the first plaintiff's practice he practised only for approximately one month at the Institute of Clinical Biochemistry which was located at the Katutura Medical Centre. The signage in respect of the Institute was the following:

(pp)

(qq) "INSTITUTE OF CLINICAL BIOCHEMISTRY
Dr Rihupisa Kandando MSc (Leeds) Ph.D (Surrey)
CONSULTATION & MEDICAL LABORATORY SERVICES."

(rr)

(ss) The first plaintiff testified that he did see clients during this time, and it is common cause that this was done without any referral from a medical practitioner. He testified that patients came to him for information on their status, for monitoring especially when already diagnosed by a medical practitioner and also for prognosis, and he also informed his patients that he was not a medical doctor and he referred the patients he tested directly to a doctor because he only did "tentative diagnosis". He stated that the only difference between a clinical biochemist and a pathologist was that the former was scientific in nature and the latter medical in nature, requiring qualification as a medical practitioner.

(tt)

(uu) The first plaintiff submitted his first claim to the second defendant on 23 July 2009, but the claim was not honoured. A couple of other claims were also not honoured by the second defendant. The first plaintiff then attempted to determine from the officials of the first defendant why these claims were not being honoured. On 12 August 2009, the first plaintiff met with the second defendant to discuss the issue. The second defendant maintained the defendants' stance that the plaintiff's claims would not be honoured. During the testimony of the second defendant, which I deal with in more detail later, it was made clear that the first defendant was entitled to its own exclusion criteria, that the benchmark tariffs published by NAMAF were in any event only guidelines and further that none of the contracting private medical aids were bound by the tariffs, nor bound to honour claims. In this regard, the defendants relied on paragraph 2.3 of the second defendant's own Rules which provide in salient part as follows:

> "Unless the Board determines otherwise, direct or indirect costs in respect of the following treatment are excluded from benefits
>
> 2.1 ...
>
> 2.2 ...

2.3 Routine physical examinations, procedures and treatment, any procedure of a purely diagnostic nature, any other examination where there is no objective indication of impairment in normal health or no actual presumed illness exists, and laboratory diagnosis or x-ray examinations, except in the course of a disability establishment by prior call or attendance of a medical practitioner."

(vv) As a result of the second defendant's refusal to honour these claims, the first plaintiff launched an urgent application on 21 September 2009 for certain interdictory relief against the first defendant and in particular, to declare clause 2.3 of the exclusion benefit quoted above as invalid. This application was struck from the roll for lack of urgency.

(ww) On 1 October 2009 the first defendant laid a complaint of misconduct against the first plaintiff to NAMAF as well as to the Medical and Dental Council of Namibia.

(xx) The basis of the complaint related to certain allegations made by the first plaintiff in his founding papers in support of the urgent application *inter alia* to the effect that he is "a specialist in the field of biochemistry" (which is also known as chemical pathology), that he is also entitled to "do consultations that can also serve as a basis for tentative diagnosis, otherwise than would have been established by a general medical practitioner" and that "biochemical tests in clinical medicine are not only used for diagnosis but are also used for screening, monitoring and prognosis". The first plaintiff also alleged that "the relevant laws and statutory provisions ... clearly repudiate the first and second respondents' claims that establishment of a disability or illness is the exclusive domain of general medical practitioners".

(yy)

(zz) A request was made by the defendants to the Medical and Dental Council to investigate the first plaintiff in light of the fact that the second defendant held the view that it was evident by virtue of the allegations referred to above, that the first plaintiff possessed no qualifications which entitled him to use the title "doctor", thus resulting in the public in general as well as the medical aid funds being wasted, and that his qualification only authorised the first plaintiff

to work in an accredited laboratory on the level of clinical biochemistry. In the meantime, the defendants went ahead and published the notice.

(aaa)

(bbb) On 6 October 2009, the second defendant also transmitted correspondence to NAMFISA alleging that the first plaintiff was practising outside his scope of practice as a medical doctor, that he claimed for consultation frees as a medical doctor and that his laboratory had not been benchmarked and approved by NAMAF.

(ccc) On 19 October 2009 (after the notice was published), the Medical and Dental Council informed the defendants that the matter would be investigated and that they would be informed of the outcome of the investigation once it was concluded. On 21 October 2009, the Medical and Dental Council requested the first plaintiff to comment on the allegations against him. Upon the first plaintiff's reply, the matter was referred to the preliminary investigation committee. After a request for clarification from NAMAF by the Committee, NAMAF confirmed that the decision made in 2005 was still applicable and that clinical biochemists could claim at the tariffs of clinical pathologists.

(ddd) NAMAF requested a legal opinion on the matter and apparently also investigated the premises of the second plaintiff. The legal opinion was provided on 24 November 2009. On 21 May 2010, NAMAF wrote a letter to the second defendant in which it was stated that the first plaintiff was still in good standing with the Medical and Dental Council, was still registered as a clinical biochemist in the category chemical biology and that no Namibian Regulations existed at the time relating to the scope and practice of a clinical biochemist amongst others.

(eee) On 11 April 2011, after investigating the complaint, the preliminary investigation committee presented its findings to the Medical and Dental Council to the effect that it could not determine whether the first plaintiff acted beyond his scope of practice since there were no regulations in place relating to his scope of practice at the time. The Committee further recommended that the case against the first plaintiff be closed. The Medical and Dental Council

communicated these findings to the defendants.

(fff) These are in essence the events which led to the institution of the action against the defendants.

(ggg) The first plaintiff reiterated in his evidence that the contents of the notice were false, that he never held himself out to be or practiced as a medical doctor, and that he was practising as a clinical biochemist. He confirmed that he indeed provided pathology services, but that pathology was used as a generic term involving clinical biochemistry which is also a speciality or discipline in its own right. He testified that he never attempted to claim as a general practitioner, but claimed on the tariffs allowed for a pathologist as permitted by NAMAF and that he was authorised to claim from medical aid funds on that basis. He denied that he ever used the title medical doctor. He further testified that much was made in cross-examination of the legal requirements that various disciplines must be registered under, in particular the regulations promulgated under the repealed Act, as well as the Regulations relating in particular to the field and scope of practice of a clinical biochemist published on 16 June 2010. He confirmed the allegations that he made in his founding papers in the urgent application mentioned above. However, he pointed out that the offending notice was published before those regulations were published.

(hhh) It is apposite at this stage to set out the law of defamation in Namibia.

(iii) Whether the defendants' notice is defamatory falls to be determined objectively. The court will consider the contents of the notice, draw its own inference about the meaning and effect thereof, and then assess whether it tends to lower the first plaintiff in the estimation of right thinking members of society generally. The standard from which the enquiry should depart is the ordinary reader with no legal training or other discipline, variously described as a "reasonable", "right thinking" individual of "average education" and "normal intelligence". It is through the eyes of such a person who is not "super-critical" or possessed of a "morbid or suspicious mind" that the court must read the statement. [3]

[3] Afshani v Vaatz and Another 2006 (1) NR 35 (HC) at 45 para [22] and the authorities collected

(jjj) The plaintiff must establish that the defendant published a defamatory statement concerning him. A rebuttable presumption then arises that the publication of the statement was unlawful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. The list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail. [4]

(kkk) The presumption of unlawfulness and *animus injuriandi* which arise once the plaintiff establishes the defamatory content of the defendants' statement casts a full onus on the defendants which requires rebuttal on a balance of probabilities to prove the existence of one or more of the defences raised. [5]

(lll) As regards the defence of truth and public benefit, it is well established that it is lawful to publish a defamatory statement, provided that publication is for the public benefit. [6] When it comes to the issue of truth, all that is required is that the defendant must prove that the defamatory statement or general charge is substantially true. This does not require the proof of each and every fact relied upon. [7] To that end, the defendant must present facts which support the allegations of dishonesty, criminal conduct and the fact that the first plaintiff was not properly qualified to practice as he did.

(mmm) The question whether a publication is for the public benefit depends on the subject matter of the statement and the time, manner and

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and applied there.

[4] Trustco Group International Ltd and Others v Shikongo 2010 (2) NR 377 (SC) at 388 para [24].

[5] Afshani v Vaatz *supra* at 49 para [31]; Shikongo v Trustco Group International Ltd and Others 2009 (1) NR 363 (HC) at 384 para [35]; Valindi v Valindi and Another 2009 (2) NR 504 (HC) at 522 para [34].

[6] Coetzee v Central News Agency 1953 (1) SA 449 (W) at 452F-H.

[7] LAWSA, 2nd Ed, Vol 7 para 247 at 245; Universal Church of the Kingdom of God v Namzin Newspapers (Pty) Ltd 2009 (1) NR 1 (HC) at 76 para [34]; Johnson v Rand Daily Mails 1928 AD 190 at 205-206.

occasion of the publication. [8] The following was stated by Beadle CJ in the case of Mohamed v Kassim[9]:

> "...the public benefit flows from making the misbehaviour of the plaintiff 'known' to the public. It seems to follow from this that that which has been said must be something of which the public are ignorant. It does not seem correct to speak of 'informing' people of something of which they are already aware. The public interest lies in telling the public something of which they are ignorant, but something which is in their interest to know."

It follows from the aforesaid that "public benefit" means that some advantage must be conveyed to the public by the communication of the information.[10]

(nnn) In this regard it is to be noted that false allegations can so very quickly and completely destroy a good reputation and that a reputation tarnished by libel can seldom regain its former lustre. There can be no justification for the publication of untruths.[11]

(ooo) As regards the defence of qualified privilege, in particular the defendants' contention that the statements were published in the discharge of a duty, Corbett JA explained this defence in Borgin v De Villiers[12] as follows:

> "The particular category of privilege which . . . would apply in this case would be that which arises when a statement is published by one person in the discharge of a duty or the protection of a legitimate interest to another person who has a similar duty or interest to receive it. . . . The test is an objective one. The Court must judge the situation by the standard of the ordinary reasonable man, having regard to the relationship of the parties and the surrounding circumstances. The question is did the circumstances in the eyes of a reasonable man create a duty or interest which entitled the party sued to speak in the way in which he did? And in answering this question the Court is guided by the criterion as to whether

[8] Zillie v Johnson 1984 (2) SA 185 (WLD).

[9] 1973 (2) SA 1 (RAD).

[10] Shikongo v Trustco Group International Ltd and Others 2009 (1) NR 363 (HC) at 390 para [55].

[11] National Media Ltd and Others v Bogoshi *supra* at 1209G-H and 1212J.

[12] 1980 (3) SA 556 (A) at 577D-F.

public policy justifies the publication and requires that it be found to be a lawful one."

(ppp)

(qqq) Thus, in determining whether the occasion may be so regarded, the court will objectively (with the standard of the reasonable person in mind) consider all the circumstances under which the statement was made, such as the contents thereof, the occasion at which it was made and the relationship of the parties. The courts in this regard have recognised that the defence applies where the statement has been made (a) in the discharge of a legal, social or moral duty to persons having a reciprocal duty or interest to receive it, and (b) in the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive it, and the statement was relevant to the matter under discussion on that occasion. These grounds, founded upon public policy, are for that reason not limited and may be extended whenever the dictates of public and legal policy so require, the boundaries of which fall to be determined by applying the general criterion of reasonableness. [13]

(rrr) At paragraph 34 of the Afshani decision, Maritz J (as he then was), also stated that for the defence to succeed, the defendant must show on a balance of probabilities that the defamatory statement was reasonably germane and relevant to the privileged occasion. In this regard the court quoted with approval the discussion of this requirement by Smallberger JA in Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others[14] as follows:

"[22] No attempt has been made to define the concept of relevance, or to formulate a universally applicable test for relevance, within the context of qualified privilege. This is not surprising as relevance, in this sense, is not capable of precise definition. Relevance in relation to the publication of defamatory matter has variously been described as "relevant to the purpose of the occasion" (Molepo v Achterberg 1943 AD 85 at 97); "in some measure relevant to the purpose of the occasion" (Basner v

[13] Afshani v Vaatz *supra* 49-50 para [32] and [33] and the authorities collected there where Maritz J (as he then) provided an insightful exposition of the law relating to the defence of qualified privilege.

[14] 2001 (2) SA 242 (SCA) at para [22] to [26].

Trigger (supra at 97) - see also Joubert v Venter (supra at 705H) and Zwiegelaar v Botha 1989 (3) SA 351 (C) at 358E); "germane to the matter" being dealt with (May v Udwin 1981 (1) SA 1 (A) at 11C-D); "relevant ... tot die onderwerp onder bespreking" ["relevant to the subject under discussion"] (Herselman NO v Botha 1994 (1) SA 28 (A) at 35G-H). In essence they are all saying much the same thing; words such as "relevant", "germane" and "pertinent" (another word used in this context) have the same basic content. To the extent that the above concepts differ, they do so in degree rather than substance.

[23] ...

[24] While the public interest undoubtedly requires that the approach to relevance in relation to privilege should not be too strict or rigid lest witnesses or deponents to affidavits be unduly restricted or fettered in their testimony or depositions, thereby detracting from their right to freedom of speech (cf Zwiegelaar v Botha (supra at 358E-F)), too liberal or wide an approach to relevance could effectively undermine or negate a defamed person's right to the protection of his or her dignity. An allied consideration is that a more generous approach to relevance may be justified in the case of a witness who makes a defamatory statement while giving viva voce evidence than where that is done by a deponent to an affidavit, bearing in mind that the latter situation would normally allow opportunity for reflection and advice (cf Zwiegelaar v Botha (supra at 357F-H)).

[25] Relevance in the context of qualified privilege is not to be equated to relevance in the strict evidential sense. The law of evidence distinguishes between evidence which is logically relevant and legally relevant. What is logically relevant may not necessarily be legally relevant because it may be too remote to have any probative or persuasive value; in other words, it may not be sufficiently relevant for the law's purposes. What may be relevant and admissible in the strict evidential sense may not necessarily be regarded as relevant in the present context and vice versa, for there are different considerations which apply to each situation.

[26] Ultimately, the concept of relevance under discussion is, in my view,

> essentially a matter of reason and common sense, having its foundation in the facts, circumstances and principles governing each particular case. The words of Schreiner JA in R v Matthews and Others 1960 (1) SA 752 (A) at 758A that "(r)elevancy is based upon a blend of logic and experience lying outside the law" have particular application in a matter such as the present, even though they were said in the context of evidential relevance (cf Hoffmann and Zeffertt The South African Law of Evidence 4 ed at 21). The assessment of whether a defamatory statement was relevant to the occasion to which it relates is therefore essentially a value judgment in respect of which there are guiding principles but which is not governed by hard and fast rules. And in arriving at that judgment due weight must be given to all matters which can properly be regarded as bearing upon it."

(sss) For the defendant to establish the privileged occasion and relevance, it need not show that the statement was correct in all respects. [15]

(ttt) The learned author RG McKerron in The Law of Delict[16] also dealt with this aspect under the heading "Forfeiture of a Qualified Privilege". He postulated that privilege may also be forfeited by being exceeded and that privilege is exceeded if the publication is in excess of what is reasonably required. In a footnote to this statement the learned author stated:

> "The expression "excess of privilege", is sometimes used, not as here, in the sense of excessive publication, but in the sense of the improper and malicious use of a privileged occasion. The use of this expression in this sense tends to confusion."

(uuu) A plaintiff may only defeat the defence if he pleads and proves affirmatively that the defendant published the statement with an improper motive or malice, or that the defendant abused or exceeded the ambit of qualified privilege. The plaintiffs can do so by proving that the defendant's motive in making the communication was not a sense of duty or the desire to protect an

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[15] Afshani v Vaatz *supra* at para [37] and the authorities collected there.

[16] 7th ed at 199.

interest but some improper motive. [17]

(vvv) This issue should be raised by the plaintiff in a replication[18], so that the defendants are placed in a position to meet such a case. It is common cause that the plaintiffs did not replicate to the defendant's plea of qualified privilege, instead plaintiffs took issue with it in cross-examination and argument.

(www)

(xxx) As regards the defence of freedom of speech enshrined in Article 21(1) of the Constitution, Maritz J in the Afshani case at paragraphs 28-30 discussed the relative constitutional values of the right to dignity and the right to freedom of speech.

> "[28] A similar challenge to the constitutionality of the law of defamation under the Namibian Constitution is less likely. Article 21(2) does not only allow in general terms for permissible restrictions to be placed on the right to freedom of speech and expression entrenched in art 21(1)(a), but does so with express reference to, among others, the law relating to defamation. By the express inclusion thereof, the founders of the Constitution recognised that the right to freedom of speech and expression must yield to the rights of an individual which the law of defamation is seeking to protect - in particular the right to dignity and privacy. Article 8(1) demands respect for human dignity and entrenches that right in peremptory language: 'The dignity of all persons shall be inviolable.' One only has to refer to the articulation of this value in the first paragraph of the Preamble to the Constitution to understand why human dignity is a core value, not only entrenched as a fundamental right and freedom in ch 3, but also permeating all other values reflected therein.

[17] Afshani v Vaatz *supra* at para [41].

[18] Mydoo and Others v Vengtas 1965 (1) SA (a) at 21A-C; Afshani v Vaatz *supra* at para [42].

[29] In Khumalo's case supra O'Regan J discussed the constitutional value of human dignity under the South African Constitution. Referring to s 1 of the SA Constitution and Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at para [35], she concludes that it is a 'foundational value' and goes on to deal with it in the context of the actio injuriarum (at 418, para [27]):

> 'The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.'

These remarks, in my view, also hold true under our Constitution.

[30] Article 21(2) of the Constitution therefore endeavours to strike a balance between the right to freedom of speech and the protection afforded by the law of defamation to personal dignity by defining the permissible scope of restrictions to be placed on the free exercise of that right. The restriction must be reasonable, necessary in a democratic society and 'required in the interests of ... defamation'. It is in this context where the element of 'unlawfulness' in the delict of defamation fulfils a pivotal role. This was recognised by Corbett CJ in Argus Printing and Publishing Co Ltd and Others v Esselen's Estate 1994 (2) SA 1 (A) at 25B-E, where he said:

> 'The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word "unlawfully" for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory.'"

(yyy) In Trustco *supra* the court dealt with the provisions of Article 21(2) in the context of the media. At paragraph [46] of the judgment it was held that Article 21(2) expressly contemplates that the law of defamation may constitute a permissible limitation of the right to freedom of speech and expression and freedom of the press if it imposes reasonable restrictions on the exercise of the rights that are necessary in a democratic society.

(zzz) It is settled that the constitutional right to freedom of speech must be balanced with the constitutional right to dignity. This principle applies not only to the media, but should apply to all instances where a defamatory statement is published.

(aaaa) The defendants' counsel submitted that the defence of a reasonable or responsible publication of information in the public interest is an extension of the defendant's constitutional right to freedom of speech and expression. In this regard, it was submitted that in dealing with the issue of responsible communication through the media, the Supreme Court in the Trustco[19] case held that such a defence would give credence to the constitutional right of freedom of speech and its application and acceptance as law in the context of Article 21 of the Constitution and would also not place the constitutional precept of human dignity at risk.

(bbbb) Counsel for the defendants further submitted that the Supreme Court left

[19] At 395G-H.

open the question whether the defence of reasonable communication of information that is in the public interest is only confined to media defendants and that it was pointed out (at 396D-E) that in certain jurisdictions such as Canada the defence is not limited to media defendants.

(cccc) It was thus submitted that this case would be an example as to why the aforesaid defence should not be restricted to media defendants only, and that for the defendants to be successful in the defence in terms of the provisions of Article 21 of the Constitution, the defendants need not necessarily show that the notice was true but that it was important in the public interest that it be published, and to that end, the notice was in all the circumstances reasonable and it was important for the defendants to publish it.

(dddd) Furthermore, it was submitted that in the context of this case, the factors to be taken into account by the court to determine the reasonableness of the publication of the notice include the following:

(a) That protection was afforded only to material in which the public had an interest as opposed to material which is interesting to the public;

(b) That regard should be had to the tone in which the article is written;

(c) That regard should be had to the nature of the information upon which the allegations were based, the reliability of the source and the steps taken to verify the truth; and

(d) In line with the Bogoshi decision the defendant would bear the onus to show the reasonableness of the publication of the article concerned, and that proof of reasonableness would inevitably be proof of lack of negligence.

(eeee) I see no reason why in the appropriate case the aforesaid defence should be restricted to media defendants only. It is well established that the

standard defences to defamation are not a closed or exhaustive list, and that the defences should be developed in a particular case. The notice was published in one of the most widely distributed newspapers in Namibia and it stands to reason that a defendant who is not part of the media should in appropriate circumstances be permitted to raise the defence of reasonable publication as an alternative. I will thus consider this defence based on the relevant principles set out in the Bogoshi case and approved in the Trustco case.

(ffff) The defendants admitted that the notice was intended to be understood by readers of the newspaper and the first plaintiff's customers to mean that, insofar as the first plaintiff was practising as a medical practitioner (doctor), he was practising under false pretences, was dishonest, was not qualified to practise as he did and was committing a criminal act (emphasis supplied). Clearly *ex facie* the notice, it is indeed defamatory of the first plaintiff. There are serous allegations of dishonesty and criminal behaviour imputed to the first plaintiff. It is therefore necessary to establish whether the defences raised by the defendants have been made out or rendered the publication of the notice justifiable on a balance of probability, and whether they have put up facts which could dispel the wrongfulness. [20]

(gggg)

(hhhh) As regards the defence of truth and public benefit I am mindful of the following facts. The first plaintiff was registered as a clinical biochemist by the Registrar for the Medical and Dental Council in terms of the Act. He was permitted to charge the tariffs that pathologists could charge. There were no regulations applicable to the scope of practice of a clinical biochemist until 2010, after the notice was published. The first plaintiff was the first to be registered as such. The Medical and Dental Council sought guidance from its "sister" organisation before registering the first plaintiff. The defendants laid a complaint along the lines of the notice to the Medical and Dental Council as well as NAMAF. NAMFISA was also pulled into the fray. The Council found the first plaintiff not guilty on the basis that there were no regulations regulating the first plaintiff's scope of practice at the time. The notice was published before the Council made its finding.

[20] National Media Ltd v Bogoshi *supra* at 1015F-I.

(iiii) The first plaintiff is the holder of a Phd, and is thus entitled to call himself Doctor, though he is not a medical doctor. The signage of the first plaintiff's practice clearly indicates Phd and not Dr Med. One of the witnesses for the defendants, Beth Clayton, said that she formed the opinion that the first plaintiff was practising as a medical doctor and acting dishonestly whilst committing a criminal offence due to the codes used by the first plaintiff in his claims to the medical aid funds. Yet, she conceded that by 17 September 2009 she was aware that the first plaintiff was allowed to use the tariff codes by NAMAF and that he was not practising as a medical doctor. The second defendant on the other hand asserted that the title "Dr" was further proof that Dr Kandando was practising as a medical doctor or confused the public to believe that he was a medical doctor.

(jjjj) The second defendant also conceded in his testimony that he was aware by 12 August 2009, that the first plaintiff was permitted by NAMAF to claim according to the tariffs of clinical pathologists (the second defendant as a member of the affordability committee of NAMAF was part of that decision). The second defendant specifically referred to the 0101 code used for first consultations as indicating that the first plaintiff was acting outside his scope of practice. It would appear, bearing in mind that the first plaintiff was licensed to operate a consulting room, based on the permission by NAMAF, that that specific code was the code which the plaintiff was permitted to use. This is also borne out by the correspondence by NAMAF provided to the defendants after the complaint was made.

(kkkk) The second defendant also admitted that the heading of the notice was his own conclusion and opinion and not based on the affidavit of the first plaintiff used in the urgent application. It would appear from the papers used in the urgent application (the merits of which were not decided) that the first plaintiff never used the phrase "attentive diagnosis". The defendants, despite informing the public that the first plaintiff was committing a criminal act, never laid criminal charges against him. The second defendant also testified that the intention was to inform members of the first defendant that it was not honouring claims from

the plaintiffs (emphasis supplied). It is clear that the notice went far beyond that intention. The second defendant also conceded that the notice was not the ideal one and that somebody else would write the notice quite differently. The first defendant also received only two claims from the plaintiffs, and no further claims thereafter.

(llll) The defendants also called Dr Roux, a clinical pathologist who testified that a pathologist needs a basic medical degree and must thereafter do an internship, and that he or she is then generally first required to practice as a general practitioner for 2 to 3 years before being accepted at a university to specialise in pathology. In the case of clinical pathology the period of specialization is 5 years. According to Dr Roux a clinical biochemist is a medical scientist but not on par with the pathologist. Further she testified that the first plaintiff can in his field interpret the test results to help with the diagnosis of disease but that he cannot plan appropriate treatment. The first plaintiff did not plan treatment. She also testified that for the first plaintiff to conduct his practice, he needs a medical laboratory and that the first plaintiff is not qualified as a specialist in the field of biochemistry given that his speciality is focussed on just chemistry. In addition she testified that the signage at the second plaintiff's practice indicated that the first plaintiff had a doctorate in biochemistry and that he conducts a medical laboratory. According to Dr Roux this was misleading. This is for the court to decide.

(mmmm) It cannot be disputed on the first plaintiff's evidence as well as the concessions made by the defendants and their witnesses that the first plaintiff is not a medical doctor and was not practising or attempting to practice as a medical doctor. The first plaintiff was exploiting a lacuna in the Act due to the fact that the scope of practice of a clinical biochemist had not yet been prescribed and because he was registered as a clinical biochemist and permitted to charge for services rendered on the tariffs of a clinical pathologist.

(nnnn)

(oooo) Taking the above into consideration and the fact that the Medical and Dental Council found him not guilty of the same offences which were published in the notice, I cannot say that it is true that the first plaintiff was practising under

false pretences, practising as a medical doctor, consulting on the basis of attentive diagnosis, that he was not entitled to use the title "medical doctor" because he never used it and his signage does not indicate that he was using the title medical doctor. The only truth in the notice was that the first plaintiff's rules did not provide for payment for the services rendered by the first plaintiff. In this instance, I cannot say that the publication was substantially true either. I also do not agree that the publication of the notice was to the benefit of the first plaintiff's members, based on the second defendant's concession as to the intention behind the notice. The first defendant was perfectly within its rights to refuse to honour claims for payment by the plaintiffs due to its own rules. The first defendant would also have been perfectly entitled to publish a notice to its members stating that it would not honour any claims of the plaintiffs, either due to the fact that its own rules did not prescribe same, or due to the fact that the defendants had laid a complaint against the plaintiffs to the Medical and Dental Council which complaints were in the process of being investigated. This, would have been entirely, if not substantially true and would have been in the public benefit or more importantly to the benefit of the first defendant's members. The manner in which the notice was published does not qualify as either truth, substantial truth or public benefit. On that basis, the first defence fails.

(pppp) As regards the second defence of qualified privilege, it is borne in mind that the law recognises the need, in the public interest, for a particular recipient to see frank and uninhibited communication of particular information from a particular source. I further bear in mind that in determining whether the occasion may be so regarded a court must objectively consider all the circumstances under which the statement was made, such as the contents thereof, the occasion at which it was made and the relationship of the parties.

(qqqq) As pointed out earlier the second defendant itself conceded that the notice was published for the benefit of the first defendant's members and to inform them that they were not honouring the claims from plaintiffs. I also point out and reiterate that the second defendant confirmed that the notice was not the ideal one. It would have been a proper discharge of the second defendant's duty to its members who had a reciprocal interest to receive the information, if

the notice was restricted to the main issue being that the first defendant would not be honouring claims of the first plaintiff pending due to its rules and/or finalisation of an investigation of a complaint against him to the Medical and Dental Council. That was the defendants' focus. The defendants' focus was not on establishing whether or not at the time and in light of the complaint the first plaintiff was operating under false pretences and was using the title "medical doctor" when the second defendant was aware that the first plaintiff held a PhD. That is why the complaint was made to the Medical and Dental Council. The circumstances under which this statement was made was subsequent to the meeting the first plaintiff had with the second defendant, the urgent application and the complaint lodged with the Medical and Dental Council which had the authority under the Act to determine whether or not the first plaintiff was practising in the manner set out in the notice. I cannot say in these circumstances that the occasion was privileged to the extent published in the notice. The privilege was exceeded because the statement was not reasonably germane and not relevant to the privileged occasion (emphasis supplied). Taking into account all the circumstances, this defence also fails.

(rrrr) As regards the issue of reasonable publication the court finds that for the same reasons as above this statement was not justifiable. In fact, considering that a complaint was made by the defendants, and the notice was published before the entity that had the authority to determine whether the first plaintiff was practising as a medical doctor had made its decision, and further that the first plaintiff was found not guilty, that the publication smacked of negligence and was not reasonable. The contents of this notice was simply "overkill" and were not in any way justifiable nor can it be called freedom of speech to the extent that this freedom in the circumstances overrode the first plaintiff's right to dignity. On that basis this defence also fails.

(ssss) It now remains for me to consider the question of damages.

(tttt) It is trite in defamation suits that the plaintiff must prove, on a balance of probability that he has suffered damage, the extent of such damage and what amount he should be awarded in respect thereof. In addition and insofar as the

second plaintiff is claiming patrimonial loss in the form of loss of income, it must prove that such loss is directly attributable to the defamation in question.

(uuuu) In the claim for *injuiriae* and in determining the award of damages, the court must place a monetary value on the damage caused to a person's reputation *ex aequo et bono*. In conducting a proper assessment the court usually determines what is reasonable and fair and in doing so the court has regard to the circumstances of the case and considers a variety of factors. These factors include:

(a) the character and status of the plaintiff;

(b) the nature of the words used;

(c) the effect that the nature of the article and the words are calculated to have upon him;

(d) the extent of the publication. [21]

(vvvv)

(wwww) Even where the defence of truth and public interest does not succeed, the fact that the statements were wholly or partially true will serve to reduce the quantum of damages. [22] The courts will also have regard to other awards for damages made for defamation. [23]

(xxxx) The highest award made in Namibia to date is the sum of N$100,000.00 awarded in the Trustco case. This case involved clear defamatory statements of a high ranking political office bearer and the presence of aggravating circumstances. In this case the Supreme Court reduced the original award in the High Court of N$175,000.00 to N$100,000.00.

(yyyy)

(zzzz) Other recent awards made in the Namibian High Court was the amount of N$100,000.00 in the case of Shidute and another v DDJ Investments

[21] Buthelezi v Poorter and Others 1975(4) SA 608 (W) at 614 to 616.

[22] Visser and Potgieter's Law of Damages 3rd ed at 526.

[23] Trustco Group Internaional Ltd v Shikongo *supra* at 403 H-I.

Holdings CC and Another [24] which pertained to allegations in a coastal newspaper that the plaintiff paid her water and electricity accounts late despite the fact that this was untrue, and the defendants refused to acknowledge it. The amount of N$50,000.00 was awarded in the case of Shifeta v Munamava and Others [25] pertaining to two articles appearing in a local weekly in respect of which the plaintiff was falsely implicated in the disappearance of funds belonging to the National Youth Council. In Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd t/a The Southern Times [26] which pertained to a front page article brandishing the Church as a satanic sect the court awarded N$60,000.00 in damages.

(aaaaa)

(bbbbb) I am mindful of the fact that the first plaintiff, although not well known, was quite well known as part of the political struggle. He is a father and a husband with children. The notice was particularly harsh towards the first plaintiff. There is no escaping the fact that this notice was published before a complaint was fully investigated and that this notice was not only published on legal advice. I do take into consideration the concession by the second defendant that the notice may have gone too far. But no apology was published and the notice was not withdrawn or in any way modified. Instead, approximately 13 court days were devoted to the hearing of this matter. It is also to be noted that the first plaintiff was practising very close to the line with his opportunistic interpretation of what he was entitled to do. His own behaviour must also be considered. Having had regard to the relevant principles as well as the cases awarded in previous matters, I award the first plaintiff the amount of N$40,000.00 for damages to his reputation and dignity.

(ccccc) As regards the first plaintiff's claim for patrimonial loss, I agree with counsel for the defendants that apart from the claim for chemical reagents, which cannot be claimed because the second plaintiff was never registered as a laboratory and could thus not operate same or purchase the reagents, all the alleged losses are expenses that would have been incurred by the first plaintiff

[24] Unreported judgment of the High Court under Case No P I 2275/2006.

[25] Unreported judgment of the High Court under Case No P I 2106/2006.

[26] 2009(1) NR 65 HC.

in any event and quite irrespective of the publication of the notice. Furthermore, these expenses would have been paid by the conducting of the practice of the second plaintiff at the Institute of Clinical Biochemistry. I further agree with the defendants' counsel that the allegation that the remaining expenses were incurred as a result of the alleged defamation is unfounded. In this regard the first plaintiff's claim for patrimonial loss is dismissed in its entirety. As regards the question of costs, as costs follow the event, very little time was spent on this aspect, and the principles involved in determining whether this part of the plaintiffs' claim could succeed were not complicated.

(ddddd)

(eeeee) As regards the plaintiffs' second claim, both parties called experts. Unfortunately, the expert of the plaintiffs was a disappointingly poor witness. His expertise was not called into question, however, this was unable to provide a single basis upon which his calculations were made and as such the plaintiffs' counsel was correct in conceding that the court should not consider his evidence. I am also mindful of the fact that the regulations that governed the scope of practice of the clinical biochemist were published in 2010, thus from 16 June 2010, it would have been clear that the first plaintiff would not have been able to practice as a biochemist without a proper medical laboratory and without a referral from a medical practitioner. As a result his claim for loss of profit in my view could be considered after 16 June 2010. No cogent evidence was presented as to how many doctors would have referred patients to the plaintiffs.

(fffff) It was also clear from the evidence and the plaintiffs' supporting documentation that the number of patients who made use of the plaintiffs' services dwindled during the period that the second plaintiff was operative. For the month of June 2009 the second plaintiff had 5 patients. For the month of July 2009 the second plaintiff had 31 patients, for August 2009 the second plaintiff had 22 patients, for September 2009 the second plaintiff had 8 patients and for the month of October 2009 - 2 patients.

(ggggg)

(hhhhh) I am inclined to agree with the contention made by counsel appearing behalf of the defendants that the reasons for the decline lay in the fact that the patients realised that the plaintiffs' services failed to add value. The first plaintiff would have been unable to advise on what treatment to follow after a particular result, or what medication to prescribe. He did not advise nor could he prescribe any medication in any event. Thus his services would serve no useful purpose over time, taking into consideration that as at June 2010 those services would have been provided via referral from a medical practitioner. These patients would thus be obliged to seek help from a medical practitioner. It is also clear that the second plaintiff was not entitled to conduct a medical laboratory and any claim for any form of service performed in the laboratory cannot be allowed.

(iiiii) It was clear from the evidence that the plaintiffs were at the inception of the practice already in a precarious financial circumstances and were throughout the existence of the practice in dire financial straits and unable to meet expenses. The second plaintiff even had to borrow money in order to establish the practice. The investment that the first plaintiff had with Bank Windhoek had to be put up as collateral security for the second plaintiff's debt. As at 1 June 2009 the second plaintiff was already in arrears with its rental in an amount of N$5,819.59 which arrears increased to N$13,678.27 as at 30 September 2009. During the period that the practice was actually operative, from 27 June to 10 October 2009, the second plaintiff only earned N$9,542.80 which did not even cover the rental of the premises. I do not believe that the plaintiffs' practice had any hope of survival and the inescapable conclusion is that the plaintiffs failed to prove the causal link between the alleged defamation and the loss of income claimed. As a result the claim for loss of income is dismissed. As costs follow the event there is no reason why this principle should not be applied to the facts of this case subject to what I have stated in regard to the first plaintiff's claim for special damages. In the result I make the following order:

(a) The first and second defendants are ordered to pay the amount of

N$40,000.00 to the first plaintiff in his personal capacity, jointly and severally, the one paying the other one to be absolved, for damage to his reputation and dignity as a result of the defamation.

(b) The defendants are ordered to pay the first plaintiff's costs in respect of the defamation.

(c) The first plaintiff's claim for patrimonial loss in the amount of N$153,732.00 is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

(d) The second plaintiff's claim for loss of income in the amount of N$3,5 million is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

PLAINTIFFS:	PU Kauta Of Dr Weder, Kauta & Hoveka Inc, Windhoek
DEFENDANTS:	H Karstens SC (with him JAN Strydom) Instructed by MB de Klerk & Associates, Windhoek