96/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 579/96

In the matter of:

NATIONAL MEDIA LIMITED	First Appellant
SIBIYA, KHULU	Second Appellant
ALLIED PUBLISHERS LIMITED	Third Appellant
PERSKOR LIMITED	Fourth Appellant

and

BOGOSHI, NTHEDI MOROLE	Respondent

CORAM: HEFER, HOEXTER, HARMS, PLEWMAN JJA et FARLAM AJA

HEARD: 2 September 1998

DELIVERED: 29 September 1998

J U D G M E N T

HEFER JA

This appeal is against the judgment in *Bogoshi v National Media Ltd and Others* 1996 (3) SA 78 (W) in which Eloff JP refused an application to amend the plea in an action for damages arising from the publication of a series of allegedly defamatory articles published in a newspaper, the *City Press*, during the period 17 November 1991 to 29 May 1994. The parties will be designated as in the Court *a quo*.

The first defendant is the owner and publisher, second defendant the editor, third defendant the distributor and fourth defendant the printer of the *City Press*. Their original plea was that the articles were substantially true and had been published for the public benefit. In the application for amendment they sought to introduce three additional defences to cater for their apprehension that they might not be able to establish the truth of the statements contained in the articles. The first proposed defence was that third defendant did not intend to defame the plaintiff; that it was unaware of the allegedly defamatory articles in the relevant issues of the *City Press* and did not know that articles of that kind were likely to appear therein; and that it was not negligent. The second proposed defence was to the same effect but related only to fourth defendant. The essence of the third proposed

defence (quoted in full at 81D-82B of the Court *a quo*'s judgment and hereinafter referred to as the "third defence") was that the publication of the articles was lawful and protected under the freedom of speech and expression clause in the Constitution of the Republic of South Africa, Act 200 of 1993 (the "Interim Constitution").

Eloff JP considered the third defence to be bad in law and dismissed the application for amendment without considering the other two. At 84G-H the learned judge explained :

> "There may be other parts of the proposed new plea which can be sustained. However, since a vital part of the proposed plea is assailable, I do not feel called upon to consider whether part of the plea can be supported."

The question for decision is whether the plea in its amended form would be excipiable. The defences which third and fourth defendants sought to raise were argued separately and may be disposed of briefly.

The principle of English law that distributors may escape liability on the ground of absence of negligence was recognised in *Willoughby v McWade and Others* 1931 CPD 536, *Trimble v Central News Agency Ltd* 1934 AD 43, *Masters v Central News Agency* 1936 CPD 388 and the *obiter dictum* in *Suid-*

Afrikaanse Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A) at 407D-G. (See also Burchell *The Law of Defamation in South Africa* at 175-176.) Printers, however, are listed in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A) with newspaper owners, publishers and editors as persons who are strictly liable for defamation. Defendants' counsel submitted that it is highly unlikely that a printer (such as fourth defendant) using modern technology would know about defamatory material in what he prints; and for this reason his position should be brought in line with that of a distributor. There is much to be said for the submission but, in order to decide the validity of the third defence, the whole question of strict liability will have to be considered. Depending on the way in which our decision goes, there may be no need to deal with fourth defendant separately.

In considering the validity of the third defence it is useful to bear in mind that liability for defamation postulates an objective element of unlawfulness and a subjective element of fault (*animus injuriandi* - the deliberate intention to injure). Although the presence of both elements is presumed once the publication of defamatory material is admitted or proved, the plaintiff is required to allege that the defendant acted unlawfully and

animo injuriandi, and it is for the defendant either to admit or deny these allegations. A bare denial however is not enough: the defendant is required to plead facts which legally justify his denial of unlawfulness or *animus injuriandi* as the case may be.

When the application came before the Court *a quo* the plea already contained a denial of unlawfulness and an allegation of truth and public benefit in support thereof. The third defence contained a positive allegation in par 7.2 that the articles had not been published unlawfully. "More particularly and in elaboration of subpara 7.2" it was alleged (in conjunction with various alternatives) that the articles had been published "in good faith" and without any intention to defame the plaintiff. There was no indication of the purport of the expression "in good faith"; but in their written heads of argument in this Court defendants' counsel submitted that it embraced allegations to the effect that the defendants were unaware of the falsity of the material, that they did not publish it recklessly, that the publication was reasonable in the circumstances and that the defendants were not negligent. Eloff JP apparently accepted this interpretation of the amendment as correct, but was under the impression that it was concerned with the question of fault

instead of wrongfulness (at 83 A-B). This impression was probably caused by the terms of the notice of objection to the amendment and the manner in which the case was argued. At the hearing of the appeal defendants' senior counsel rightly conceded that all these allegations could not be implied. He then moved for an amendment of which this Court, and presumably the plaintiff, had received notice a day or two before and which appeared at first glance to be much wider than the one before the Court *a quo*. For obvious reasons we were reluctant to consider it. But it soon became clear that in substance the new amendment did not differ from the one which had been refused, and that the Court *a quo*'s judgment and the written heads of argument submitted by both sides covered all the salient points. Plaintiff's counsel conceded moreover that they would suffer no inconvenience, and their client no prejudice, if we were to consider the amendment in its new form. In the exceptional circumstances of the case and in order to avoid unnecessary expense, we decided to do so.

Stripped of presently irrelevant detail the third proposed defence now reads as follows:

"7.2 . . . the defendants plead that the publication of the articles

was not unlawful by reason of the protection afforded to the defendants:

7.2.1 by section 15 to the Constitution of the Republic of South Africa Act, 200 of 1993 . . .

7.2.2 alternatively to subparagraph 7.2.1 above, by section 15 of the Constitution read with section 35(3) of the Constitution . . .

7.3 More particularly:

7.3.1A the defendants were unaware of the falsity of any averment in any of the articles;

7.3.1B the defendants did not publish any of the articles recklessly, i.e. not caring whether their contents were true of false; the facts upon the defendants will rely in this context are . . .

7.3.1C the defendants were not negligent in publishing any of the articles; the facts upon which the defendants will rely in this context are . . .

7.3.1D in view of the facts alleged in paragraphs 7.3.1A to 7.3.1C, the publications were objectively reasonable;

7.3.1E the articles were published without *animus injuriandi*."

alternatively to paragraph 7.3.1 above

7.3.2 the appellants repeat *mutatis mutandis* the contents of paragraphs 7.3.1A to 7.3.1E above.

7.3.3 the articles concern matters of public interest,

7.4 in the circumstances the publication of the articles was not unlawful and is furthermore protected by section 15,

> alternatively section 15 read with section 35(3) of the Constitution."

(I have omitted the supporting facts alleged in par 7.3.1B and C. They relate mainly to the qualifications of the reporters who wrote the articles and their investigations before the articles were published. The omitted parts of the amendment appear from the annexure to this judgment.)

The nub of the defence is par 7.4. The publication of the articles, it says, was lawful and constitutionally protected by reason of the circumstances alleged in the preceding paragraphs. Leaving constitutional issues aside for the moment, the question is whether the allegations in the preceding paragraphs legally justify the averment of lawfulness or whether, as Eloff JP held (at 84F-G), the defendants can only escape liability if they can at least establish that what they had published was true.

I am not aware of a previous case in which a plea along these lines was considered before by a court in this country. But it is hardly necessary to add that the defences available to a defendant in a defamation action do not constitute a *numerus clausus*. In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of

reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community. In accordance with this criterion Rumpff CJ indicated in *O'Malley's* case *supra* at *402fin*-403A that it is the task of the Court to determine in each case whether public and legal policy requires the particular publication to be regarded as lawful. (See also *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1168C; *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 462F-G; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 588H-J.) Accordingly, as EM Grosskopf JA observed in the last mentioned case at 590C-D,

> "[w]here public policy so demands, [the Court] would be entitled to recognise new situations in which a defendant's conduct in publishing defamatory matter is lawful."

Of course, the present situation is not new. Members of the press have often figured as defendants in defamation actions and more often than not their citation stemmed from the publication of inaccuracies or falsehoods of which they were unaware. The novelty of the third defence is that hitherto, whenever they sought to escape liability for lack of knowledge of the falsity

of the defamatory contents of their publications, or on account of an honest mistake, the focus has always been on *animus injuriandi* and not on lawfulness. In the result, the possibility of the legality of the publication of untruthful defamatory statements has not received adequate attention. The emphasis on *animus injuriandi,* particularly during the last thirty years or so, can be traced to De Villiers AJ's remarks in *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840E-G that

> " [u]nderlying the conception of *animus injuriandi* is the principle stated by *Ulpian* in the *Digest*: *injuriam nemo facit nisi qui scit se injuriam facere* (D.47.10.3.2). Thus, as is the position for *dolus* in general, it is essential that the alleged wrongdoer should be conscious of the wrongful character of his act . . . *Dolus* or *animus injuriandi* is therefore consciously wrongful intent . . . " (Emphasis added.)

At 850 *in fin* - 851A the learned judge proceeded to say :

> "In particular, I can see no reason why an erroneous belief in the existence of a so-called 'privileged occasion' could not in fit circumstances protect a defendant . . ."

Thereafter came the decisions in *Jordaan v Van Biljon* 1962 (1) SA 286 (A) and *Craig v Voortrekkerpers Bpk* 1963 (1) SA 149 (A) reaffirming the

requirement of *animus injuriandi,* and *Nydoo en Andere v Vengtas* 1965 (1) SA 1 (A) in which this Court expressly rejected the approach in *Strydom v Fenner-Solomon* 1953 (1) SA 519 (E) to the effect that, in deciding whether a privileged occasion has been established, the test is entirely objective.

Finally, in *O'Malley* this Court -

(1) expressly accepted the principle that consciousness of the wrongfulness of the publication is required; and stated in a series of *obiter dicta*

(2) that liability for defamation cannot be founded upon negligence; but that

(3) essentially on the ground of lack of negligence, news distributors may escape liability for defamation of which they were unaware;

(4) that owners, editors, publishers and printers of newspapers ought to be liable in accordance with the law in England where *liability arises from the publication of defamatory material and* not from any particular intention, and where these members of the press are liable for defamation of which they were not

aware (403E and 404H); and that

(5) other members of the media, such as broadcasters, are liable on the same basis.

This was the state of the law when *Pakendorf supra* was heard. One of the issues was whether the owner and editor of a newspaper could avail themselves of the fact that an untrue defamatory report had been published as a result of a reporter's mistake. The trial Court followed the *obiter dicta* in *O'Malley*, but when the matter came on appeal to this Court, the appellants' counsel argued that the dicta were wrong and that *animus injuriandi* in the form of consciously wrongful intent was required. This Court held the defendants liable for defamation in the absence of fault after mentioning the great injustice to the plaintiff if the defendants were to be permitted to rely on the absence of *animus injuriandi* because a mistake had been made. The effect of the judgment was that, unlike ordinary members of the community, - and, for that matter, also unlike distributors - newspaper owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness

of the publication of defamatory material. It should be emphasised that the judgment was not concerned with any question of justification since counsel for the owner and editor conceded that the publication had been unlawful (at 148A).

The ratio of Eloff JP's judgment in the present case is that the defendants are strictly liable at common law in terms of the decision in *Pakendorf* and that the Interim Constitution did not change the position. To the extent that the third defence is concerned with lawfulness, the reliance on *Pakendorf* was misplaced since it did not deal with that issue. However, as will become apparent, the judgment in *Pakendorf* does have a bearing. In addition, the third defence raises the question of fault, albeit in the framework of lawfulness and the first and second defences raise it squarely. (Counsel for the plaintiff in effect submitted that the position of the distributor should be brought in line with that of the other members of the press and that the distributor should also be liable without fault.)

In this Court the argument on behalf of the defendants was presented on alternative bases. The first is a constitutional one: the strict liability of members of the press is unconstitutional, it was submitted, (a) because it

impinges upon the freedom of speech and expression, which includes freedom of the press and media, conferred by s 15(1); or (b) because it is not in accordance with the spirit, purport and object of Chapter 3 as required by s 35(3) of the Interim Constitution. The second basis is that *Pakendorf's* case was wrongly decided and that the third defence is valid under the common law. I will deal with the second leg of the argument first.

Although the ultimate question is whether the Court made the correct decision in *Pakendorf,* I find it necessary to make the following remarks on the way in which the decision was reached:

(1) Some academic writers hold the view that the decisions mentioned in the judgment and in *O'Malley* do not adequately support the conclusion that English law on the subject of strict liability had been accepted in our law much earlier. As I read the judgment in *Pakendorf,* the Court took a policy decision and set no great store by any of the previous decisions. Whether or not the cases support the conclusion, and whether or not strict liability was recognised before, cannot affect the answer to the fundamental question whether it should have been recognised at all.

(2) In taking the policy decision to hold certain members of the press liable without fault the Court seems to have overlooked the inconsistent reasoning in *O'Malley,* where a positive statement that liability for defamation can never be founded on negligence, is followed by a reference to the position of a distributor as a recognised example of a defence based on the absence of negligence. Why other members of the press were treated differently was not explained either in *O'Malley* or in *Pakendorf.* As Burchell (*op cit* 193) puts it:

> "Unfortunately the South African Appellate Division has seen the problem as involving a choice between two extremes - either requiring *animus injuriandi* or providing for strict liability. The middle course of requiring negligence has much to recommend it."

(3) In *Pakendorf* the Court recognized this form of liability in the law of defamation regardless of its fate in the country of its birth, and of the criticism which it had already attracted. In England Prof Holdsworth, as long ago as 1941, claimed that strict liability was productive of undesirable litigation and that it encouraged purely speculative actions (*A Chapter of Accidents in the Law of Libel* 1941 LQR 74 at 83). In

this country, Prof Price (1960 *Acta Juridica* 274) wrote:

> "The suggestion that liability for defamation is absolute, or, for that matter merely strict, can depend only on such cases as *Hulton v Jones, Cassidy v Daily Mirror Newspapers, Newstead v London Express Newspapers, Ltd* and *Hough v London Express Newspaper, Ltd.* These decisions have no counterpart in our law, and their full implications have given rise to much misgiving in England, leading to the considerable changes introduced by the Defamation Act of 1952. The unhappy doctrine of contributory negligence should have taught us a lesson in the matter of blindly following English legal trends, only to be left high and dry when reaction sets in. South African law owes a great deal to English law, but that is no reason for abandoning our own legal principles."

Although the Court's attention was apparently not drawn to these trenchant remarks, it was at least aware of the fact that the British Parliament had intervened to eliminate some of the doctrine's unacceptable consequences. Yet it decided to adopt strict liability in the form in which it existed in England thirty years earlier, and to leave it to the South African legislature to decide whether or not it would follow its British counterpart. The result is that we have been left with a legal principle which had been tried in England, and was found

wanting.

(4) 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. But there is no indication in the judgment of a weighing of interests, and in particular, that the freedom of expression received any attention.

By undertaking that very exercise, I shall endeavour to demonstrate why, in *Pakendorf*, this Court, in my view, took the wrong decision in regard to the policy to be adopted in a case such as this.

It would be wrong to regard either of the rival interests with which we are concerned as more important than the other. The importance of the protection of reputation is self-evident. As pointed out in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 23H-J, the Courts have often quoted the following passage in Melius de Villiers (*The Roman and Roman-Dutch Law of Injuries* at 24-5) with approval:

> "The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation . . .

> The rights here referred to are absolute or primordial rights; they are not created by, nor dependant for their being upon, any contract; every person is bound to respect them . . ."

In a judgment of the Supreme Court of Canada (*Hill v Church of Scientology of Toronto* (1986) 26 DLR (4th) 129 at 162) Cory J cited an article by David Lepofsky in which the author said that reputation is the "fundamental foundation on which people are able to interact with each other in social environments", and proceeded to say (at 163) that

> "the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. "

The freedom of expression is equally important. Prof van der Westhuizen (in Van Wyk *et al: Rights and Constitutionalism; The New South African Legal Order* at 264) describes it as essential in any attempt to build a democratic social and political order. Elsewhere it has been referred to as "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v Connecticut* (1937) 302 US 319 at 327); and in the majority judgment of the European Court of Human Rights in *Handyside v*

United Kingdom (1976) 1 EHRR 737 at 754 it was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this is not an overstatement appears from McIntyre J's reminder in *Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd et al* (1987) 33 DLR (4th) 174 at 183 that

> "[f]reedom of expression . . . is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society."

Writing about the freedom of the press, Kranenburg (*Het Nederlands Staatsrecht)* 524 also starts with the remark that

> "[d]e vrijheid van drukpers is een der belangrijkste grondrechten, ja, na de godsdienstvrijheid misschien het belangrijkste",

and proceeds to tell us in practical terms that

> "[n]aast de rechtsvormende invloed van de pers is van even grote betekenis de waarborg, de zij verschaft tegen misbruik van gezag, tegen ongerechtvaardigde aantasting van belangen en verkregen aanspraken, tegen willekeur . . . Niets werkt zoo zuiverend op verkeerde bevoegdheidsuitoefening, op ongezonde toestanden, op corruptie, als het licht der

openbaarheid."

In the same vein Joffe J said in *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 (2) SA 221 (T) at 227H-228A:

> "The role of the press in a democratic society cannot be understated . . . It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern."

With this in mind we may now examine the way in which these two interests have been weighed in this country in the past. This is reflected in the following passage from the judgment in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate supra* at 25B-E:

> "I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully

> defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory. (See generally the *Inkatha case supra* at 588G-590F.) The resultant balance gives due recognition and protection, in my view, to freedom of expression." (Per Corbett CJ on behalf of the Court.)

Strict liability was not in issue and is not mentioned in the judgment. But the last sentence does create the impression that the Court was of the view that stereotyped defences like truth and public benefit, fair comment and qualified privilege provide adequate protection for the freedom of the press. For reasons which will presently emerge I believe that this is not the case.

Let us first examine the possible grounds of justification for strict liability. In the present case plaintiff's counsel relied on the fact that there are other instances of liability without fault in our law (like the *actio de pauperie,* the *actio de effusis vel ejectis,* and actions based on the unlawful deprivation of personal freedom). Whilst acknowledging that the notion of liability without fault is not foreign to our law, the short answer to this kind of

argument is that entirely different policy considerations underlie the strict liability recognised in each of the instances mentioned.

In *Pakendorf* the Court mentioned the inequity of permitting the owner and editor of a newspaper to rely on the absence of *animus injuriandi* brought about by a mistake on the part of a reporter, but advanced no further reason for holding them strictly liable. In *O'Malley* the difficulty to bring *animus injuriandi* home to any particular person was suggested as possible justification. Insofar as it implies a form of collective or substituted liability of persons who may be entirely blameless, on the ground that no particular person can be found, the suggestion is, with respect, wholly untenable. Compared with such injustice, the harm done to the victim of an honest mistake becomes less significant.

There is, however, a potent consideration which was not mentioned. It is the social utility of strict liability in inhibiting the dissemination of harmful falsehoods. One has a natural reluctance to open the door to the dissemination of false information which cannot serve any purpose other than to vilify the victim. Such reluctance is not only natural, it is right. In the *Church of Scientology* case *supra* at 159-160 Cory J said:

"False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to the healthy participation in the affairs of the community. Indeed they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society . . . False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre."

In similar vein is *Gertz v Robert Welch, Inc* 418 US 323 at 339 - 340 where the point is made that there is no constitutional value in false statements of fact, but that an erroneous statement of fact is nevertheless inevitable in free debate.

All this is very true. But, we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion (Prof JC van der Walt in *Gedenkbundel: HL Swanepoel* at 68). The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks (Strauss, Strydom & Van der

Walt: *Mediareg* 4th ed at 43). Conversely, the press often becomes the voice of the people - their means to convey their concerns to their fellow citizens, to officialdom and to government. To describe adequately what all this entails, I can do no better than to quote a passage from the as yet unreported judgment of the English Court of Appeal in *Reynolds v Times Newspapers Ltd and Others* delivered on 8 July 1998. It reads as follows :

> "We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of, matters of public interest to the community. By that we mean matters relating to the public life of the community and those who take part in it, including within the expression 'public life' activities such as the conduct of government and political life, elections . . . and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure. Recognition that the common convenience and welfare of society are best served in this way is a modern democratic imperative which the law must accept. In differing ways and to somewhat differing extents the law has recognised this imperative, in the United States, Australia, New Zealand and elsewhere, as also in the

> jurisprudence of the European Court of Human Rights . . . As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large . . .. We have no doubt that the public also have an interest to receive information on matters of public interest to the community . . ."

In endorsing this view I should add that it makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when *Pakendorf* was decided (*Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 400D-G) although its full import, and particularly the role and importance of the press, might not always have been acknowledged.

If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the "chilling" effect of defamation actions but nothing can be

more chilling than the prospect of being mulcted in damages for even the slightest error. I say this despite the fact that some eminent writers such as Prof JC van der Walt (*op cit*) and Neethling, Potgieter and Visser (*Law of Delict* 2nd ed 351-352) hold a different view. Others like Prof Burchell (*op cit* 189), Van der Merwe and Olivier (*Die Onregmatige Daad in die Suid Afrikaanse Reg* 6th ed 440 and Prof PJ Visser (1982 THRHR 340) have criticized the decision in *Pakendorf*. Strict liability has moreover been rejected by the Supreme Court of the United States of America (*Gertz v Robert Welch, Inc supra* 323), the German Federal Constitutional Court (BVerfGe 12, 113), the European Court of Human Rights (*Lingens v Austria* (1986) 8 EHRR 407), the courts in the Netherlands (as appears from Asser's work to which I will refer later), the English Court of Appeal, the High Court of Australia (in decisions to which I will also refer) and the High Court of New Zealand (*Lange v Atkinson and Australian Consolidated Press NZ Ltd* 1997 (2) NZLR 22 - the decision was confirmed on appeal in a judgment not available to me but part of which is quoted in the unreported judgment of the Court of Appeal referred to earlier).

In my judgment the decision in *Pakendorf* must be overruled. I am,

with respect, convinced that it was clearly wrong. That does not mean that its conclusion on the facts of the case is assailable. The defamatory statement was the result of unreasonable conduct in obtaining the facts by incompetent journalists (at 154H).

The policy considerations mentioned so far in overruling *Pakendorf*, are also relevant in the context of justification and I now turn to deal with that aspect of the third defence. We are not struggling with an endemic problem and, since it has arisen in other jurisdictions, it will be instructive to see how it was resolved elsewhere.

In *Theophanous v Herald & Weekly Times Ltd and Another* (1994-1995) 182 CLR 104, *Stephens and Others v West Australian Newspapers Limited* (1994-1995) 182 CLR 211 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court of Australia extended the concept of qualified privilege to cover the publication to the general public of untrue defamatory material in the field of political discussion. But the Court was understandably not prepared to grant the media *carte blanche* in the dissemination of material of that kind. According to the judgment in *Lange v Australian Broadcasting Corporation* the requirement for protection is

"reasonableness of conduct" which is explained as follows at 574:

> "Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."

The matter is also dealt with in *Reynolds v Times Newspapers Ltd and Others* referred to earlier. In that case the Court of Appeal preferred a three stage test to determine whether any individual occasion is privileged: first, the duty test: Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases may be the general public) to publish the material? Second, the interest test: Did those to whom the material was published have an interest to receive that material? And last, what it called the "circumstantial test" which poses the

question:

> "Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice?"

"Status" was used to denote the degree to which information on a matter of public concern may, because of its character and known provenance, command respect. This test is more concise than, but does not differ materially from, the test of "reasonableness of conduct" as expounded in Australia. Like the first sentence in the quotation from the *Lange* case, it serves to indicate that the publication in the press of false defamatory statements of fact will be regarded as lawful if, in all the circumstances of the case, it is found to be reasonable; but it emphasizes what I regard as crucial, namely, that protection is only afforded to the publication of material in which the public has an interest (ie which it is in the public interest to make known as distinct from material which is interesting to the public - *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another supra* at 464C-D).

A remarkably similar approach appears in Asser's *Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* 9th ed Vol III p 224 par 238

where the author says:

> "Een belangrijke grond ter rechtvaardiging van de uitlatingen, waarop in zaken van aantasting van eer en goede naam veelvuldig een beroep wordt gedaan, is het algemeen belang . . .. In de praktijk wordt zij vooral ingeroepen ter zake van uitlatingen die via de pers en radio en televisie worden verspreid: het algemeen belang is hier uiteraard gelegen in de, door Grondwet en verdragen gewaarborgde, vrijheid van meningsuiting die de pers in staat stelt al dan niet vermeende misstanden aan de kaak te stellen. Met name - doch niet alléén - in deze gevallen berust het oordeel omtrent de onrechtmatigheid op een afweging van belangen, waarvan de uitkomst afhankelijk is van alle omstandigheden van het geval."

It has been said (in *Marais v Richard en 'n Ander supra* at 1168D-E and the *Inkatha Freedom Party* case *supra* at 593F-I) that the criterion of unlawfulness must be the legal convictions in South Africa and not elsewhere. But the solution of the problem in England, Australia and the Netherlands seems to me to be entirely suitable and acceptable in South Africa. In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in

the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. Prof Visser is correct in saying (1982 THRHR 340) that a high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the

community. (*Münchener Kommentar zum Bürgerlichen Gesetzbuch* Vol 5 1679.)

I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive. Asser *loc cit* says:

> "Men zie voor een niet limitatieve opsomming van ten deze relevante omstandigheden . . . Als relevante omstandigheden word o.m. genoemd de aard van de openbaar gemaakte verdenkingen; de ernst van de gevolgen van de publikatie voor de gelaedeerde; de ernst van de misstand, bezien vanuit het algemeen belang; de mate waarin de verdenkingen steun vonden in het ten tijde van de publikatie beschikbare feitenmateriaal; de inkleding van de verdenkingen, en de mogelijkheid om het doel langs voor de gelaedeerde minder schadelijke wegen te bereiken . . . is voor de betrachten zorgvuldigheid ook de aard van het medium van belang (televisie is indringender dan het geschreven pers) asook de imago van onpartijdigheid en deskundigheid dat degene die de mededeling doet bij het publiek heeft."

Matters like these are of course relevant when the liability of an owner, publisher or editor is under enquiry. The examination of the facts in order to determine the liability of a printer will obviously follow different lines which

will concentrate mainly on his ability to become aware of and prevent mistakes and the unwitting publication of defamatory material.

In the light of all these considerations I am satisfied that the amendment, to the extent that it relies on the lawfulness of the publications, is not excipiable.

I revert now to the question of fault raised in the first and second proposed defences and also, although obliquely, in the third defence.

My conclusion on *Pakendorf* renders it necessary to consider the liability of members of the press on some other basis. Of course there is always the possibility of vicarious liability: in fit cases the owner of a newspaper will be vicariously liable for the acts and omissions of his employees, including reporting and editorial staff, acting within the scope of their employment. But the modern trend seems to be towards freelancing, and we must also bear in mind the benefit which an individual employee derives from the requirement of consciously wrongful intent. This allows the owner to escape liability whenever his employee is able to rebut the presumption of *animus injuriandi*. Vicarious liability is not the answer. Nor is it the view expressed in Van Der Merwe and Olivier (*loc cit*) that the

liability of an owner, editor or printer can be based on *dolus eventualis*; for in many cases *dolus eventualis* will probably be present, but in others not. Prof JC van der Walt's theory (*op cit*) of risk liability, in turn, is really a rationalized form of strict liability. Some writers (eg Burchell: *op cit* 193, PJ Visser in 1982 THRHR 340 and JD van der Vyver in 1967 THRHR 38) are in favour of negligence being the basis of liability and the judgment in *Hassen v Post Newspapers (Pty) Ltd and Others* 1965 (3) SA 562 (W) points the same way; but any suggestion that liability for defamation can be founded on negligence was rejected in the *obiter dicta* in *O'Malley*'s case. On the other hand, *O'Malley* did not overrule the principle discussed at the outset of this judgment that distributors can escape liability if they are not negligent.

Against this background, it is necessary to raise the question left open in *Pakendorf* (at 155A), namely, whether absence of knowledge of wrongfulness can be relied upon as a defence if the lack of knowledge was due to the negligence of the defendant.

If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of

the publication of defamatory untruths. In practical terms (because intoxication, insanity, provocation and jest could hardly arise in the present context) the defence of lack of animus injuriandi is concerned with ignorance or mistake on the part of the defendant regarding one or other element of the delict (Burchell *op cit* at p 283; see also Raifeartaigh *Fault Issues and Libel Law - A Comparison between Irish, English and United States Law* [1991] 40 ICLQ 763). The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication. In such a case a defence of absence of *animus injuriandi* can plainly not be available to the defendant.

Defendants' counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi,* and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case. As the High Court of Australia pointed out in *Lange* (at 572), the law of defamation did not, in its initial stages, deal with publications to tens

of thousands, or more, of readers, listeners or viewers, but with publication to individuals or a small group of persons. The Court proceeded to state that "the damage that can be done when there are thousands of recipients of a communication is obviously greater than when there are only a few recipients" and for this reason held that it is not inconsistent with the implied freedom of communication of the Australian Constitution to place an additional burden upon the media in order to escape liability for defamation. In that country, and in all the others mentioned earlier where strict liability is not accepted, the media are liable unless they were not negligent. Taking into account what I said earlier about the credibility which the media enjoys amongst large sections of the community, such an additional burden is entirely reasonable.

The resultant position of media defendants may not in this respect be so different from that of other defendants because *Pakendorf* left open the question whether any defendant can rely on a defence of absence of knowledge of unlawfulness due to negligence. However, we have not been called upon to decide the question in relation to other members of the public.

My conclusion accordingly is that, insofar as the first and second

defences in effect signify that third and fourth defendants were not negligent, the amended plea will not be excipiable.

To conclude this part of the judgment in which I have been dealing with the common law, the onus of proof remains to be dealt with.

In civil law, as was said in *Mabaso v Felix* 1981 (3) SA 865 (A) at 872H, considerations of policy, practice and fairness *inter partes*, may require that the defendant bears the overall onus of averring and proving an excuse or justification for his otherwise unlawful conduct. This remark is particularly apposite to cases of the present kind where there is a presumption of unlawfulness arising from the publication of defamatory material. And even in the absence of a presumption, considerations of policy, practice and fairness would require the defendant to prove the justificatory facts. For, as the Court proceeded to say in *Mabaso v Felix* at 873D-F,

> "[t]here is another reason why, at any rate in delicts affecting the plaintiff's personality and bodily integrity, the *onus* of proving excuse or justification, such as self-defence, should be placed on the defendant: usually the circumstances so excusing of justifying his wrongdoing are peculiarly within his own and not the plaintiff's knowledge. True, *Wigmore* rejects that

> consideration as a 'universal working rule' for determining the incidence of the *onus* of proof (*ibid*), but that is no reason for its not being most apposite in the kind of delicts just mentioned. To put it another way, it would for that reason be fair and accord with experience and good common sense that in such delicts the defendant should ordinarily bear the *onus* of proving the excuse or justification."

In the present case, for instance, the facts upon which the defendants rely, are peculiarly within their knowledge. Their counsel accepted that the onus relating to justification rested upon them but argued that it would at least be for the plaintiff to prove negligence on their part. But how would the plaintiff set about doing this if he does not even know, and has very little prospect of discovering, much less proving, how the false information came to be published? Moreover, it ought to be clear by now that the enquiry into all the circumstances of the case involves precisely what it says and is not limited to the possibility of negligence on a defendant's part. Negligence is obviously an important consideration; but I have mentioned some others and I indicated that there may be even further ones. Bearing in mind that the evidence relating to negligence may well be intertwined with evidence on some other issue, it is unrealistic to expect the plaintiff to prove some of the

facts and the defendant to prove others. In my judgment it is for the defendant to prove all the facts on which he relies to show that the publication was reasonable and that he was not negligent. Proof of reasonableness will usually (if not inevitably) be proof of lack of negligence.

I *turn to consider the views expressed above in the context of the* Interim Constitution. I do so in light of s 35(3) which reads a follows:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter."

This provision, as Kentridge AJ explained in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 885G-H," ensures that the values embodied in chapter 3 will permeate the common law in all its aspects." (See also the separate judgment by Mahomed DP at 897E-G and *Gardener v Whitaker* 1996 (4) SA 334 (CC) at 347D-H.) The resultant position appears to be the same as that in Canada which is described as follows in the *Church of Scientology* case *supra* at 156 paras 91 and 92:

> "It is clear from *Dolphin Delivery, supra,* that the common law must be interpreted in a manner which is consistent with Charter principles. The obligation is simply a manifestation of

> the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values . . . Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter."

(See also *Du Plessis* at 881-882 par 55, 884B-F.)

In the present case I have not sought to revise the common law conformably to the values of the Interim Constitution; I have done no more than to hold that this Court stated a common law principle wrongly in *Pakendorf*. It is plain, nevertheless that s 35(3) requires an examination of the constitutional compatibility of my conclusion.

The Constitutional Court has not in any of its judgments fully spelled out the spirit, purport and objects of the Interim Constitution. But s 33(1) provides sufficiently clear guidance for present purposes. The entrenched rights, it says, may be limited only to the extent that the limitation is reasonable and justifiable in an open democratic society based on freedom

and equality. (Cf *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) at 740 par 26.) Some of the rights may only be limited if, in addition to being reasonable, the limitation is also necessary. One of these is the right "to respect for and protection of . . . dignity" conferred by s 10. The right "to freedom of speech and expression which shall include freedom of the press and other media" is conferred by s 15(1). Any limitation on this right must, in so far as it relates to free and fair political activity, also pass the necessity test.

The proper balance between these two rights in terms of constitutional values may conveniently be discussed by reference to the judgments in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) and *Buthelezi v South African Broadcasting Corporation* [1998] 1 All SA 147 (N). I share the view expressed in *Holomisa* at 607E-G that

> ". . . s 10's recognition of every person's 'right to respect for and protection of his or her dignity' must encompass . . . the right to a good name and reputation. A further consideration is that the Constitutional Court, although in a very different context, has given primacy to the rights to life and dignity in the catalogue of constitutional protections. As Chaskalson P (with whose reasons most of the other Judges agreed) stated in *S v Makwanyane and Another* 1995 (3) SA 391 at 451C-D:

> 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others'".

I also agree that

> "[i]n a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power . . . It is for this very reason that the Constitution recognises the especial importance and role of the media in nurturing and strengthening our democracy." (*Holomisa* at 608J-609D.)

In *Buthelezi* Thirion J did not dispute the correctness of these parts of the judgment but differed on the question of the onus of proof. I will deal with that question in a moment. But let me first say, that, in weighing the two interests, I am unable to accept the paramountcy which Cameron J would accord, indiscriminately and irrespective of the circumstances of each case, it seems, to the freedom of expression relating to free and fair political activity. *Holomisa* and *Buthelezi* were both concerned with allegedly

defamatory publications about policitians. The Australian decisions recognize that the public has an interest in the performance of public representatives and in their fitness for office; and I have indicated that greater latitude is accorded to political discussion in our own country. But, as I indicated before, the right to protect one's reputation weighed no less than the freedom of expression in pre-transition times; and the quotation from the judgment in *Makwanyane* confirms my own impression that the Interim Constitution rated personal dignity much higher than before. The ultimate question is whether what I hold to be the common law achieves a proper balance between the right to protect one's reputation and the freedom of the press, viewing these interests as constitutional values. I believe it does.

Cameron J's decision in *Holomisa* on the onus of proof in the negligence based type of defence which he enunciated, stemmed directly from the excessive importance which he attached to the freedom of expression relating to political activity, and from the proposition at 611G-H of his judgment that

"[r]eputation, though integral to 'the essential dignity and worth

> of every human being' is not to be weighed equally with physical integrity."

I cannot find anything in the text or the spirit of the Interim Constitution to support this. As Thirion J said in *Buthelezi* at 156e-g,

> "[w]hy should an invasion of a person's right to dignity and reputation be treated differently? It too is one of the individual's fundamental rights . . . Recovery from a physical injury depends on the healing powers of the body. Recovery from an injury to reputation depends on the memory of a fickle public which is all too ready to believe and remember what is adverse to reputation."

In the type of defence which I have enunciated in this judgment, I have placed the onus on the defendant. In *Prinsloo v Van der Linde andAnother* 1997 3) SA 1012 (CC) the constitutionality of a statutory presumption was challenged under the equality provision of the Bill of Rights (s 8(1)). In the joint judgment of Ackermann, O'Regan and Sachs JJ the following is said (at 1028 par 36) :

> "In any civil case, one of the parties will have to bear the onus on each of the factual matters material to the adjudication of the dispute . . . As long as the imposition of the onus is not arbitrary, there will be no breach of s 8(1)."

On the same page in par 38 the judgment continues:

> "There is indeed nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established 'golden rule' like the presumption of innocence that runs through criminal trials . . . As long as the rules relating to the onus are rationally based, therefore, no constitutional challenge in terms of s 8 will arise."

I have explained why in my view the onus should be on the defendant. This view is supported in a constitutional context by the Australian decisions mentioned earlier and the judgment of Owen-Flood J in the British Columbia Supreme Court in *Pressler and Pressler v Lethbridge and Westcom TV Group Ltd* 48 CRR (2d) 144. I should add that the falsity of a defamatory statement is not an element of the delict, but that its truth may be an important factor in deciding the legality of its publication. I find it difficult to see why (as was held in *Holomisa*) a plaintiff should, as part of his claim, allege and prove something that the defendant may rely upon in justification.

Eight of the nine articles were published in the *City Press* before 27 April 1994 when the Interim Constitution came into operation. In similar circumstances the Constitutional Court unanimously held in *Du Plessis* that

the Interim Constitution did not "turn conduct which was unlawful before it came into force into lawful conduct" (per Kentridge AJ at 866D-E); and accordingly that "the defendants are not entitled to invoke s 15 as a defence to an action for damages for defamation published before the Constitution came into operation" (866G). It is clear therefore that the reliance on s 15 in par 7.2.1 of the third defence is misplaced in relation to these articles. As far as the article published after 27 April 1994 is concerned, I have already found that the common law, as expounded in this judgment, is in conformity with constitutional values.

On my view of the common law, the amended plea will contain all the essential allegations for a valid defence. The amendment will accordingly be allowed.

In conclusion I wish to acknowledge that I have perhaps not accorded sufficient recognition to South African writers. As Prof Burchell wrote in the preface to *The Law of Defamation in South Africa*

> "the law of defamation has provided the battleground for a conflict between the proponents of the major theories of delictual liability."

Since the conflict raged mainly in academic ranks, the literature on the subject is so vast that one must perforce be selective. I have read as much as I possibly could of the textbooks and articles which appeared in the journals over the years. Several authors will probably recognise their thoughts in what I have written.

It is recorded that the defendants applied for and were granted condonation for non-compliance with the Rules at the hearing of the appeal. They were ordered to pay the costs occasioned by the petition for condonation.

I make the following order:

1. The appeal is allowed with costs, including the costs of two counsel.
2. Substituted for the order of the Court *a quo* is an order in the following terms:

   (a) The defendants' plea is amended in terms of annexure "A" hereto.

   (b) The defendants are ordered to pay the costs of the

application for amendment which will include the costs of two counsel.

Judge of Appeal

Concurred:

Hoexter JA
Harms JA
Plewman JA
Farlam AJA

ANNEXURE "A"

Paragraphs 3, 7, 12, 16, 19, 22, 25, 28, 31 and 34 are replaced with the following:

"3. Ad paragraph 6

3.1 Save for denying that the fourth defendant was the printer of the City Press during the period in which the articles referred to in claims F, G and I of the particulars of claim were published, the defendants admit the allegations in 6.1.

3.2 The defendants deny the allegations in 6.2.

3.3 If it is held that any of the articles referred to in the particulars of claim is about and concerning the plaintiff and is defamatory of the plaintiff, the third defendant states that neither it and its employees:

3.3.1 knew at the time of distribution of the newspapers that the articles contained therein were defamatory of the plaintiff;

3.3.2 were negligent in not knowing that the articles were defamatory of the plaintiff;

3.3.3 knew or ought to have known that the City Press was of such a character that its articles were likely to be defamatory of the plaintiff.

3.4 In elaboration of paragraph 3.3 above the third defendant states that:

3.4.1 in the distribution of City Press newspapers the third defendant:

3.4.1.1 collects printed and bundled copies of the newspapers from the fourth defendant at specified times;

3.4.1.2 loads the printed and bundled copies off the fourth defendant's conveyor belt and on to its trucks immediately prior to

the fourth defendant's conveyor belt and on to its trucks immediately prior to delivery; and

3.4.1.3 effects delivery thereof to selected outlets through a system of depots and routes;

3.4.2 the third defendant and its employees do not read of have a reasonable opportunity to read the articles at any time prior to their distribution;

3.4.3 the third defendant had no intention to defame the plaintiff by distributing the matter referred to in particulars of claim.

3.5 If it is held that any of the articles referred to in the particulars of claim, and which were published during the period in which the fourth defendant was the printer of City Press, is about and concerning the plaintiff and is defamatory of the plaintiff, the fourth defendant:

3.5.1 denies that it is strictly liable for the publication of such matter;

3.5.2 denies that in printing the said matter it acted *amino iniuriandi* or can be deemed to have acted *amino iniuriandi*.

3.6 In elaboration upon the denials in subparagraphs 3.2 and 3.5 the fourth defendant states that neither it nor its employees:

3.6.1 knew that relevant issues of the City Press at the time they were printed or sold contained articles which were defamatory of the plaintiff;

3.6.2 was negligent in not knowing that the articles were defamatory of the plaintiff;

3.6.3 knew or ought to have known that the first defendant

was of such a character that its articles were likely to be defamatory of the plaintiff.

3.7 The fourth defendant states that the printing and publication of the articles took place in the following circumstances:

3.7.1 the fourth defendant receives a black and white make up from the first defendant during the Thursday to Saturday prior to printing;

3.7.2 where colour printing is involved, the fourth defendant receives a colour slide form the first defendant which is then sent to the fourth defendant's colour stripper who separates the colours and then re-combines them in colour negatives;

3.7.3 the fourth defendant uses the lithography method of printing and did so at the time of printing the articles;

3.7.4 the fourth defendant combines the black and white make up with the colour negatives to produce a final page negative;

3.7.5 the fourth defendant's plate make department then develops the page negative on to a aluminium page plate;

3.7.6 the aluminium plate is not itself intended to be read;

3.7.7 from the aluminium plate an image is transferred into an intermediate blanket;

3.7.8 the information is then printed from the intermediate blanket on to the paper which is trimmed and cut on rollers by mechanical process inside the printer to produce folded pages which emerge in sequence;

3.7.9 the pages then move through the packer which counts, orders and bundles complete copies of the final

product;

3.7.10 the bundles are then loaded on to a conveyer belt for distribution by the third defendant;

3.7.11 the function of reading and laying out the articles is performed by the editor of the City Press;

3.7.12 the fourth defendant and its employees have no role in the editorial content and make up of the newspaper they print and are not entitled to make alterations to the content or make up thereof;

3.7.13 the printing press produces approximately 25 000 copies of a newspaper per hour;

3.7.14 the author of the article is given deadlines by the City Press by which time the make ups for printing must be delivered;

3.7.15 the operation is a high speed operation;

3.7.16 the fourth defendant prints at least four newspapers over each weekend;

3.7.17 the fourth defendant prints at least seven different newspapers in a high speed manufacturing process.

3.8 In these circumstances the fourth defendant did not, nor is it reasonably possible for the fourth defendant to have read through the material it prints prior to its printing, and the system utilised is dictated by the exigencies of the newspaper industry and is a reasonable one to use.

3.9 Save a aforesaid, the defendants admit the allegations herein.

7. <u>Ad paragraphs 10 and 11</u>

7.1 The defendants deny the allegations herein as if specifically traversed.

7.2 In addition to the afore going, the defendants plead that the

publication of the articles was not unlawful.

7.3 More particularly:

7.3.1A the defendants were unaware of the falsity of any averment in any of the articles;

7.3.1B the defendants did not publish any of the articles recklessly, i.e. not caring whether their contents were true of false; the facts upon which the defendants will rely in this context are:

(a) <u>the first and second defendants</u>;

(i) the reporters who wrote the articles were well qualified and responsible journalists;

(ii) the plaintiff was at all material times a practising attorney;

(iii) Mr David Sebati, who had been seriously injured, was his client;

(iv) the said Sebati was indigent;

(v) the plaintiff was, in his professional capacity, being investigated by the Auditor-General;

(vi) the reporters who wrote the article took reasonable steps to establish and/or investigate the truth of the allegations, which steps included:

- investigations with respect to fraudulent claims pertaining to the old Multilateral Motor Vehicle Accidents Fund;
- enquiries with the family of Mr Solomon Mogotsi who was investigating fraudulent third party claims;
- enquiries with Mr Michael Prinsloo, a director of Assesskor;

- enquiries with Mr Steven Kgomo in relation to a claim submitted by the plaintiff and/or the firm of which the plaintiff is a partner;
- enquiries with the Transvaal Law Society relating to "touting" for work;
- interviews with one Martha and one Joyce Matshane in relation to the plaintiff's efforts to submit a claim arising form an accident in which they were injured;
- interviews or enquiries with Mr Timothy Phale pertaining to the aforesaid accident;
- investigations relating to the practice of "touting" in streets, hospitals, mortuaries and police stations;
- interviews or enquiries with the said Sebati and his family relating to the conduct of the plaintiff in acting on Sebati's behalf;
- interviews or enquires with Mr A J Tsanwani, a trustee or curator who purportedly acted on the said Sebati's behalf;
- enquiries with Mutual and Federal Insurance pertaining to the administration of funds to which the said Sebati became entitled on the settlement of his claim;
- examination of application papers filed in the Witwatersrand Local Division of the

Supreme Court by Dr Jackie Mphafudi in which the plaintiff was a respondent;

- enquiries with the Master of the Supreme Court pertaining to the administration of funds to which the said Sebati had become entitled;
- the obtaining and examination of a taxed bill of costs prepared by or on behalf of the plaintiff in relation to the plaintiff's fees for representing the said Sebati;
- efforts to obtain powers of attorney form the said Sebati in order to have sight of and examine documents pertaining to Sebati's claim;
- enquiries with the plaintiff pertaining to the allegations contained in the articles;

(vii) the defendants published the enquiries made by the journalists with the plaintiff and published the plaintiff's response to allegations contained in the articles;

(viii) the defendants published the result of an enquiry by the Transvaal Law Society;

(ix) the plaintiff, in his professional capacity, has been the subject of an investigation by the Office for Serious Economic Offenses;

(x) the journalists, in investigating and in writing the articles, and the defendants in publishing the articles, complied with the standards of investigative reporting applicable in the

journalistic profession;

(xi) the articles constitute a fair and balanced account of the journalists' interviews, enquiries and investigations into their subject matter;

(b) the third defendant:

The facts alleged in paragraphs 3.3 and 3.4 above;

(c) the fourth defendant:

The facts alleged in paragraphs 3.5 to 3.8 above;

7.3.1C the defendants were not negligent in publishing any of the articles; the facts upon which the defendants will rely in the context are:

(a) the first and second defendants:

the facts alleged in paragraph 7.3.1B(a) above;

(b) the third defendant:

The facts alleged in paragraphs 3.3 and 3.4 above

(c) the fourth defendant:

The facts alleged in paragraphs 3.5 to 3.8 above;

7.3.1D in view of the facts alleged in paragraphs 7.3.1A to 7.3.1C, the publications were objectively reasonable;

7.3.1E the articles were published without *animus injuriandi*."

alternatively to paragraph 7.3.1 above

7.3.2 the appellants repeat *mutatis mutandis* the contents of paragraphs 7.3.1A to 7.3.1E above.

7.3.3 the articles concern matters of public interest.

7.4 in the circumstances the publication of the articles was not unlawful . . .

12. Ad paragraphs 16 and 17

The defendants repeat paragraph 7 of their plea.

16. Ad paragraphs 21 and 22

The defendants repeat paragraph 7 of their plea.

19. Ad paragraphs 26 and 27

The defendants repeat paragraph 7 of their plea.

22. Ad paragraphs 31 and 32

The defendants repeat paragraph 7 of their plea.

25. Ad paragraphs 36 and 37

The defendants repeat paragraph 7 of their plea.

28. Ad paragraphs 41 and 42

The defendants repeat paragraph 7 of their plea.

31. Ad paragraphs 46 and 47

The defendants repeat paragraph 7 of their plea.

34. Ad paragraphs 51 and 52

The defendants repeat paragraph 7 of their plea.