REPUBLIC OF NAMIBIA REPORTABLE

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**

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) [2012] NAHCMD 221 (23 July 2014)*

Coram: Smuts, J

Heard: 5-16 November 2012,
27-30 May 2013, 5 July 2013

Delivered: 23 July 2014

Flynote: A union leader had written a letter to the then Chancellor of the University of Namibia calling for an inquiry into alleged irregularities and corrupt conduct involving the Vice-Chancellor and members of the top management of the university. The letter came into the hands of the *Informante*, a weekly newspaper which prominently published the allegations together certain further embellishments of their own upon them. The Vice-Chancellor and members of UNAM's top management instituted defamation claims against the union leader and the reporter, editor and publisher of the newspaper. The court upheld a defence of qualified privilege in respect of the claim against the union leader. The media defendants raised defences of truth and public interest, fair comment based upon essentially time facts, reasonable publication and proposed that the defence of qualified privilege be extended as a general defence to the media in matters of public interest. The court rejected this proposal and confirmed the position under common law that such a defence would only be open to the media in rare and appropriate cases and that the instant did not meet the requisites for the defence. The court also found that the other defences raised by the media defendants were not established by them and awarded the plaintiffs damages.

ORDER

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(1) The plaintiffs' claim against the first defendant is dismissed with costs;

(2) Judgment is granted against the second, third and fourth defendants jointly and severally in the amount of N$120 000 in favour of the second plaintiff and N$40 000 in favour of each of the fourth, sixth and eighth plaintiffs respectively;

(3) The second, third and fourth defendants must pay interest on the amounts set out in paragraph (2) of this order jointly and severally at the rate of 20% per annum from the date of this judgment to the date of payment.

(4) The first defendant's cost order against the plaintiffs is to include the costs of one instructed and one instructing counsel.

(5) The second, third and fourth defendants must pay the second, fourth, sixth and eighth plaintiffs' costs jointly and severally, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

SMUTS, J

(a) The individual plaintiffs in these defamation proceedings are members of the top management of the University of Namibia (UNAM). They pursue two claims in this trial. Firstly, they claim that they were defamed by the first defendant, Mr E. Kaaronda, the then Secretary-General of the National Union of Namibia Workers, (NUNW) an umbrella organisation to which various unions are affiliated, in a letter he had written to UNAM's then Chancellor, the founding President of Namibia, in February 2010.

(b) The second claim is against the second, third and fourth defendants. They are respectively the publisher, the then editor and reporter of the *Informante* weekly newspaper which published an article reporting upon Mr Kaaronda's letter in its issue of 11-17 February 2010. I refer to them as the media defendants.

(c)

<u>The pleadings</u>

(d) UNAM as an institution is also a plaintiff in this matter, even though it does not seek any damages. (It is not clear to me why. But this no doubt facilitated the extensive discovery process engaged in by the media defendants.) Certain of the individual plaintiff's withdrew their actions before the trial commenced. Those remaining are the second plaintiff, the Vice-Chancellor, of UNAM, Professor L. Hangula, the fourth plaintiff, Professor O. D Mwandemele, who is its Pro-Vice-Chancellor: Academic Affairs and Research,

the sixth plaintiff, Mr J Jansen, its Bursar and Mr A.E Fledersbacher, the Registrar of UNAM, the eighth plaintiff.

(e) Mr Kaaronda's letter is addressed to the founding President in his capacity as UNAM Chancellor. It is dated 4 February 2010 and stated the following:

> **'IRREGULARITIES, FINANCIAL MALADMINISTRATION AT UNAM AND OUR LACK OF CONFIDENCE IN ITS MANAGEMENT**
>
> Please accept fraternally warm salutations from the working men and women of our country under the auspices of the National Union of Namibian Workers while wishing you a happy and prosperous 2010.
>
> The National Union of Namibia Workers through one of its affiliates present at the University of Namibia, NANTU, has learnt with shock and dismay about the fact that the management of UNAM appears to have lost control of the administration and management of the institution. This apparent loss of control has created a situation untenable for prudent administration of the University and resulted in the compromise of certain crucial ingredients of a trustworthy University management.
>
> We are aware of six senior positions which were filled in a manner not consistent with acceptable norms of recruitment in that no external or internal advertisements were placed so as to not deprive qualified and interested Namibians from applying and ultimately occupying such positions through a fair and transparent process. 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 those of Special Advisor to the Vice Chancellor and that of Strategic Planner.
>
> Appointments to positions such as those of Faculty Deans, Deputy Deans, Directors, Deputy Directors and Heads of Departments of Academic Centers were previously made on recommendations and input from staff members and are now the sole domain and prerogative of the Vice Chancellor. To further buttress our point on administrative

discretion used to achieve the wrong 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 Center a position for which he is not trained or qualify to hold. The University has numerous other capable Namibians in its employ from among whom a suitable candidate could have been chosen.

The National Union of Namibian Workers is also concerned about the overflow of expatriates who occupy positions at the expense of equally and or better qualified Namibians. It is also strange and highly questionable as to why the University has for the past years displayed a tendency of bias towards and in favour of certain expatriates, viz. Tanzanians at the same time contracts of expatriates 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 to positions of professors in situations where they failed to fulfil the University criteria as set out in the UNAM promotions policy.

The current widely publicized case where a senior member of the University staff compliment is said to have been treated unfairly is just one of the newest mischievous and corrupt practices by the University management. As always we are in possession of amble evidence suggestion that the right and fair procedures guiding the appointment of staff members were not followed. The NUNW telephonically spoke to the Chairperson of Council, the Vice Chairperson of Council as well as the Vice Chancellor none of whom could redress the perpetual injustice now visited on yet another senior member of staff.

As for the incidence of financial maladministration, the University recorded a deficit of approximately N$12 million in 2006 and the situation as we write is deteriorating at an alarming pace. For instance, the University has for a number of years continued with building and construction projects without subjecting such projects to tender procedures. There is a an issue involving a misused hefty sum of money involving the Computer Department as well as the Estate Services Department, where one official is scheduled to appear in court. The

hasty resignation of the Director of the Estate Services speaks volumes of how messy the financial affairs are in this department.

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 Namibian 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.

The most painful thing about this is that the money which the University management has used to pay back the stolen money was taken from the coffers of the University which resulted in the further deprivation of Namibians who could have greatly benefited from these resources. It is apparent that the Vice Chancellor is either not interested to properly serve our people is incapable of serving our people with the required sense of diligence and care.

With the above in view, the National Union of Namibian Workers wishes to request your kind office to step in so as to stop the perpetuation of the injustices alluded to above. We also wish to call for a commission of inquiry into all our allegations with the result that the Vice Chancellor and his management be suspended and if found guilty be discharged from office. It also goes without saying that the appointment of the Pro-Vice Chancellor for Administration and Finance be stopped forthwith until proper, fair and transparent procedures are followed in the recruitment process.

Please comrade Chancellor, accept the highest considerations from the NUNW as we await your most favourable response.

. . .' (sic)

(f) The individual plaintiffs contend that the letter refers to them either directly or by implication. They aver that it was published by Mr Kaaronda to the then Chancellor, made available to *Informante* and others unknown to the

plaintiffs. They claim that the letter was defamatory in that it was understood by its readers or intended to impute that each of the plaintiffs is inter alia incompetent, incapable of managing UNAM, has no regard for procedures relating to staff appointments, is corrupt, mischievous, does not have regard to the laws of Namibia, is dishonest, a thief or covers up for theft, is unworthy to occupy his position, should be investigated and is morally questionable.

(g) They each claim N$250 000 in damages against the first defendant.

(h)

(i) The letter featured in an article published in *Informante* in its edition of 11-17 February 2010. The article was authored by the fourth defendant, Ms P. Nyangove. It is prominently referred to on the front page of the newspaper with a banner headline straddling large colour photographs of the Professor Hangula and Mr Kaaronda proclaiming in large lettering: 'UNAM VC squanders N$5 million – Kaaronda.'

(j)

(k) The full text of the article appears on page 3 of that issue under the heading 'UNAM Vice-Chancellor accused of corruption' with a sub heading below in smaller print stating 'Employs expatriates at the expense of qualified (sic) Namibians.' The text of the article, under the by – line of Ms Nyangove's name, 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 our 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 those 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.”’

(l)

(m) The plaintiffs claim that the article and its headline are defamatory of them by stating of them that they squandered N$5 million, were accused of corruption, Professor Hangula and his senior management had embezzled N$5 million meant for the Masters Programme in Public Administration (MPPA) at UNAM, chose to pay back N$5 million in a dubious and very suspicious manner and thereby short-changing of students, unprocedurally employing expatriates at the expense of qualified Namibians, recorded a deficit of N$12 million in 2006

(n) The plaintiffs claim that the statements complained of in the context of the headline and the article carried the following defamatory meanings, that they were involved in or committed embezzlement, are dishonest, are thieves, corrupt and have no regard for the laws of Namibia, have no regard for UNAM’s procedures for appointments and favour expatriates over qualified Namibians,

find ways to short change Namibian students, are not worthy to occupy their positions and are morally questionable persons.

(o) They allege that they provided an opportunity to *Informante* to publish an apology but that the media defendants declined to do so. They each claim damages in the sum of N$500 000 from the media defendants, jointly and severally.

(p) The remaining defence raised by Mr Kaaronda is one of qualified privilege. Another defence was raised and already dealt with and dismissed in an application for absolution at the close of the plaintiff's case. Mr Kaaronda pleaded that he was under a 'legal and/or moral and/or social duty and /or was exercising a right' in addressing his letter and in making the statements contained in it to UNAM's then Chancellor. He pleaded that the Chancellor was under a 'legal and/or moral duty and/or social duty or had a legitimate interest' in receiving the letter. The first defendant further pleaded that the statements in question (complained of) were 'pertinent or germane to the privileged occasion.' Mr Kaaronda also denied that the plaintiffs suffered damages.

(q) The media defendants admitted publication but denied the other elements of defamation. They also raised defences of truth and public interest as well as fair comment based upon essentially true facts and asserted that the publication of the report was in the public interest.

(r)

(s) The media defendants also pleaded a defence they termed as a qualified privilege. This they pleaded in the following way:

> '(a) The defendants are members of the media, and are under a professional, moral and social duty to publish information to the readers;
>
> (b) The public as readers of *Informante* have (sic) a right to be informed of the information contained in the article;
>
> (c) The information in the article relate to a public institution and its functionaries who transact with public funds and are in charge of public facilities;
>
> (d) The information conveyed in the article was contained in a letter by a credible person of standing in society;

(e) In the circumstances the (media) defendants acted reasonably in publishing the article.'

(t) The media defendants also denied that the plaintiffs suffered any damages.

(u) The plaintiffs replicated by denying that the Mr Kaaronda had acted under a privileged occasion. They added that, even if he did, he exceeded the bounds of privilege by being actuated by malice.

Factual background

(v) Although other issues were raised in Mr Kaaronda's letter and in the *Informante* article, the financial management and accounting in respect of the MPPA became the primary focus of the trial. The MPPA was a fifteen months master degree programme started in 1999 under UNAM's previous Vice-Chancellor, Professor Peter Katjavivi. It had the laudable goal of providing training to public sector employees in public policy analysis, planning and implementation. It was offered by UNAM together with the Institute of Social Study (ISS) in the Hague.

(w)

(x) The programme was funded by two donors. One of these was the African Capacity Building Foundation (ACBF) based in Harare. It committed US$850 000 to this programme in 2000 and entered into an agreement with UNAM to that end. This agreement specified how the funds were to be used and the manner of procurement and accounting.

(y)

(z) Under the agreement, UNAM was obligated to maintain records and accounts which were adequate to reflect the operation and expenditure of the project in accordance with sound accounting principles. There were also strict reporting requirements in relation to the financial expenditure and management of the project. The agreement also provided that the ACBF would be entitled to a refund of all or portions of any amount withdrawn by UNAM from the grant account 'if such amount is not used in accordance with the provisions' of the

agreement. It also provided that the ACBF would not finance good or services which had not been procured in accordance with the agreed procedures set out in the agreement and would be entitled to re- imbursement in respect of goods and services where this has not occurred.

(aa) It emerged from the evidence that the ACBF was concerned that funds may have been misappropriated or not expended in accordance with the terms of the agreement. It required an investigation. A firm of accountants, PriceWaterhouseCoopers (PWC), was appointed to conduct a forensic investigation of the grant account. This appointment was made in October 2004. The investigation was done under the supervision of Mr Horton Griffiths, an expert in forensic services and a partner of the Cape Town practice of that firm.

(bb)

(cc) A draft report was prepared and provided by PWC to the project leader of the MPPA at the time, Professor Mukwena on 24 January 2005. It did not purport to be an audit. But it provided an analysis of the grant account into which ACBF funds were placed and the withdrawals from that account. It became evident in the report that the grant account was a separate foreign exchange account which was thus held from were withdrawn. The picture which then emerged in the draft report was of a failure to keep proper financial records of that account.

(dd)

(ee) The draft report listed a number of transactions where funds were withdrawn from the grant account to recipients and beneficiaries without sufficient or any supporting documentation to justify those withdrawals. A large portion of these funds was paid to two senior staff members of UNAM at the time, namely Professor El Toukhy who initially administered the programme and Professor Harris who was a Pro-Vice-Chancellor of UNAM at that time. Transactions exceeding US$190 000 were referred to in the report which did not have supporting documentation. The auditors were unable as a consequence to determine whether those payments were made in terms of the agreement between UNAM and ACBF as is reflected in their draft report.

(ff) The draft report in January 2005 provided details of transactions where

supporting documents were required and called for them. The auditors were informed at the time that the documentation was available and would be searched for. Some (but not much) documentation was provided during late May 2005 and a revised draft report was prepared and delivered to UNAM in June 2005.

(gg) The ACBF reverted to the Vice-Chancellor of UNAM in a letter dated 9 May 2006, pointing out that supporting documentation was required (and was lacking) in respect of US$307 000 as identified in the forensic investigation. Given the fact that the supporting documentation had not been forthcoming, the ACBF required re- imbursement of that sum. It also sought the re-imbursement of the sum of approximately N$103 384 which had been paid from the MPPA account for computers and air conditioning which had been utilised and installed for the UNAM Business School and not for the MPPA programme.

(hh)

(ii) The Vice-Chancellor convened a meeting in June 2006 to address this demand. It included the two Pro-Vice-Chancellors, the Bursar and Dr Riruako, the Director of the MPPA. It was then resolved to re-imburse ACBF in these amounts. The total re-imbursement came to approximately N$2.2 million. It was subsequently paid by means of N$1 million coming from the Vice-Chancellor’s contingency fund and the remaining portion from savings which had been achieved in UNAM’s budget that year.

(jj) This sum was however only re-imbursed to ACBF 2008. Dr Riruako in 2008 requested the auditors to provide a final report which they delivered to him in September 2008. Prof Hangula and Prof Mwandemele who gave evidence at the trial, stated that Dr Riruako had not provided the final report to them and that they only saw it shortly before the hearing in November 2012 for the first time when notice was given on behalf of the lawyers for the media defendants of documents which would be provided at the trial under a subpoena issued by them to Dr Riruako.

(kk) In the mean time, the position of Pro-Vice-Chancellor: Academic Affairs and Research at UNAM was advertised. Prof Mwandemele was appointed in

that position. Dr Riruako had also applied and felt aggrieved that his application had not been successful. The union representing him, the Namibian National Teachers Union (NANTU) is affiliated to NUNW. It approached Mr Kaaronda in his capacity as Secretary-General of NUNW to provide leadership on issues upon which the union was dissatisfied within its dealings with UNAM management. These included the filling positions and use of expatriates at the university and the issues set out in Mr Kaaronda's letter. Mr Kaaronda then met with NANTU's branch Chairperson at UNAM together with Dr Riruako and three others. According to Mr Kaaronda's evidence – which was not in this respect disputed by Dr Riruako in his testimony – the latter played a significant role in the drafting of Mr Kaaronda's letter to the then Chancellor of the university. That letter was then delivered at the office of the former President, the then Chancellor. A copy was also made available to *Informante*.

(ll) When the former Chancellor received Mr Kaaronda's letter, he was at his Oshakati residence in northern Namibia. Prof Hangula was co-incidentally also in northern Namibia at the time. The Chancellor called for an urgent meeting with him. It was also attended by the Chairperson of the University Council, Professor F. Amaambo. According to Prof Hangula, the former Chancellor required an explanation for the allegations contained in that letter. He proceeded to provide an explanation in the presence of Prof Amaambo. According to him, the then Chancellor accepted his explanation and did not raise the issues any further with him.

(mm) According to Ms Nyangove, the author of the report in the *Informante*, a copy of Mr Kaaronda's letter was anonymously provided to the security personnel at the *Informante* and she received it on the Monday afternoon prior to the publishing deadline on Wednesday afternoon (of 10 February 2010).

(nn) According to Ms Nyangove's testimony, she attempted on several occasions to reach the Vice-Chancellor and was informed that he was in northern Namibia at the time. She stated that she was eventually provided with his mobile number and tried to reach him. But it indicated to her on each occasion that his phone was unreachable. Ms Nyangove also testified that she

obtained confirmation from Mr Kaaronda that he had addressed the letter to the former Chancellor. She also secured a confirmation from the latter's personal assistant, Mr Nauta that the former Chancellor had received the letter. She was also able to get hold of Prof Amaambo, (who said that he does not respond to rumours on telephone calls). This was included in her report. Ms Nyangove also testified that she called Mr Hoveka, of UNAM's Public Relations Office on the Wednesday morning between 10h00 and 11h00. He informed her that he would need time to make enquiries and revert to her. She said that she informed him of the newspaper's deadline later that afternoon at 16h00. She said that he did not revert to her that afternoon and the report was then printed that evening and disseminated the next day. She stated that the then editor, Mr M. Hamata and the acting news editor provided the headlines to the story, including that contained on the front page and decided to place the photographs of Mr Kaaronda and Prof Hangula on the front page.

(oo)

(pp) These are, in essence, the common cause facts which gave rise to the publication of the report and the letter sent by Mr Kaaronda. I turn now to of the evidence given at the trial.

<u>The evidence</u>

(qq) Prof Hangula and Prof Mwandembele, as well as, Mr Jansen, the Bursar and the Human Resource Manager of UNAM, Mr R.L. Izaks gave evidence for the plaintiffs. Mr Kaaronda gave evidence but did not call any other witnesses before closing his case. The media defendants called Mr H. Griffiths, who oversaw the forensic investigation, Mr M.M. Diergaardt who had participated in that investigation, Dr Riruako as well as Ms Nyangove and Mr Hamata. I refer to the salient aspects of the evidence.

<u>Evidence for the plaintiffs</u>

(rr) In his testimony, the Prof Hangula stated that he had been appointed as Vice Chancellor in 2004. He had been employed by UNAM since 1993. Before his appointment as Vice-Chancellor, he had served as Pro-Vice-Chancellor:

Academic Affairs and Research. He testified that the contents of Mr Kaaronda's letter were fundamentally untrue in respect of the factual matter raised in it. This meant that the report based upon it in the *Informante* was also untrue including the further embellishments upon it which were contained in that report, accusing him of squandering and embezzling N$5 million.

(ss) Prof Hangula stated that his meeting with the Chancellor was humiliating for him and that the publication in *Informante* had injured him in his personal feelings and damaged his reputation and that it had profoundly offended him and injured him in his dignity.

(tt)

(uu) Prof Hangula confirmed that NANTU was a recognised bargaining unit at UNAM and that the university had a relationship with NANTU but not with NUNW. He referred to the appointments complained about in both the letter and in the report. He stated that those appointed to the positions in question were not expatriates, were mostly Namibian citizens and that there had been nothing wrong in the procedure followed in appointing them. He was however vague when asked to explain the procedures which would be followed in respect of academic and non-academic promotions and appointments of staff at the university and stated that Mr Izaks, UNAM's Human Resource Manager, would address those questions in his evidence. He denied that the university in any way contravened immigration legislation or was engaged in corrupt practices. He also denied overruling committees in respect of appointments and promotions. He further pointed out that the complaints raised about the appointment of the Pro-Vice-Chancellor were wrongly directed to him. He pointed out that that appointment is made by university council under the empowering legislation.[1] He said that this appointment had not been made by himself or senior management but by the council in a process which had been led by the council and that Dr Riruako had lost the contest for that position.

(vv) Much of his cross-examination centred upon the MPPA and the expenditure of funds for which supporting documentation could not be provided and which amounts were then repaid to ACBF. He said in his evidence-in-chief

[1] S 8 of The University of Namibia Act, 18 of 1992.

that the amounts in question which could not be accounted for had predated his appointed as Vice-Chancellor and that he was not, according to his recollection, involved in the transfer of the impugned funds from the grant account. During cross-examination, he was however obliged to accept that he had signed one of the requisitions for one the payments for which supporting documentation could not be found. This has occurred in April 2004.

(ww)

(xx) Prof Hangula also pointed out in cross-examination that some of the documentation relating to the MPPA had been kept by Dr Riruako to the exclusion of the university management. He denied that he had ever seen the final forensic report and stated that this had only come to light shortly before the commencement of the trial when the lawyers for the media defendants had disclosed documentation provided to them by Dr Riruako. He was not able to shed light upon the payments made to Professors El Toukhey and Harris as these predated his tenure as Vice-Chancellor. He conceded that he did not follow up on the draft report after the meeting in June 2006, following the decision to re-imburse ACBF. He conceded that he did not make further inquiries to Dr Riruako or to other members of management concerning further steps to be taken in order to further investigate why the documentation could not be traced and what the transactions related to.

(yy)

(zz) Prof Hangula suspected that Dr Riruako’s grudge against UNAM had been the cause for his failure to provide the final report and documentation to management and for approaching Mr Kaaronda and thereafter assisting the lawyers for the media defendants in defending the defamation action.

(aaa)

(bbb) Prof Hangula conceded that the draft report had not been reported to the university council. He said that this was because at that stage only a draft had been provided and that it first needed to be finalised, as is stated in that report. But he confirmed that he did not direct inquiries for a final report.

(ccc)

(ddd) As to Ms Nyangove’s attempts to contact him, he confirmed that he was in northern Namibia at the time and that his phone may have then given a response that he was unreachable. He however denied that he had received an

SMS text from Ms Nyangove. During his cross-examination he was requested to provide his cellphone number to the media defendants' lawyers who said that there would be further investigation of that aspect. Nothing however came of that.

(eee)

(fff) Prof Mwandemele testified that as Pro-Vice-Chancellor he is a member of the university's top management. The top management comprised those appointments made by council, as is specified in UNAM's empowering legislation.[2] These were the Vice-Chancellor, the two Pro-Vice Chancellors, the Bursar, the Registrar and the Librarian. He confirmed that he had only seen the final forensic report shortly before the trial as it was only then provided by Dr Riruako and only then through the intervention of the media defendants' lawyers. Shortly before the trial, Dr Riruako had returned what Prof Mwandembele termed a 'truck load of documents' to the university. He also stated that Dr Riruako was responsible for managing the finances of the project during the times that he was at its helm. He also stated that where documentation could not be located for certain expenditure did not mean to say that it was necessarily unaccounted for. It merely meant that the documentation for those transactions could not be found. He pointed out that the expenditure of the items in question which were reimbursed to the donor had predated those who served in top management at the time of the *Informante* report.

(ggg) The Bursar, Mr Jansen, also gave evidence. He stated that the MPPA funds were separately accounted for from the funds of the university. He confirmed that they were under the control of the Vice-Chancellor at the time. He confirmed that there were certain items of expenditure for which he could not find the supporting documentation after it had been requested from him. At the time of the transactions in question, he had not been Bursar and had worked within the financial department of the university. He stated that, as far as he could recall, the payments to Professor Harris, for which supporting documentation could not be found, related to the 'top up' of his salary for which the university took responsibility. He accepted that he did not sustain damage as a consequence of the publication of Mr Kaaronda's letter to the erstwhile

[2]The University of Namibia Act.

Chancellor.

(hhh) During cross-examination, he stated that there were regular management meetings of the top management of the university which take place every second month. He could not however recall that any follow up or call for the final report was raised at any management meeting after the meeting with the Vice-Chancellor in June 2006 concerning the draft report where it had been decided to reimburse ACBF for the funds for which supporting documentation could not be located. He insisted that this was the reason for the reimbursement of the money and not that it could not be accounted for at all. He stated that, as far he was concerned, the payments in question could be (partially) accounted for in the sense of identifying the recipients and in some instances what they had been for but accepted that supporting documents could not be traced and that some payments did not fall within the ambit of the ACBF grant.

(iii) The evidence of Mr Izaks, the Human Resource Manager of UNAM centred on the procedures for appointments and promotion of staff at UNAM. He explained this in some detail. He pointed out that the university had the need to secure expatriates to the university for the infusion of new and fresh ideas at such an institution of higher learning. He said that expatriates only made up seven percent of the teaching staff of the university. He stated that he was unaware of any instances where the Vice-Chancellor had overruled committee recommendations on personnel issues, as had been referred to in both the letter and in the report. He referred to the specific positions raised in the letter and report and stated there had not been anything untoward or unprocedural in those appointments.

Mr Kaaronda’s evidence

(jjj) Mr Kaaronda, in his testimony, stated that he had no idea how his letter had fallen into the hands of *Informante*. He stated that he had intended it as a confidential letter to the Chancellor and had taken some care to secure its confidentiality. He was at pains to point out that his letter had not stated that the

Vice-Chancellor had squandered N$5 million and that the word 'embezzled' had not appeared in his letter.

(kkk)

(lll) Mr Kaaronda stated that his meeting of NANTU members included Dr Riruako. The meeting centred on complaints that UNAM's management did not take NANTU's grievances seriously. He said that his letter was first prepared as a draft at the meeting. It was then discussed with those present and finalised. When asked as to why he had decided to address his letter to the then Chancellor, he stated that he had first contacted Prof Amaambo, Chairperson of Council who said that he was on his way to the airport and referred him to Dr Ndeutala Angolo, Deputy Chairperson of the Council. He had contacted her, but she had stated that she was attending a family function in the north of the country. He did not want to pursue the matter further with her, given the fact that she had, according to reports in the media, been implicated in the award of a large tender (of N$80 million) by UNAM to a company in which she had an interest (for the construction of the university hostels). He pointed out that the media reports had implicated her in the allocation on that tender and raised serious concerns of a conflict of interest which not been denied. Nor had the reports been retracted. He felt uncomfortable in raising the issue with her in those circumstances.

(mmm) Mr Kaaronda also stated that he had contacted Prof Hangula concerning the appointment of the Pro-Vice-Chancellor. Prof Hangula had stated to him that there was little he could do about that appointment as it was made by the Council. But Mr Kaaronda did not take up the issue of irregularities concerning tenders with him as he did not have the impression that he (Prof Hangula) was involved. Nor did he take up the issue of the N$5 million referred to in his letter with Prof Hangula.

(nnn)

(ooo) Mr Kaaronda also referred to his own background in raising instances of alleged corrupt dealings with the Chancellor when he had been President of Namibia. He cited alleged corruption at the Government Institution Pension Fund (GIPF). He had also approached the former President on another issue affecting the rail parastatal, Transnamib. He stated that these approaches had

had some effect.

(ppp) Mr Kaaronda stated that NUNW had been approached because its affiliated union, NANTU has sought leadership on the issue. He also confirmed that the forensic audit report had been in his possession when his letter was drafted at the meeting and recalled that it had been prepared by PriceWaterhouseCoopers.

(qqq) He conceded that his letter misrepresented the truth by implying that there had not been a forensic audit report. He also conceded that the amount of N$5 million turned out to be incorrect. It was then put to him that he had not independently confirmed the allegation beyond the group of people he had spoken to which included Dr Riruako.

(rrr) Mr Kaaronda also stated that he had not been aware that Dr Riruako had unsuccessfully applied for the appointment of Pro-Vice-Chancellor which had been raised in the letter. He had only become aware subsequently of his dispute about that appointment. He had thought that the Chancellor would order or call for an investigation or a commission of inquiry into the allegations raised into his letter. He referred to an alleged prior irregularity concerning an appointment at UNAM's medical school which he felt supported his call for the need for an investigation into the issues raised in his letter.

(sss)

(ttt) He felt obliged to report the matter to the Chancellor as he considered that the Deputy Chairperson of the Council was compromised. He stated that he could have raised the matter with the Anti-Corruption Commission but preferred to keep it within the university itself.

(uuu) Mr Kaaronda stated that he had had no discussion with Ms Nyangove and had only been asked to confirm that he had addressed the letter to the Chancellor.

Evidence for the media defendants

(vvv) The media defendants first called Mr H. Griffiths of PriceWaterhouseCoopers. He outlined the methodology followed in preparing the draft reports and final report. He confirmed their contents. He stated that after providing the draft report to Dr Riruako, there had been little follow up before he prepared his revised report on 21 June 2005. There was thereafter little communication with him and he was only requested in the period April to June 2008 by Dr Riruako to provide a final report because there had been a settlement with ACBF. He pointed out that the expenses which had been highlighted in the draft report and which had resulted in the reimbursement of funds to the donor were in respect of items where supporting documentation could not be located or not substantiated by proper documentation. He also stated that the report itself had not been secret or secretly conducted.

(www) Dr Riruako also testified for the media defendants. He denied that he had taken a forensic report with him to the meeting with Mr Kaaronda and stated that 'basically most of the information . . . revealed in (Mr Kaaronda's) letter, apart from his own case, did not come from him.' He said that it came from NANTU. But he was constrained to concede that MPPA related matters contained in the final forensic report were conveyed by him to Mr Kaaronda.

(xxx) During his evidence-in-chief, Dr Riruako viciously attacked and insulted both Prof Hangula and Prof Mwandemele and did so gratuitously. For instance, he referred to Prof Hangula as 'not having balls' and repeatedly attacked Prof Mwandemele. He accused the latter of lying and of travelling at the university's expense to Germany to visit his 'girlfriend'. He also referred to him as being the Vice-Chancellor's 'evil genius' and his 'bulldog' – 'the person unleashed to keep everybody in touch in check. . .'. He also accused the Prof Hangula and Prof Mwandemele as being part of a conspiracy, with Prof Mwandemele 'given a secret duty to find anything wrong against myself and fire me'. I was even constrained at a point to request him to refer to the Vice-Chancellor and Prof Mwandemele by their professional designations in the course of his evidence instead of physically pointing at them in court. He also accused Prof Hangula of 'cooking credentials to an acceptable level' in order to qualify for a professorial position. He also accused Prof Mwandemele of improper conduct by obtaining

questions in advance of an interview for a position.

(yyy)

(zzz) Dr Riruako was repeatedly evasive and was at times sarcastic during cross-examination. But he did accept that he had been the source of the statement concerning the repayment of the ACBF funds in Mr Kaaronda's letter. He also agreed with the description of N$2.2 million as being 'stolen money'. When he was asked whether he had informed the auditors that he had regarded the money as being stolen, he merely replied 'I told the auditors everything I knew'. He was then referred to the contractual obligations to repay money as spelt out in the draft report where funds had not been applied in accordance with agreement and accepted that there were contractual obligations to do so.

(aaaa)

(bbbb) Dr Riruako was also unable to explain contemporaneous documentation concerning the re-imbursement of ACBF funds which he had signed at the time. He had indicated (in a letter addressed PriceWaterhouseCoopers on 25 June 2008) with the heading 'request to bring the investigation of the MPPA project to closure' that the 'investigation have (sic) been handled to my satisfaction as Director of project; I thus request you good office to bring the investigation to closure as there were no further pending issues' after referring to the reimbursement having been made. He also, in a joint aide memoire with an ACBF representative, in September 2010 stated that the project had accounted for funds which were 'incorrectly utilised' and sought the resuscitation of the working relationship with ACBF. He confirmed that this document had been prepared by himself as a co-signatory and was with the view to resuscitation of the programme.

(cccc)

(dddd) Dr Riruako made a singularly poor impression as a witness. He struck me as an embittered employee who wanted to get back at the Vice-Chancellor and at Prof Mwandemele because he had not been appointed to the position of Pro-Vice-Chancellor to which by Prof Mwandemele had been appointed. His evidence was punctuated by gratuitous slurs of both Prof Hangula and Prof Mwandemele, oftentimes on issues which were not germane to those raised in the proceedings. He was also evasive at times and also at other times was reluctant even to concede the obvious. He was unable to explain the

inconsistency between his evidence given in court in 2013 that the funds were 'stolen' and the need to bring people to book when compared with his contrary contemporaneous written statements at the time.

(eeee) His bias and partiality as a witness was all too clear. He sought to utilise every opportunity to discredit the Vice-Chancellor, Prof Mwandemele and the institution. This bias seriously undermined his evidence and the weight to be attached to it. I have no hesitation in rejecting his evidence where it conflicted with other witnesses such as Mr Kaaronda who he stated that he had seen the forensic report which had been brought to the meeting with the NANTU members including Dr Riruako (as opposed to Dr Riruako's denial that he took it to the meeting).

(ffff)

(gggg) I also reject his evidence that he provided the final forensic report to Prof Hangula. Whilst the latter was at times vague in his recollection and unsatisfactory with regard to his failure to explain the failure to follow up on the draft report, I did not find him to be an untruthful witness at all. This despite being subjected to an extremely protracted and at times hostile cross-examination. He was unequivocal in denying sight of the final report until it had been produced shortly before the trial commenced, more than four years after it had been provided to Dr Riruako. Prof Mwandemele and Mr Jansen also made it clear that they had not seen the final report until then as well. I also accept Prof Hangula's evidence that he would have referred the final report to them for advice as to what action to be taken on it. The failure on the part of Dr Riruako to provide the final report to the Vice-Chancellor and the top management at the university also adversely reflects upon him and the sincerity of his expressed outrage and disdain for funds not being accounted for and contending that they were 'stolen'. Had he genuinely been so concerned about those issues, then I would have thought he would have firstly sought the final report long before he did and then have rigorously raised the matter within the university upon the receipt of the final report. Instead he retained it (and several other documents of the programme) for some considerable time without doing anything about it and rather used it to discredit the university management after he had been overlooked for the position of the Pro-Vice-Chancellor.

(hhhh) Mr Diergaardt, a local employee of PriceWaterHouseCoopers was called to confirm the method of investigation followed by his firm. He confirmed however that he did not request the Bank of Namibia for source documents in respect of the grant account which was a foreign exchange account held with First National Bank for which foreign exchange approval may have been needed for transactions.

(iiii) Ms Patience Nyangove, the fourth defendant, then testified. She confirmed that she had written the report herself. She had at that stage worked as a journalist for some 6 years. She confirmed the steps she had taken prior to publication which I have already set out. She was cross-examined at some length about them.

(jjjj)

(kkkk) Ms Nyangove was repeatedly cross-examined as to the need to verify factual matter contained in the letter when reporting on those contents. It would appear from her replies that she understood the need to verify was in essence limited to verifying that the letter had been addressed by Mr Kaaronda to the Chancellor and to secure comment by those affected or implicated in the story and not as to the factual matter contained in the latter. She stated that she sent an SMS to Prof Hangula, as I have indicated. But no documentary evidence was provided in support of her evidence to this effect in the face of the unequivocal denial by Prof Hangula that he had received an SMS from her. The media defendants' lawyers were alive to the possibility of documentary evidence which could be utilised in support of her evidence on that matter by requesting the Vice-Chancellor's mobile number. But significantly no corroboration was provided with reference to the account and records of the mobile number utilised by Ms Nyangove in allegedly sending the text message.

(llll)

(mmmm) When repeatedly asked about the need to verify factual matter in the report, Ms Nyangove stated 'but sir, that is the whole point of calling, looking for Prof Amaambo, going to the UNAM Public Relations Officer, going to the Ministry of Education'. It became clear that Ms Nyangove however failed to appreciate the need for her as a journalist to conduct her own investigation of

factual matter contained in the report.

(nnnn)

(oooo) When asked about the approach to the Public Relations Officer of UNAM on late Wednesday morning (between 10h00 and 11h00) and expecting him to provide a response on that same afternoon, Ms Nyangove stressed that the concern that she had at the time not known whether another reporter had been provided with a copy of the letter. It became clear from both her own and Mr Hamata's evidence that they were more concerned about being scooped on the story than present a professionally prepared report consistent with journalistic standards.

(pppp) With reference to Prof Amaambo, she referred to him as 'maybe the second in charge from the Vice-Chancellor' and referred to him as part of UNAM's management. When I put to her that, as Chairman of the Council, the position is more one of an oversight capacity, she stated that she would not be privy to that information. This despite the fact that it is plainly spelt out in the Act, as is commonly the case with such institutions. She thus would not appear to have made an effort to appreciate the governance structure of the university.

(qqqq) When Ms Nyangove was confronted with Mr Kaaronda's evidence that she had merely asked him whether he is the author of the letter directed to the Chancellor and nothing further, she disputed that and stated that he had also said that he had no comment. She further explained the difference in their versions by stating that it was not up to her to ask Mr Kaaronda questions as to where he had obtained the information or canvass or interrogate issues in the letter any further or obtain verification of those facts (apart from seeking comment from those implicated in the letter).

(rrrr) In her witness statement provided before the proceedings, Ms Nyangove had stated that' . . .the failure to account for N$5 million had been independently verified. She also noted that there had been a forensic audit done'. It was pointed out to her that this fact does not emerge from the letter and that rather a contrary impression is created (that a forensic audit had not been done). Her answers in response that this conflict was unsatisfactory. It would appear that

she subsequently became aware of this fact but was not prepared to acknowledge this and correct her prior statement, as a truthful witness should. Mr Hamata's witness statement had a similar allegation contained in it. But he had rightly acknowledged that he had only subsequently became aware of a forensic report. He stated that at the outset of his evidence that his knowledge of that fact did not exist at the time when the report was prepared and that the inclusion of that reference in his statement was in error. By not being prepared to make a similar concession, in my view adversely affected Ms Nyangove's credibility. As to the conflict between her evidence and that of Mr Kaaronda to which I have already referred, I have no hesitation in accepting his evidence and rejecting hers. I found Mr Kaaronda to be a truthful and credible witness.

(ssss) When asked about the use of the term 'embezzle' which she had utilised in her report, she tended to structure her answer with reference to evidence which had emerged in the trial rather than what was contained in that letter.

(tttt)

(uuuu) When confronted with the urgency with which she felt the need to publish the story, in the context of her scoop, she replied that, having obtained the story, 'we had to publish it that Thursday'. When I asked her about the choice of those words, she stated that she 'had to' publish the story because 'it was news'. When I pointed out to her that the money had gone 'missing' some years before, she stated that Mr Kaaronda's letter had been provided at that juncture. When asked why the report could not wait for another week, given the fact that *Informante* is a weekly newspaper, she stated that they were reporting on what Mr Kaaronda had written to the Chancellor and that this had given rise to the urgency. She also stated that she did not make any enquiries to the security guard as to who had left the letter with the *Informante*, raising the confidentiality of sources, even though she had not been asked to provide the identity of the source but rather whether she had established it for herself.

(vvvv)

(wwww) Ms Nyangove also did not explain why the Public Relations Officer, Mr Hoveka, had only been approached on the late morning of the deadline day (Wednesday) when she had already been in possession of the letter since late on the Monday afternoon. She also acknowledged that she did

not ask Mr Hoveka when he would be able to revert to her but had stated that she had rather informed him that she needed to go to print on the same day. She acknowledged that he would need to consult in order to provide a meaningful response to her. When asked about the reasonableness of her expectation that he would be able to revert within that same day when she herself had considerable difficulty (and was unsuccessful) in reaching the Vice-Chancellor on his cell phone and knowing that he was at that time in the north of Namibia, Ms Nyangove did not provide a direct response and stated that there are several ways within an institution of getting in touch with somebody.

(xxxx)

(yyyy) Ms Nyangove also stated that she did not regard the report as involving investigative journalism because it instead amounted to merely reporting upon Mr Kaaronda's letter addressed to the Chancellor. It was, according to her, mere reporting and not investigative reporting.

(zzzz) Mr Max Hamata, the editor of *Informante* at the time, was the final witness in the trial. He stated that he had decided upon the front page headline and the other headlines and approved publishing the report. He stressed the urgency with which the story was prepared, given the deadline of that weekly newspaper on Wednesday afternoons. When he was referred to a previous judgment of this court upheld on appeal concerning the publication of a report by him which was characterised as 'inaccurate reporting', he stated in response to the cross-examiner 'any journalist and just like in your profession as well, you are prone to error.'

(aaaaa)

(bbbbb) When asked about the obligation to report accurately in the context of verifying factual matter raised in Mr Kaaronda's letter, Mr Hamata stated:

> (ccccc) 'We looked at the statement that we received from Kaaronda. We looked at the addressee of such statement and the concerns are of public interest so it was necessary for us to bring this information in the public domain. So we believed that the contents of this letter were accurate.'

(ddddd)

(eeeee) When asked about any attempts to verify contents of the letter, he

stated that he had not done so himself but that these attempts had been made by his reporter (Ms Nyangove). When asked for more specification, he stated that he asked the reporter to 'check that everybody has been contacted and get verification of the content of the story, of the letter.' When he was asked whether the journalist had obtained the verification, he stated 'she was told that for instance the official spokesperson of UNAM was saying that it was not practical to come back to her'. He was asked whether that constituted verification. In response he stated:

> (fffff) 'That is a denial. It is a blockage. I mean someone is blocking us, the person that is serving the public institution is avoiding to give us the relevant information. He is frustrating our attempt to carry out our work.'

(ggggg)

(hhhhh) When asked why the story could not be held back for a week to enable to Mr Hoveka to revert or to at least find out from him when it would have been practical for him to obtain the information, he stated 'I expect Mr Hoveka as a competent official spokesperson of the university he must at least be aware of what is going on at the university. Therefore he should be constrained to provide us with a prompt response and that is the order of the day in any normal public institution.' He subsequently confirmed that he regarded Mr Hoveka's response that it was impractical to respond within a few hours as a 'blockage' and that it was 'relevant for us to go ahead with the story'. It also emerged from his evidence that Ms Nyangove had not informed him that the Vice Chancellor was in northern Namibia at the time.

(iiiii) When Mr Hamata was further pressed to answer a question put to him as to why his newspaper did not afford Mr Hoveka more time to revert and thus delay publication for a week, his answer was in essence that the version on behalf of UNAM would not have changed and the response would still have been the same on the part of Mr Hoveka. He also insisted that the time frame given to Mr Hoveka to respond was reasonable, adding that he was employed to speak on behalf of the institution and that he ought to be aware of what is going on at the institution. He contended that it was Mr Hoveka who was unreasonable (not to respond promptly).

(jjjjj) When asked as an investigative journalist whether he would have considered that further investigation of the allegations was required, he disagreed and stated that further investigation was not required and that the newspaper did not doubt the contents of Mr Kaaronda's letter. He considered that the allegation of misappropriation of MPPA funds rang true because of his previous investigation into what he termed the N$80 million UNAM hostel construction 'corrupt tender deal'. He thus considered that the letter partially confirmed what the newspaper had previously reported on the hostel tender.

(kkkkk) Mr Hamata was also asked why the Bursar had not been approached and why there had not been an attempt to obtain access to UNAM's financial statements in order to verify certain of the allegations contained in the letter. Mr Hamata responded that the approaches to Mr Hoveka and Prof Amaambo were sufficient. But when pressed as to the need to verify the actual contents contained in the letter reported on, he referred to the prior hostel construction tender as confirming those allegations and then stated that it was unfortunate that Mr Hoveka was unwilling to revert to the newspaper. When further pressed on the need verify the actual factual assertations contained in the report, he eventually answered that all the facts were set out in the letter and that he did not see the need for further investigation of the topic by the reporter apart from seeking responses (from those referred to in the report). Whilst he was satisfied with the contents of the letter he did not see the report as merely reproducing the letter and stated that a further dimension was added by seeking and obtaining comment from Mr Nauta that it had been received by the Chancellor and Professor Amaambo that he declined to comment telephonically on rumours and Mr Hoveka that more time was needed before he could comment.

(lllll) When asked about the front page headline which he had devised, he stated that it was derived from the contents of the report itself and that it was, in his view, fitting. The reference to the Vice-Chancellor squandering N$5 million arose from the money which had been 'taken from the MPPA programme.' When it was put to him that most of the transactions referred to in the forensic report had predated the appointment of the Vice-Chancellor to his position, Mr

Hamata merely responded by saying ‘he did squander’.

(mmmmm) Mr Hamata further stated that the MPPA money had been ‘entrusted to UNAM’ and, being spent for another purpose, ‘this amounted to theft or fraud’. When asked as to where Mr Kaaronda used the term ‘trust money’, he referred to the forensic investigation of the auditors and correctly conceded that this had had only come to his attention after the report had appeared in the newspaper. He also sought to justify the term ‘embezzle’ with reference to the New Shorter Oxford Dictionary definition of the word. He stated that it had been justified because money had been entrusted for certain purposes and had been used for different purposes. He did not testify that the dictionary had been consulted when the report had been written. He conceded that the term had been used without knowing the extent of the inability to account for the MPPA funds and without knowing how the money had been ‘lost’.

(nnnnn) When asked about the ‘independent confirmation’ referred to in Mr Kaaronda’s letter, and whether it would have been important for a journalist to establish the nature of that independent confirmation, he avoided this question by referring to the approaches to Prof Amaambo and UNAM’s spokesperson and the attempt to reach the Vice-Chancellor, but added he did not see the need to obtain further particulars as to the nature of the independent confirmation itself even though he conceded that this was an important aspect of Mr Kaaronda’s letter.

(ooooo) At the conclusion of Mr Hamata’s evidence, I asked him whether it would have made a difference to him and his decision to publish had he been aware that the Vice-Chancellor was in northern Namibia at the time. He considered that it would not have made a major difference, adding in the same breath that as a weekly newspaper it had to compete with daily newspapers in publishing stories. He accepted that as head of a daily publication, he would not have been under the same deadline pressure and that choosing to run a story under the pressure of time may involve an extra risk for that weekly newspaper.

(ppppp)

(qqqqq) I turn to the two claims and the defences raised to them.

(rrrrr)

(sssss) **Claim against the first defendant**

(ttttt)

(uuuuu) Whilst the first defendant denied that the letter contained defamatory statements concerning the plaintiffs, the argument at the conclusion of the trial was confined to the alternative defence of qualified privilege. Before this is addressed, the question arises as to whether the first defendant's letter was defamatory of the plaintiffs.

Was the letter defamatory of the plaintiffs?

(vvvvv)

(wwwww) After salutations are made, the introductory portion of the letter expresses shock and dismay at the fact that UNAM's management appears to have lost control of the administration and management of the institution. A number of statements follow in the letter to support this introductory remark. References are made to six senior positions which were filled in a manner not consistent with acceptable norms of recruitment. It was also stated that these positions were filled so as to deprive qualified and interested Namibian from applying for them. The impression was thus created that Namibians were not appointed to those positions. The letter further refers to 'the overflow of expatriates who occupy positions at the expense of equally or better qualified Namibians'. The letter also states that contracts of expatriates are extended 'in contravention of immigration requirements.' In conclusion of this portion of the letter it is then stated that the unfair treatment of staff 'is just one of the newest mischievous and corrupt practices by the university management.'

(xxxxx)

(yyyyy) The letter also refers to the NUNW being 'informed and have independently confirmed that the university management had failed to account for about N$5 million lost in the MPPA programme'. In this regard, it is stated that while some committed Namibians employed at the university including the Director of that programme had requested 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'. It is further stated in this regard that 'the most painful thing about this is that the money which the university management has used to pay back the stolen money was taken from the coffers which resulted in the further deprivation of Namibians. . .'

(zzzzz) These statements, viewed in the context of the letter as a whole, are in my view defamatory of the Vice Chancellor and members of top management of UNAM. They are imputed to follow inappropriate and unacceptable procedures in appointment which have the effect of denying qualified Namibians applicants the opportunity of being appointed and at the same time unfairly favouring expatriates in a 'mischievous and corrupt manner', to the extent that immigration legislation is contravened in the process when extending the contracts of the expatriates employees. The use of improper procedures to favour expatriates whose contracts are extended in contravention of the law is presented as the 'newest' manifestation of corrupt practices by university management.

(aaaaaa)

(bbbbbb) The letter is further defamatory in imputing to the university's management the failure to account for some N$5 million in the MPPA programme and repaying that sum to the donor in a 'very suspicious and dubious manner' instead of appointing a forensic audit. The funds in question were further described as stolen money.

(cccccc) An ordinary reader would have understood the letter as imputing to the Prof Hangula, as Vice Chancellor, and the top management of UNAM improper and corrupt practices with regard to filling positions which resulted in qualified Namibians being overlooked and improperly favouring expatriates. An ordinary reader would understand that this improper conduct extended to breaching immigration legislation by unlawfully extending the terms of expatriates' employment contracts. The description of this as 'mischievous and corrupt' would lead to an ordinary reader having understood that the Vice-Chancellor and the university's senior management were engaged in improper and corrupt practices with regard to appointments to senior positions and were even prepared to breach the law in favouring expatriates over qualified

Namibians.

(dddddd)

(eeeeee) The statements concerning their involvement in the N$5 million in the MPPA programme for which the university management had failed to account and also describing these funds subsequently as 'stolen money' are in my view defamatory of members of the university management. This is compounded by stating that they had in a very suspicious and dubious manner' chose to repay the money to the donor instead of agreeing to an investigation of the issue by way of a forensic audit. This statement clearly imputes to the university management a failure to manage funds under its control to the extent of being stolen but more significantly when this was found out by preferring to surreptitiously pay back money to a donor instead of appointing an investigation into the issue. This is compounded by the reference to the funds as 'stolen', thus imputing to the management either involvement in theft at least or at least seeking to cover up by surreptitiously repaying monies instead of investigating the issue.

(ffffff)

(gggggg) The letter is thus defamatory of the individual plaintiffs in the senses contended for in the particulars of claim.

Qualified privilege

(hhhhhh)

(iiiiii) Mr Nkiwane who represented first defendant, referred to the recent restatement of the defence of qualified privilege by this court in *Afshani and Another v Vaatz*.[3] After a thorough survey of relevant authorities, this court in that matter set out and discussed the requisites for the defence of qualified privilege in defamation matters. Mr Nkiwane correctly accepted that Mr Kaaronda would have the onus to establish his defence of qualified privilege and must thus prove his right and duty to communicate the defamatory matter to the then Chancellor and the latter had a reciprocal interest and duty to receive that information.[4]

(jjjjjj)

[3] 2006(1) NR 35 (HC).

[4] *Afshani* supra at par [34].

(kkkkkk) In explaining the defence, Maritz J, as he then was, in *Afshani* neatly summarised it thus:

> '[32] . . . The defence finds its roots in common law and has been consistently applied in a long line of cases. Its rationale is so closely associated with the interest of the public to allow for a free flow of ideas and information between people on matters of common interest or for the common good that it is, not surprisingly, recognised in many other democratic societies. 'The essence of this defence', Lord Nicols of Birkenhead said in *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 at 1017G, 'lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end.'
>
> [33] Depending on the nature of the occasion, the privilege may either be absolute or qualified (cf *May v Udwin* (*supra*)). The defendant relies on the latter. 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 (cf *Borgin v De Villiers and Another* (*supra*) at 577D). Judicial precedent shows that the Courts 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 them (compare eg *Ehmke v Grunewald* 1921 AD 575 at 581; and *Yazbek v Seymour* (*supra*) at 701G); and (*b*) in the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them (eg*De Waal v Ziervogel* 1938 AD 112 at 121; *Mohamed and Another v Jassiem* (*supra*) at 710B-C), and the statement was relevant to the matter under discussion on that occasion (*Botha and Another v Mthiyane and Another* (*supra*) at para [52]). 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 (*Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590C-D) - the boundaries of which fall to be determined by applying the general criterion of reasonableness (*Bogoshi's* case *supra* at 1204D).
>
> [34] For the defence to succeed, the defendant must also show on a balance of

probabilities that the defamatory statement was reasonably germane and relevant to the privileged occasion. In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at para [22]-[26] Smalberger JA discussed this requirement:

> “[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 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 onderwerponderbespreking" ["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] In *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207D Hefer JA stated:
> "It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other." He went on to observe (at 1207E) that
> "(i)t would be wrong to regard either of the rival interests with which we are concerned as more important than the other”, a matter on which he then proceeded to elaborate. This is particularly so where the Constitution in terms seeks to protect both the dignity of the individual and freedom of speech (see ss 10 and 16(1) of the Constitution of the Republic of South Africa Act 108 of 1996).
> . . .
>
> [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."

(llllll) It was also stressed by Maritz J that a defendant relying upon the defence of qualified privilege need not show that the statement was true and correct in all respects,[5] and that in order to determine whether the occasion is privileged, an objective assessment is to be made applying the principles set out above.

(mmmmmm)

(nnnnnn) Mr Nkiwane referred to the fact that Mr Kaaronda was at the time the General Secretary of the NUNW. Two of its affiliated unions were recognised as representing employees at UNAM, including NANTU. He had been petitioned by the General Secretary of NANTU to become involved in escalating grievances raised by UNAM's staff in view of UNAM's management not taking NANTU seriously. To this end, he met with some five NANTU members including its branch chairperson at UNAM and Dr Riruako. At this meeting, he was provided with details of the different complaints encapsulated in his letter which was drafted and then addressed to the Chancellor. Mr Kaaronda made it clear that the letter was addressed to the Chancellor in that capacity, because he suspected irregularities, impropriety and unfair procedures being perpetrated at UNAM by its top management which should be drawn to his attention so that he could cause an enquiry to be appointed.

(oooooo) Mr Kaaronda pointed out that certain of the complaints related to the Vice-Chancellor himself and his top management. He indicated that he had

[5] *Afshani* supra at par [37].

approached the Vice-Chancellor on the appointment of Pro-Vice-Chancellor but to no avail. He also indicated that he had also approached the Chairperson of the University Council, Prof Amaambo who referred him to the Deputy Chairperson, Dr Angolo. He said that Dr Angolo had stated to him that she was at the function in northern Namibia when he called her. He was, as I have said, reluctant to follow up the issue with her, given the fact that there had been widely publicised reports of her involvement in an N$80 million tender for the construction of a student hostel for UNAM which, according to Mr Kaaronda, had placed her in a conflicted position. These allegations had not, according to him, been denied in the media. He stated that it was reported that the successful tenderer was reported to be a company in which she had a stake and that this had not been disclosed to the University Council. He stated that as a consequence, he had no confidence in raising matters involving corruption at the university with her. This was in my view understandable. He considered that he should rather approach the Chancellor and petition him to exercise his influence with the university in order to cause an enquiry to be held at into the allegations.

(pppppp) Mr Kaaronda further stated that he had seen a forensic report provided at the meeting and was told that it supported the allegation of N$5 million not being properly accounted for and had resulted in repayment to donors. He also stated that the main source for the information contained in the letter with regard to the MPPA programme was Dr Riruako, the head of the programme, who occupied a senior position at the university. He did not however state that he had read or had any regard to the report itself. But what is clear, is the fact that he was aware of its existence and that he had, according to his testimony, seen it. Although his evidence in this regard differs from that of Dr Riruako who denied that he had taken the report to the meeting, Mr Kaaronda's evidence is to be preferred and Dr Riruako's to be rejected where it conflicts with Mr Kaaronda's evidence. As I have said I found Mr Kaaronda a credible and candid witness, unlike Dr Riruako. Mr Kaaronda's testimony on factual matters was also largely undisturbed in cross-examination.

(qqqqqq)

(rrrrrr) Mr Kaaronda also stated that he had approached the then Chancellor on

other occasions with regard irregular or corrupt practices, although then in his capacity as executive head of state. The instances cited included a decision by the rail parastatal Transnamib, which would have had serious employment implications. The decision in question was put on hold and not implemented. He also cited as another example of the dissipation of pension funds held by the Government Institution Pension Fund (GIPF) in investing in non-listed companies. It is a notorious fact that vast sums had been badly abused in that way and resulted in losses to the GIPF, (to the detriment of public sector workers who would be future pensioners as well as former workers who were then current pensioners).

(ssssss)

(tttttt) Mr Kaaronda also testified that he regarded the letter as confidential. He had only directed it (and intended it) for the office of the former Chancellor and denied ever providing a copy to Informante. He was unequivocal in his evidence in this regard which was not seriously disputed in cross-examination.

(uuuuuu)

(vvvvvv) In cross-examination, he acknowledged that the Chancellor's position was of a titular nature, in conferring degrees and the like. But he considered that, given his experience with previous approaches to him, it could result in the Chancellor calling for an inquiry which was the objective of his letter.

(wwwwww)

(xxxxxx) Mr Nkiwane thus contended that Mr Kaaronda had established his right and duty to address his letter to the Chancellor which highlighted the matters raised with him as irregularities at the university. He further contended that the then Chancellor had a reciprocal right and duty to receive the letter in view of what was raised in it and, by their virtue of past experience, he may use his position to call for and cause an enquiry by the university.

(yyyyyy) Mr Coleman on the other hand submitted that the Chancellor was merely a titular figure and titular head of the university empowered to confer degrees and would not have the power 'to step in so as to stop the perpetuation of injustices or establishing the enquiry.' He submitted that Mr Kaaronda would have known that. He submitted that the Minister responsible for higher education had certain investigation powers in relation to UNAM under the High

Education Act, 2003.[6] But the fact that there may be another avenue to follow (such as the Minister) would not render a privileged occasion impermissible.[7]

(zzzzzz)

(aaaaaaa) Mr Coleman also submitted that Mr Kaaronda went beyond the ambit of the mandate of the letter by NANTU (to assist in raising the issues concerning UNAM management) and thus in any event exceeded the bounds of privilege. As for the latter contention, the NANTU letter sent to Mr Kaaronda which was handed in as an exhibit, was wide and open ended and sought his assistance for 'joining hands and leadership' on the issue of 'a vote of no confidence in UNAM management.' Certainly some of the issues raised in the letter directly relate to employment practices at the university such as an alleged over reliance upon expatriates and procedures for promotions and appointments and allegations of unduly favouring expatriates at the expense of suitably and better qualified Namibians. Clearly, Mr Kaaronda's statements concerning the employee related issues raised in his letter would fall within the ambit of qualified privilege in the circumstances.

(bbbbbbb)

(ccccccc) The question arises as to whether the allegations concerning the N$5 million which he said had been 'suspiciously and dubiously paid back as stolen money' and of financial maladministration within this context fall within the ambit of qualified privilege. Mr Coleman correctly points out that the statements contained in the letter concerning this allegation were false. The assertion of an independent confirmation of UNAM's failure to account for approximately N$5 million was simply not true. There could have been no independent confirmation of that. Indeed, had Mr Kaaronda looked at the relevant portions of the report, he would not have found any statement to support the assertion of N$5 million being stolen money and not having been accounted for. Furthermore, the letter creates a false impression that despite the request of the Director of the MPPA programme and other staff members to have a forensic audit, the university management had instead chosen to pay back what was termed stolen money to a donor, thus imputing ulterior and improper motives for doing so on the part of UNAM management. This latter statement is of a serious nature. Mr Kaaronda

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[6]Part VI of Act 26 of 2003.

[7]See *Afshani* supra at par [39].

himself stated that he had seen the forensic report and was certainly aware of its existence. It was thus misleading in the extreme to create the impression that a forensic investigation had not been conducted when requests had been directed to university management to do so, but that it had instead decided to pay N$5 million to the donor in question.

(ddddddd)

(eeeeeee) Can it be said that statements made by Mr Kaaronda in his capacity as NUNW Secretary General concerning large scale financial maladministration and impropriety were germane to the privilege occasion? In my view, the answer is in the affirmative. UNAM's employees are represented by recognised unions, including NANTU, affiliated to NUNW. As representatives of those employees, their recognised union (and its umbrella body to which it is affiliated) has a clear interest in financial maladministration and impropriety being investigated and addressed at the university which is publicly funded.

(fffffff) Once it is accepted that the occasion is privileged and the matters raised germane to it, then it would follow that the defamatory statements in the letter are protected even though he had created a clearly misleading impression.

(ggggggg) Although the plaintiffs replicated that Mr Kaaronda had been actuated by malice, he was not seriously cross-examined on this issue. On the contrary, his evidence that he believed in the correctness of what was conveyed to him, particularly in the context of the N$5 million, (because it had been told to him by the Director of that programme who was a senior employee), was not disturbed. Once it is not contested that he believed in the statements and in the absence of cross-examination directed at establishing recklessness on his part and submissions to that effect, it would follow that the plaintiffs have not established malice on the part of Mr Kaaronda.

(hhhhhhh) It follows that, the defence of qualified privilege having been established by Mr Kaaronda, the plaintiffs' claims against him are to be dismissed.

(iiiiiii) I turn to the claims against the media defendants.

Claim against the media defendants

(jjjjjjj) The first question arises as to whether the report is defamatory of the plaintiffs.

(kkkkkkk)

(lllllll) I have already found aspects of the letter, which also feature in the report, are defamatory of the plaintiffs for the reasons I have set out with reference the letter itself. But the media defendants went further than the text of the letter. They embellished upon it in some respects. As Mr Kaaronda hastened to point out in his evidence, he had not accused the Vice-Chancellor of squandering N$5 million of university money. Nor had he accused him or members of the senior management of embezzling N$5 million or any sum of money at all, as he also pointed out.

(mmmmmmm)

(nnnnnnn) These statements do not in my view arise or even flow from the letter itself and certainly constitute embellishments. They are clearly defamatory of the individual plaintiffs. Although the letter does refer to corrupt and mischievous practices in the context of the appointment and the promotions of staff members and undue favouring of expatriates, one of the headlines used in the report states that the Vice-Chancellor's himself is accused of corruption.

(ooooooo)

(ppppppp) At the conclusion of the trial, the focus of the argument was understandably rather upon the various defences raised by the media defendants denying unlawfulness and not whether the report was defamatory. But, as this issue is denied in the plea, it would need to be briefly addressed.

(qqqqqqq) In Mr Hamata's evidence, he referred to the New Shorter Oxford English Dictionary definition of 'embezzle' in seeking to justify the use of the term. He did not testify that the dictionary was consulted at the time that the article was written. I understood that he referred to the use of the term rather in the context of the defence of truth and public benefit raised by the media defendants.

(rrrrrrr)

(sssssss) I refer to it because of its connotations and how the reference to the term in the context of the article read as a whole, particularly where there is reference to stolen money to the tune of some N$ 5 million, is to be understood by the ordinary reader. The definition of embezzle in that where the work is

> (ttttttt) '1. make off with (provisions money); steal. . .; 2. Weaken, impair, squander, dissipate; 3. Esp. of any employee or servant: misappropriation or steal (money, goods, etc) belonging to or on the way to an employer or master, in violation of trust or duty.'

The Concise Oxford Dictionary has a shorter definition. It is 'divert (money etc) fraudulently to one's own use'.

(uuuuuuu) In my assessment, an ordinary reader would understand the use of this term in the context of the article to mean that the Vice-Chancellor and his management are accused of stealing university money entrusted to them in their respective capacities for their own use.[8] This is a very serious allegation to level against the Vice-Chancellor and members of his management. It is indeed highly defamatory of them.

(vvvvvvv)

(wwwwwww) The term squander is defined in the New Short Oxford English Dictionary to mean:

> '. . .2 spend recklessly or lavishly; use in a wasteful manner.'[9]

The shorter definition in the Concise Oxford Dictionary is 'spend, money, time etc wastefully: dissipate fortune.

(xxxxxxx) The banner headline on the front page of the *Informante* would thus in the context of the article lead the ordinary reader to understand the headline in the context of the report to mean that the Vice-Chancellor squandered a large sum of money entrusted to him, namely N$5 million, by wasting or misusing or misspending it. This statement is likewise defamatory of the Vice-Chancellor. This is then gravely compounded by the use of the verb 'embezzle' in the introductory portion of the report used with reference to that sum.

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[8]Applying the test restated in *Le Roux v Dey* 2011 (3) SA 274 (CC) at par 89.

[9]Vol 2 at p 3011.

(yyyyyyy)

(zzzzzzz) The report is thus highly defamatory of Prof Hangula and members of UNAM's senior management.

(aaaaaaaa) **The defences raised by media defendants**

(bbbbbbbb) Mr Heathcote SC, assisted by Mr P. Barnard, who appeared for the media defendants, argued that the report was in essence the truth and that it was published in the public interest. He also argued that portions of the report which contained comment based upon essentially true facts. He correctly accepted that the media defendants had the onus to establish these defences as well as the further defence of reasonable publication raised in the plea, also termed qualified privilege, as quoted above. The latter defences are referred to below.

(cccccccc)

(dddddddd) **Truth and public benefit and fair comment.**

(eeeeeeee) Mr Heathcote argued that Prof Hangula had in fact authorised a payment which could not be accounted for and that all the plaintiffs knew that the forensic audit report disclosed serious irregularities with regard to the ACBF funds. These irregularities, he argued, amounted to money stolen when used to buy air conditioners as well as the money used to pay Professors El Toukhey and Harris and the other money for which no supporting vouchers could be produced.[10] He further submitted that all the plaintiffs were involved in the decision to rather repay the amounts back to the donor and that they were all involved in what he termed the cover up by taking money from what he inaccurately referred to as the students' contingency fund and ensuring that this would not be properly disclosed in the university financial statements and not insisting on any investigation.

(ffffffff)

[10]Mr Heathcote relied upon S v Boesak 2000 (3) SA 381 (SCA). But that matter is in my view distinguishable and would not support his contention. Nor would the approach of the court in that matter in my view affect what I have stated as to the ordinary meaning of the term embezzlement in the report and how that term would thus have been understood.

(gggggggg) These contentions are in significant respects not supported by the facts viewed as a whole. The payments made from the grant account for which supporting documentation could not be produced largely occurred prior to Professor Hangula's appointment as Vice-Chancellor. This was not disputed. Nor can it be. A requisition for one of the transactions from the account was signed by Prof Hangula. The others predated his appointment and would have been authorised by the former Vice Chancellor, Prof Katjavivi.

(hhhhhhhh)

(iiiiiiii) The submission that the plaintiffs were involved in the decision to 'rather repay the money', of its own, overlooks the contractual relationship between UNAM and the ACBF which was pertinently raised by the latter. The terms of that contract are referred to above. They required UNAM to repay amounts for which supporting documentations could not be provided or which were not spent in respect of the programme. UNAM was thus under a contractual obligation to repay those amounts and met that contractual obligation after the forensic investigation revealed transactions for which supporting documentation could not be found. The further sum of N$103 384 used to install air conditioners and for computers for the UNAM's Business School and not for the MPPA programme, was thus not authorised in terms of the agreement and also needed to re-imbursed.

(jjjjjjjj)

(kkkkkkkk) In respect of the payments for which supporting documentation could not be found, the Bursar explained that the recipients of those funds were all identified and included the former Pro-Vice-Chancellor, Professor Harris and Professor El Toukhey. None of the plaintiffs could explain quite why those payments should have been made to them from the MPPA programme. But those payments had been largely authorised by the previous Vice Chancellor and not Prof Hangula, except for a single payment.

(llllllll)

(mmmmmmmm) The contention that the plaintiffs were involved in a cover-up and had not insisted on the investigation is also not properly founded. There was after all an investigation. It was conducted by PriceWaterhouseCoopers. It had revealed expenditure for which supporting documentation could not be produced. It was as a consequence of that investigation that the repayment was

made to the ACBF. The repayment of the sum of N$2.2 million had been negotiated with the ACBF with the involvement of Dr Riruako who himself had declared that he was satisfied that the sums had been accounted for and that there were 'no further pending issues', as stated in his contemporaneous correspondence at the time.

(nnnnnnnn) None of the recipients of the impugned transactions in question was any of the plaintiffs. With the exception of a relatively short period in respect of Prof Hangula, the individual plaintiffs were not even involved in those payments.

(oooooooo) The evidence of Mr Griffiths did likewise not established that there had been embezzlement or even that the funds were stolen. The tenor of his evidence was that the payments in question were without supporting documentation at the time when the forensic investigation was conducted – sometime after they had been made.

(pppppppp) It is clear to me that the media defendants did not establish the truth of the serious allegations levelled against Prof Hangula and members of UNAM's management in the report as to embezzling or being involved in a theft of MPPA funds, let alone N$5 million of such funds.

(qqqqqqqq) There was no evidence presented of any contravention by UNAM of immigration legislation. Nor was there any evidence of Prof Hangula overruling committees making decisions on appointments and promotions. There was also no evidence to justify a comment that the appointments to the specified positions in the report had been done improperly to justify the comment that employment practices that were corrupt as was implied in the report.

(rrrrrrrr) It follows that the media defendants have not established the defence of truth and public benefit. Nor have they established the defence of fair comment based upon essentially true facts.

Qualified privilege

(ssssssss) The alternative plea of the media defendants raising qualified privilege is set out above. It contends that the media defendants had a qualified privilege because of their duty to publish information of public interest (concerning the funds of a public institution). They contend that their readers had the right to be informed of the article and that the information contained it emanated from a credible person of standing. In the circumstance, they say that they acted reasonably in publishing the report and that this constituted qualified privilege.

(tttttttt) The formulation of the plea in this way would seem to amount to a conflation of the defences of reasonable publication and qualified privilege. During oral argument.

(uuuuuuuu)

(vvvvvvvv) Mr Heathcote strenuously argued that the defence of qualified privilege should be extended to media defendants in view of freedom of expression and the media entrenched in Art 21 of the Constitution. Mr Heathcote also argued that the media defendants had established the defence of reasonable publication as a separate defence. It is not clear to me that this was open to them. If two separate defences are raised they should be separately pleaded or at least properly formulated as such in the alternative so as to alert the plaintiffs as to the defences being relied upon. But in raising the defence of qualified privilege, the media defendants had however also asserted that they acted reasonably in publishing in the light of the factors referred to in the plea. Mr Coleman addressed me fully on the defence of reasonable publication. His cross-examination of the media defendants was also directed with this defence in mind. He would seem to have understood that the plaintiffs were required to meet that defence. The further defence of qualified privilege could be argued as a matter of law on the basis of the factors referred to in the same paragraph of the plea. It would follow in the circumstances that both defences have been sufficiently raised and will be considered in that sequence even though not separately raised with the clarity expected in pleading.

(wwwwwwww) Mr Heathcote in essence submitted that the position of the media, in the context of the constitutional protection of freedom of expression and the media warrants that a qualified privilege should be extended to media defendants in defamation actions. In support of this contention he referred to the introductory remarks of the Supreme Court in its seminal ruling in *Trustco Group International Group v Shikongo*[11] in which the defence of reasonable and responsible publication was established for media defendants. By way of introduction, O'Reagon, AJA concisely summarised the delict of defamation in the following way:

> 'The law of defamation in Namibia is based on the *actio injuriaurm* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it way 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. This 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.'[12]

(xxxxxxxx) Mr Heathcote also relied upon a statement later in the judgment, where O'Reagon, AJA in passing referred to the media being able to raise the defence of qualified privilege in appropriate and rare circumstances justifying the invocation of that defence.[13] This passing obiter remark, with which I respectfully agree, is to be viewed within the context of how it was referred to in that judgment, referring to the limited defences previously available to the media in discussing the need for the demise of strict liability and the development of the defence of reasonable publication. It certainly does not in my view give rise to or even support the extension of a more general defence of qualified privilege for media defendants in reporting matters of public interest, as was contended by Mr Heathcote.

[11]2010 (2) NR 377 (SC).

[12]Supra at par [24].

[13]Supra at par [29].

(yyyyyyyy) In support of his contention, Mr Heathcote in his written argument referred to Burchell[14] in submitting:

> 'We first refer to the *de lege ferenda* defence advocated by Burchell. He expresses the concern that the trite defences to defamation do not give adequate effect to the media's constitutional rights and duties. His view is, broadly stated, that in order to five effect to the relevant policy considerations underlying judgments like *Bogoshi, Afshani*, and *Shikongo*, a defence should be provided to protect a media defendant who may find itself in a de facto position akin to a privileged occasion.'

Mr Heathcote also relied upon *Afshani* where this court explained the policy considerations which underpin the defence of qualified privilege.[15]

(zzzzzzzz) Mr Heathcote also extensively relied upon *Kauesa*.[16] But this Supreme Court judgment, although emphatically stressing the fundamental importance of freedom of expression (which is not in issue) does not, beyond that, provide support for his argument.

(aaaaaaaaa) It is correct that Professor Burchell in his seminal work at the time *The Law of Defamation in South Africa*,[17] published in 1985, in discussing limitations of the defence of fair comment for the media in the context of the compelling need not to inhibit a free press, referred to a dissenting judgment of the Canadian Supreme Court[18] which advocated broadening the defence of fair comment for newspapers when publishing defamatory comment. In that matter the defamatory comment was in a form of a reader's letter published in the newspaper. The approach of the dissent on that matter was that if the defamatory comment is objectively fair, the question should then be whether it was published with malice. After discussing this approach, Burchell emphasised the need for latitude to the media in publishing comment so as not to inhibit a

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[14]The Law of Defamation in South Africa (1985) at 233-236.

[15]*Afshani* supra at par [30].

[16]*Kauesa v Minister of Home Affairs* 1995 NR 175 (SC).

[17](1985) at p233-236.

[18]In *Chernesky v Armadale Publishers Limited and Others* (1979) 90 DLR 3d 321.

free press and proposed an alternative approach to rather regard the defence available to a newspaper in that context as one of qualified privilege,[19] adding:

> 'A newspaper's defence when it publishes *another's* comment can be seen as one of the privilege. A newspaper has a duty to publish certain comments of others and the public have a corresponding right to read such material.'

The learned author then referred to *Zillie v Johnson and another*[20] which, he contended, showed that the press has a duty to report what others have said in certain circumstances even though a third party may be defamed in the process.[21]

(bbbbbbbbb) This was the passage in Burchell's work relied upon by Mr Heathcote in support of his argument. The learned author however deals with the defence of qualified privilege in another chapter of that same work[22]. He again referred to *Zillie* and the approach of the court to permit that publication in the media, even if defamatory, by reason of not being unlawful. Burchell further states:

> 'The media would not, generally speaking, have a duty to report rumours or suspicions which later prove to be false, but there may be special cases where "the urgency of communicating a warning is so great, or source of the information is so reliable, that the publication of the suspicion or speculation is justified". Whether a duty to inform exist depends upon all the circumstances of a particular case: the degree of public interest in the matter communicated and the nature of the information are important factors.'[23]

(ccccccccc) It is in this context that I understand and agree with the obiter remark of O'Reagon AJA in *Trustco* relied upon by Mr Heathcote.

(ddddddddd) Burchell's comment relied upon by Mr Heathcote is also to be seen in the context of that time (and of his work as a whole, including the discussion of qualified privilege in a subsequent chapter, overlooked by Mr

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[19] Supra at 236.

[20] 1984 SA (2) SA 186 (W).

[21] Supra at p236.

[22] Supra at 244-259.

[23] Supra at p248.

Heathcote). His work was published in 1985, at time when there was a strict liability upon the media for the publication of defamatory matter[24] which he rightly subjected to criticism (and has since been vindicated in that principled criticism). Strict liability was subsequently overruled in *National Media Limited v Bogoshi,*[25] applied and approved by the Supreme *Court in Trustco*.[26] In his subsequent work entitled *Personality Rights and Freedom of Expression – the Modern Actio Injuriarum*,[27]Burchell in his preface warmly welcomed the demise of the principle of strict liability of the media and 'the reaffirmation of realistic standards with the media freedom'[28] put in its place in *Bogoshi*.

(eeeeeeeee) In his later work, Burchell does however continue to express support for the duty of the media to inform in circumstances which could constitute an occasion of qualified privilege in a matter of burning public concern.[29] He however points out that the judgment in *Zillie v Johnson*, supported by the trial court in *Neethling v Du Preez and Others,* was rejected by HoexterJA on appeal *Neethling*.[30]

(fffffffff) The court of appeal in *Neethling*, although with reference the common law prior to the constitutional protection of freedom of expression and the media in South Africa, expressed the view that publication in the media necessarily involves dissemination to the world at large and that the courts under common law are in general disinclined to recognise between a newspaper and its readers the community of interest sufficient to sustain the defence of qualified privilege as a general matter. But that court did acknowledge under common law that there are a few well recognised exceptions to this rule. One of the exceptions the court referred to was that found to have been the case in the *Zillie* matter, namely the refutation of a public charge, although not expressing itself as to the

[24]See *Pakendorf and Other v De Flamingh* 1982 (3) SA 146 (A).

[25]1998 (4) SA 1196 (SCA).

[26]2010 (2) NR 377.

[27] (1998).

[28]Supra at p IX.

[29]Personality rights and freedom of expression at p295.

[30] 1994 (1) SA 708 (A).

correctness of that decision.[31] The court referred to English authority as well in support of this exception.[32] The court however cited, with approval, another judgment of that court in *Argus Printing and Publishing Co. Ltd v Inkatha Freedom Party*[33] where that court had held that a court is not limited to the 'accepted grounds of qualified privilege. Where public policy so demands, it would be entitled to recognise new situations in which a defendants' conduct in publishing defamatory matter is lawful.'

(gggggggg)

(hhhhhhhhh) The court of appeal in *Neethling* proceeded to list a number of factors which it distilled from a wide range of authorities to set principles in this context. These principles predate the adoption of the Interim Constitution in South Africa in 1994 when freedom of expression and media was guaranteed. They would accordingly need to be read subject to the constitutionally entrenched right to freedom of expression and the media. The principles have however, subject to that qualification, been extracted from the common law with regard to the defence of qualified privilege. At the heart of the enquiry is the requirement that publication is to be pursuant to a duty – whether moral legal or social – and the existence on the part a reader of a corresponding interest or right to receive the defamatory communication. The court stressed that the reciprocity is essential, stating:

> 'It connotes a common legitimate interest which is more than idle curiosity in the affairs of others.'[34]

(iiiiiiii) The court stressed that the existence of the duty to publish is objectively determined, based upon the standard of the community in question and whether right minded persons in it would have considered it their duty to make the communication. The court concluded by stating:

> 'In deciding whether a defamatory publication attracts qualified privilege the state of the matter communicated (i.e its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not intended to be exhaustive) are: does the matter

[31]Supra at 778-779.

[32]Supra at 778 are referred to *Adam v Ward* [1917] AC 309.

[33]1992 (3) SA 579 (A) at 590 C-E.

[34]Supra at 780 H-I.

> emanate from an official and identified source or does it spring from source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after the weighing and sifting of evidence, or is it no more than an ex parte statement or merely hearsay?'[35]

(jjjjjjjj) In addressing this interesting question in *The Law of South Africa*[36] the learned authors, with reference to authorities including *Zillie, Neethling* and *Bogoshi* summarise the positions as follows:

> 'The courts do not recognise between a newspaper and its readers a community of interest sufficient to sustain the defence of qualified privilege. Though it may be said that the press has the duty to publish, every reader of the newspaper cannot be regarded as having a sufficient interest in the subject matter.[37]
>
> Even if the occasion is recognised as privileged, the second leg to the defence under consideration requires proof by the defendant that the defamatory matter was relevant or germane and reasonably appropriate to the occasion. This is so because it is the occasion and not the statement that is privileged. . .'

(kkkkkkkkk) Although this summary may not fully reflect the nuanced approach in *Neethling*, it follows from these authorities that there is under our common law not a sufficient community of interest to sustain a defense of qualified privilege in reporting matters of public interest as between a newspaper and its readers by virtue of that relationship of itself. But, as is also been frequently stressed, where public policy so demands in the particular circumstances of given case, there may be qualified privileged as between a newspaper and its readers where the occasion requires it – where the exigency of the particular case may justify a defendant's conduct in publishing defamatory matter on the basis of qualified privilege. I respectfully agree with O'Reagon AJA in the *Trustco* matter that in appropriate and rare circumstances qualified privilege may justify the publication of defamatory matter by the media.

[35]Supra 781 B-D.

[36]2nd edition vo. 7.

[37]Supra at par 250.

(lllllllll) It would not in my view be the basis for a new general defence for media defendants as is proposed and contended for by Mr Heathcote. I agree with Professor Burchell that the media would not generally speaking have a duty to report rumours or suspicions which later prove to be false. I agree with his formulation that there would need to be special cases where the urgency of communicating a warning is so great or the source of the information is so reliable that publication of suspicion or speculation would be justified, as is further explained by the (South African) Appellate Division in *Neethling*.

(mmmmmmmmm) On the facts of this matter, the media defendants have not remotely brought themselves within the ambit of a defence of this nature under the common law or as posited by the authority relied upon by their counsel, considered in its entirety and not selectively. On the contrary, the report, with its serious inaccuracy and untruthful and unjustified embellishments, amounts to the reporting of rumours or suspicions which have later proven to be false. This is plainly the case with regard to N$5 million having been embezzled or stolen with the involvement of Prof Hangula and the top management of UNAM. The embezzlement of funds was not even stated in Mr Kaaronda letter relied upon for the report and was disavowed by him in unequivocal terms. This was thus also not a special case where the urgency of communicating the information was so great, with a source so reliable that publication could be justified. These aspects are addressed further in regard to the defence reasonable publication.

(nnnnnnnnn)

(ooooooooo) Suffice it to state in this context that the journalist did not even establish from the author the nature of the independent confirmation of the allegations contained in the latter. Nor was any independent verification of the allegations contained in the letter undertaken in any proper sense as I point out below. As I also point out below, the intrinsic quality of the report, regarded by the court (of appeal) in *Neethling* to be crucial, is very seriously lacking in this instance. Whilst the source was identified and was a senior union official, a reasonable and responsible journalist would need to conduct some verification of such serious allegations even if they emanate from such official, given the partisan and frequently adversarial nature of union employer relations. What is clear is that the journalist did not even attempt to establish the nature of the

investigation or any findings, if there had been any investigation. The letter did not purport to be a report of a formal finding based upon reasoned conclusions which had been reached after weighing and sifting evidence. It was rather an *ex parte* statement based upon hearsay when regard is hard to the report in the absence of establishing any independent confirmation.

(pppppppp)

(qqqqqqqq) I accordingly conclude that whatever the ambit of a defence of qualified privilege for the media may be and its precise contours which are not necessary to determine in this judgment, it is clear to me upon the facts of this case that the media defendants have not remotely brought themselves within the reach of such a defence.

(rrrrrrrr) But ultimately, the short answer to Mr Heathcote's contention that the defence of qualified privilege should be extended to media defendants as a general defence is that public policy, as is also informed by the constitutional values of freedom of expression and the media as well as the right to dignity, does not require such an extension of this defence, (even though it may arise upon the application of common law principles in appropriate and rare circumstances as the exigencies and public policy may require). The reason why public policy does not require the general extension of such a defence is because the Supreme Court, in its closely reasoned judgment and after a thorough survey of other jurisdictions, engaged in the careful balancing required by the constitutionally entrenched freedom of expression and the media on the one hand and the right to human dignity on the other, adopted and the principle of reasonable publication as a defence for media defendants in the defamation matters. I turn now to that defence.

(ssssssss)

Reasonable publication

(tttttttt)Even though probably not well articulated in the media defendants' plea, this defence has however been raised by setting out the two fundamental elements embodied in it. They are publication in the public interest and by asserting that the media defendants acted reasonably in publishing the article.

(uuuuuuuuu) In *Trustco*, the Supreme Court, developed the law of defamation in line with the constitutionally entrenched rights to human dignity and the freedom of expression and the media by concluding:

> '"[53] On the other hand, the development of a defence of reasonable or responsible publication of facts that are in the public interest as proposed by the respondent (and as accepted by the High Court) will provide greater protection to the right of freedom of speech and the media protected in art 21 without placing the constitutional precept of human dignity at risk. The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.
>
> [54] It is clear that this defence goes to unlawfulness so that a defendant who successfully establishes that publication was reasonable and in the public interest, will not have published a defamatory statement wrongfully or unlawfully. A further question arises, however, given the conclusion reached earlier that the principle of strict liability established in Pakendorf was repugnant to the Constitution. That question is what the fault requirement is in defamation actions against the mass media. The original principle of the common-law is that the fault requirement in the actio injuriarum is intentional harm not negligence, although there are exceptions to this rule. Distributors of defamatory material are liable if it is shown that they acted negligently.
>
> [55] In Bogoshi, the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach is consistent with the establishment of a defence of reasonable publication and should be adopted".

(vvvvvvvvv)

(wwwwwwwww) The court further explained the defence in the following terms:

> "[56] The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity. It

> is not necessary in this case to decide whether this defence is available only to media defendants. It should be observed that in some jurisdictions, such as South Africa, the defence has so far been limited to media defendants, while in other jurisdictions, such as Canada, the defence is not limited to media defendants".

(xxxxxxxxx) The question thus arises as to whether the media defendants have established the defence of reasonable publication.

(yyyyyyyyy) The report refers to the management of the UNAM, an institution established with public funds by an Act of Parliament and claims that those at the helm of the institution have squandered and embezzled a large sum of money, namely N$5 million alleges that and they engage in corrupt practices including with regard to appointment and promotion of staff, overlooking qualified Namibians and favouring expatriates. These issues, raised in the article, are in my view in the public interest as they concern the manner in which a public institution such as the UNAM is run. The university is after all funded by way of public funds. Holding those responsible to account for and exposing funds as being squandered or embezzled by them will thus be in the public interest even though members the university management are not elected officials. They are after all at the head of an institution of higher education, funded publicly which requires accountability on their part and should entail transparency in the manner in which the institution's affairs are conducted. Media reporting on its activities, like those of elected officials and other institutions expending public funds, is an important way in which those responsible for that expenditure can be held to account, as was stressed in *Trustco* in quoting with approval Lewis JA in the South African Court of Appeal in *Mthembi-Mahanyle v Mail & Guardian Ltd and Another*:[38]

> 'Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably.'

[38]2004 (6) SA 329 (SCA) at par 65.

(zzzzzzzzz) Having found that the issues raised in the report are in the public interest, I turn to whether the publication of that report was reasonable in the circumstances.

(aaaaaaaaaa) In making this determination, regard is to be had to generally accepted standards of good journalistic practice, as was also stressed by the Supreme Court in *Trustco.*[39] Although the media defendants in this trial were not referred to those standards, it is clear to me that the code referred to and quoted in the *Trustco* matter provides considerable assistance in determining whether or not the media defendants acted reasonably. The code quoted in *Trustco* is as follows:

> 'Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:
>
> — test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
>
> — diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.
>
> — identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.
>
> — always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
>
> — make certain that headlines, news teases and promotional material, photos . . . and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.
>
> . . .
>
> — avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story.
>
> . . .
>
> — avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status. . . .'
>
> [77] Of course, courts should not hold journalists to a standard of perfection. Judges must take account of the pressured circumstances in which journalists

[39] Supra at par 75-77.

> work and not expect more than is reasonable of them. At the same time, courts must not be too willing to forgive manifest breaches of good journalistic practice. Good practice enhances the quality and accuracy of reporting, as well as protecting the legitimate interests of those who are the subject matter of reporting. There is no constitutional interest in poor quality or inaccurate reporting so codes of ethics that promote accuracy affirm the right to freedom of speech and freedom of the media. They also serve to protect the legitimate interests of those who are the subject of reports.'

(bbbbbbbbbb) I furthermore respectfully agree with the sentiments expressed in the Supreme Court judgment in *Trustco* that journalists should not be held to a standard of perfection and that a court should take into account pressured circumstances in which journalists work. A court would however at the same time not be prepared to condone what the Supreme Court termed manifest breaches of good journalistic practice and reporters and editors engaged in slipshod journalism at the expense of quality and accuracy in their reporting.

(cccccccccc) A further factor to be borne in mind would include the seriousness of allegations raised in the report, as was stressed by the Canadian Supreme Court in *Grant v Tourstar Corporation*.[40] The court in *Grant* made it clear that the more seriousness of the effect of the allegation on a named person's rights, the more care should be taken before publication. That court also stressed the public importance of the matter, the urgency of the publication, the status and reliability of the source and whether the plaintiff's version was sought and accurately reported.[41]

(dddddddddd) I have set out Ms Nyangove's evidence in some detail. She had received Mr Kaaronda's letter anonymously late on the Monday afternoon preceding the publication of the report on Thursday. Her deadline was late on the Wednesday afternoon. When repeatedly asked about steps she took to verify the factual content of the allegations contained in the letter and then appearing (and embellished upon) in the report, it became clear from her

[40] 2009 SCC 61, referred to with approval in the *Trustco* matter at pars [38] and [39]

[41] As explained in *Trustco* at par 39].

approach that she did not see the need to do so once Mr Kaaronda had confirmed that he had addressed the letter to the Chancellor and the Chancellor's office had confirmed receipt of the letter. It would appear from her approach that Ms Nyangove saw the only task then was to obtain comment from the Vice-Chancellor and a member of UNAM's management thus implicated in the report.

(eeeeeeeeee) Ms Nyangove had made no attempt at all to verify factual allegations contained in the letter and appearing in the report except for seeking comment from the Vice-Chancellor and the Chairperson of Council and the university's spokesperson. Ms Nyangove did not even asked Mr Kaaronda as to the nature of the independent confirmation referred to in the letter or any possible details of that. There was also no attempt to verify other factual matter contained in the report except for the attempt to obtain comment. There were also no attempts by Ms Nyangove to obtain verification of other factual matter contained in the report such as seeking the financial statements of the university or even enquiring as to the identity of the occupants of the positions referred to in the report and whether these persons were expatriates or Namibian citizens. It was also put to Ms Nyangove that the financial statements of the university are public documents which are to be tabled in Parliament. She did not attempt to approach the Bursar or anybody else for those financial statements to see if they verified or supported any of the allegations in the report.

(ffffffffff) In essence, Ms Nyangove's approach was supported by her editor Mr Hamata. He did not see the need to obtain verification of factual allegations contained in the letter and the report, except for the need to obtain comment on the part of the people implicated in it. It was also in my view unreasonable to consider that there had been allegations previously concerning a conflict of interest in tender to build hostels as confirming the allegations in the report, as Mr Hamata would have it.

(gggggggggg)

(hhhhhhhhhh) Ms Nyangove did however attempt to contact the Vice-Chancellor. It is not disputed that she contacted his office and would have been

informed that he was in the northern Namibia at the time. Her evidence that his mobile telephone was not reachable was also not disputed and was indeed corroborated by him. But he denied that he received a text message from her seeking comment. In the course of his cross-examination he was asked to provide his mobile number to the lawyers for the media defendants. Despite this, no records to the contrary were put to him. Although, as I have indicated, Prof Hangula was at times vague in his recollection of events, I nevertheless found him to be a truthful witness. Ms Nyangove on the other hand did not impress me as a witness. She was evasive at times and sought to avoid answering questions. I also take into account that the record of her mobile telephone was not adduced in evidence. This was obviously open to her to do so, an aspect her legal team was alive to. I find the absence of those records to be significant in the circumstances. I accordingly reject her evidence of sending a text message to Prof Hangula's mobile number as untruthful.

(iiiiiiiii) Ms Nyangove also could not explain quite why she had waited until late Wednesday morning (between 10h00 and 11h00) to approach the official spokesperson of the university for comment on the allegations in the face of the deadline, disclosed to him, as being 16h00 on the very same afternoon. Being faced with this deadline and given the wide range of subject matters raised with him, it was understandable that he said it was impractical for him to revert by then. Instead of establishing how much time would be necessary for him to revert to her and further discussing the matter with him, Ms Nyangove and Mr Hamata decided to proceed with the report nonetheless.

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(kkkkkkkkk) Ms Nyangove did not inform Mr Hamata that Prof Hangula was at the time in northern Namibia. This was in my view an important factor to be taken into account when considering the fact that his mobile number was unreachable. Furthermore, Mr Hamata without further interrogating the issue or even being aware of that fact, merely decided that the spokesperson was engaging in 'blockage' of the publication of the allegations. This, in my view, in the absence of any attempt to verify the actual factual allegations in the report and to even enquire from Mr Kaaronda as to the nature of the confirmation, was unreasonable and irresponsible journalism in the context of the wide range of

allegations raised in the report.

(llllllllll) Both Ms Nyangove and Mr Hamata acknowledged that the spokesperson would need to consult widely on the allegations before being able to prepare a response. The assumption that his statement (that it would be impractical to revert within a few hours in respect of the allegations which could have been put to him a day before) amounted to a blockage is in all of the circumstances in my view unreasonable. Paramount in the thinking of both Ms Nyangove and Mr Hamata was the need to run the story so as to avoid being scooped in case the letter was made available to a journalist from another publication. Mr Hamata accepted that the deadlines imposed as a result of being a weekly publication did cause an extra risk to publish stories which were discovered or developed close to the deadline. But to minimise the risk, the rules of sound journalistic practice in my view required the journalist in question to verify aspects of the story or at least to reasonably attempt to do so, especially where some those facts may be in the open domain and to afford those affected a reasonable opportunity to respond to the allegation. But in this case, no attempt at all was made to verify factual allegations contained in the report, apart from the unreasonable attempts at comment. There was not even an attempt to obtain the financial statements or any information concerning them or the identity of the appointees to the positions referred to in the report from sources at the university which Mr Hamata said that he had.

(mmmmmmmmmm) I also take into account that the report was based upon a letter raising allegations and calling for investigation of them and not as findings based upon reasoned conclusions which had occurred after evidence had been sifted through and alike.

(nnnnnnnnnn) Although the letter emanated from a national union leader, he testified as to its confidential nature, being addressed to the Chancellor of the university in that capacity about alleged irregularities of the university and in essence called upon the Chancellor to cause an investigation into those irregularities. The reporter and editor did however not see fit to enquire at all concerning the basis for the allegations or even attempt to check upon

information in the open domain or obtainable from other sources which the newspaper had at the university.

(oooooooooo) The journalist (and editor) should also have taken into account that union leaders often approach issues from a partisan and adversarial perspective when raising matters on behalf of their members. In this process, they are often given to the use of strong language and expressing matters in robust and even at times exaggerated or intemperate terms.

(pppppppppp) I also take into account the seriousness of the allegations imputed by the report to the Vice-Chancellor and members of top management. As I have already indicated, the more serious the allegation, the more care would be expected of a journalist to verify factual matter and obtain comment before publication.

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(rrrrrrrrrr) Finally, it would seem to me that the steps taken to afford Prof Hangula and the official university's spokesperson the opportunity to comment on the reports was wholly unreasonable in the circumstances as I have set out. It was in my view also unreasonable, because of the impending deadline, to proceed with the publication of the report without any other verification and without affording the Vice-Chancellor and the university's spokesperson a reasonable opportunity to be able to respond to it. The pressure of the deadline in question would in my view appear to have dictated the decision to publish that week. This was unreasonable in the circumstances. The report could easily have appeared in the following week. The story was not so urgent that it could not wait, particularly given the seriousness of the allegations against the individual plaintiffs, which called for verification and a reasonable opportunity for comment. As was stressed by the Supreme Court in *Trustco,* it is an elemental principle of fairness that a person should be given an opportunity to respond.[42] Implicit in this is that the opportunity to do so must be reasonable with due regard to the circumstances of the particular matter. The failure to do, as was also stressed by the Supreme Court, and exemplified by what occurred in this case, would dramatically increase the risk of inaccuracy.

[42]Supra at par 85.

(ssssssssss)

(tttttttttt) I accordingly conclude that the publication of the report in all the circumstances set out above was not reasonable or constituted responsible journalism. Furthermore, Ms Nyangove and her amplification to include embezzlement and Mr Hamata in according the headline he saw fit, embellished upon Mr Kaaronda's allegations, resulting in both the headline and the introduction to the story misrepresenting what was even stated in the letter itself. This is yet a further breach of the code of conduct for journalists and a further manifestation of the unreasonable nature of the publication of the report.

(uuuuuuuuuu) I accordingly conclude that the media defendants acted wrongfully when they published the defamatory article concerning the individual plaintiffs.

(vvvvvvvvvv)

Quantum of damages

(wwwwwwwwww) I turn to the difficult issue of determining a monetary value to the damage sustained by the plaintiffs. The position of Prof Mwandemele, Mr Jansen and Mr Fledersbacker is different to that of Prof Hangula. They were not referred to by name. I found in my earlier judgment that, despite this, as members of the top management of UNAM, there was a reference to them by virtue of the small size of UNAM's top management and the positions they occupy – all being appointed by the Council in accordance with the empowering legislation[43] – constitute a reference to them.

(xxxxxxxxxx) Prof Hangula was on the other hand prominently referred to. There was firstly a banner headline referring to 'UNAM VC squanders N$5 million' adjacent to a large colour photograph of himself on the front page of newspaper. The headline above the actual report, prominently displayed on page 3, states 'UNAM VC accused of corruption' with his photograph and that of Mr Kaaronda below the headline. His name is printed below the photograph. The introductory paragraph starts with the words 'University of Namibia Vice Chancellor and his senior management allegedly embezzled N$5 million meant

[43] Act 18 of 1992.

for the (MPPA) and are allegedly employing expatriates at the expense of equally or better qualified Namibians'

(yyyyyyyyyy) These allegations are serious. The article was intended to injure Prof Hangula, as was evidenced by Mr Hamata's repetition in evidence of the main allegations against him. I also take into account that there was no attempt to verify the factual matter in the report except for the far less than reasonable attempts to afford Prof Hangula and UNAM's management the opportunity to comment upon them. The reporter and editor were unrepentant in their unreasonable conduct and were similarly impenitent that their sloppy journalism had caused the plaintiffs harm and damage.

(zzzzzzzzzz)

(aaaaaaaaaaa) Prof Hangula gave evidence of the injury to his feelings and dignity and his reputation as head of Namibia's statutorily ordained institution of higher education. But I also take into account the lack of proper governance and financial accountability within that institution under his leadership which emerged in evidence. Whilst the impugned payments from the grant account had for the large part occurred under the auspices of his predecessor, the decision to pay back the sum of some N$2.2 million because expenditure from the grant account occurred without documentation occurred under his watch. The decision to do so cannot be faulted in view of the contractual provisions with ACBF and in the face of the PWC investigation. But what is disturbing is the lack of further investigation or follow-up of the issue subsequently. The explanation given for this by Prof Hangula was that the report acted upon was a draft and provisional. But it was considered a sufficient basis to re-imburse the donor. Quite why it could not form the basis for further and more detailed investigation is not adequately explained. Nor did he explain why he did not seek the final report and press for it. Whilst it was provided more than 2 years after the decision to repay ACBF, there would appear to have been no effort at all to call for it or even enquire about it on his part or on his behalf by top management. Nor did Prof Hangula adequately explain why this disturbing state of affairs – being obliged to repay some N$2.2 million to a donor because of the failure to provide supporting documentation – was not reported to the university's Council.

(bbbbbbbbbbb) It was plainly incumbent upon him as chief administrative officer of the university to take more action to address the financial maladministration identified in the forensic report, even if it had largely preceded his appointment. The failure to have reported it to Council or for that body to address it compounds the failure of governance which occurred.

(ccccccccccc) But none of this justified the headline of squandering N$5 million and the statement that Prof Hangula and his senior management at UNAM had embezzled that sum or the imputation that they stole it or were involved in the theft of that sum and the other untruthful defamatory matter contained in the report. Nor was any evidence tendered to show that the appointments to the positions cited in the report were irregular, inappropriate or corruptly made. A contrary picture however emerged in evidence, one lacking in irregularity and with no basis for the use of the term ‘corrupt’ in this context, despite the evidence on personnel procedures at times being vague.

(ddddddddddd) The Supreme Court in *Trustco* conducted a detailed survey of recent awards in defamatory matters determined by this court. It also cited with approval the lucid sentiments expressed by Sachs, J in the South African Constitutional Court in *Dikoko’s* case[44] on the difficulties in determining an award and the importance of awarding damages.

(eeeeeeeeeee)

(fffffffffff) In weighing up the factors I have referred to, together with approach of the Supreme Court in *Trustco* and the recent awards in this court and the effect of inflation, it would seem to me that an award of N$120 000 should be made in favour of Prof Hangula and N$40 000 for each of the remaining individual plaintiffs (fourth, sixth and eighth).

Costs

(ggggggggggg) It was not disputed by any of the parties that the costs of instructed counsel would be justified in this matter.

[44] Supra at [92] to [94].

(hhhhhhhhhhh) Mr Coleman in both his written and oral argument, sought a special order of costs – on an attorney and client scale – against the media defendants. He cited the *Trustco* matter in support of this contention. He submitted that such an order was justified in view of the treatment of Prof Hangula in court 'as well as the use of the rules in an attempt to defend the indefensible'. Mr Coleman contended with reference to specific examples that wrong facts had to both Prof Hangula and Mr Jansen. Whilst there would appear to be some substance to certain of those examples, there was a large number of documents referred to in cross-examination and there would be room for bona fide mistakes on the part of counsel although care should of course be taken to avoid them. Although the cross-examination of Prof Hangula was unduly protracted and repetitive at times, this should not only be ascribed to counsel as Prof Hangula's answers were at times vague which necessitated further questioning. Although incorrect facts were put to him, given the voluminous papers referred to and the length of cross-examination, I am not persuaded that these formed a pattern of abuse or were deliberate and would warrant a special costs order.

(iiiiiiiiiii) In the circumstances, I decline in the exercise of my discretion, to award a special order as to costs.

(jjjjjjjjjjj) As to Mr kaaronda's costs, the fundamental principle is that costs should follow the result. He was successful in his defence of qualified privilege. He should thus be entitled to his costs for that reason, even though it could with justification be said that he should have exercised more caution in making certain (and indeed most) of the allegations contained in his letter.

(kkkkkkkkkkk) The result is that the individual plaintiffs failed in their action against the first defendant but succeeded in their claim against the media defendants in the sums set out above.

(lllllllllll) The following order is made:

(1) The plaintiffs' claim against the first defendant is dismissed with costs;

(2) Judgment is granted against the second, third and fourth defendants jointly and severally in the amount of N$120 000 in favour of the second plaintiff and N$40 000 in favour of each of the fourth, sixth and eighth plaintiffs respectively;

(3) The second, third and fourth defendants must pay interest on the amounts set out in paragraph (2) of this order jointly and severally at the rate of 20% per annum from the date of this judgment to the date of payment.

(4) The first defendant's cost order against the plaintiffs is to include the costs of one instructed and one instructing counsel.

(5) The second, third and fourth defendants must pay the second, fourth, sixth and eighth plaintiffs' costs jointly and severally, such costs to include the costs of one instructing and one instructed counsel.

____

DF Smuts

Judge

APPEARANCE

PLAINTIFFS	:	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.