THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 054/2003
Reportable

In the matter between

SANKIE MTHEMBI-MAHANYELE **Appellant**

and

MAIL & GUARDIAN LIMITED **First Respondent**

PHILIP VAN NIEKERK **Second Respondent**

CORAM: HOWIE P, MPATI DP, MTHIYANE, LEWIS JJA, PONNAN AJA

HEARD: ***7 May 2004***

DELIVERED: ***2 August 2004***

Summary: Defamation of a cabinet minister by implying that she was corrupt: cabinet ministers do have locus standi to sue for defamation; but publication found to be both justifiable (lawful) and reasonable in all the circumstances; defamation thus not actionable; appeal dismissed with costs.

JUDGMENT

LEWIS JA

[1] ‘SANKIE MTHEMBI-MAHANYELE

Minister of Housing

Grade: F

Why is she still in the Cabinet? She has shown she cannot deliver in one of our key delivery ministries. *Her award of a massive housing contract to a close friend and her sacking of her former director general, Billy Cobbett, continue to haunt the public perception of her (*my emphasis*).*

Prognosis: A coupé on the gravy train would do nicely, thank you very much.’

This is the wording of a ‘report card’ in respect of the then Minister of Housing, the appellant in this matter, written and published by the first respondent, a weekly newspaper (referred to as ‘the M & G’), late in December 1998. The second respondent, Mr Philip van Niekerk, was then the editor of the paper. The statement was part of a general ‘report card’ grading and commenting on the work of all members of the cabinet in 1997. The grade ‘F’ was stated to mean: ‘Pathetic. A fail. Jump before you are pushed’.

[2] The appellant sued for defamation, asserting that the words in the report that I have emphasised were defamatory of her. She claimed damages in the sum of R3m. At the trial the appellant did not persist in asserting that the words relating to the dismissal of Mr Cobbett were defamatory, but rested her case on the publication of the words that she had awarded ‘a massive housing contract to a close friend’.

[3] The appellant alleged that the words complained of signified that she was a person of base moral standard; that she was dishonest, and would thus dishonestly award a massive housing contract to a close friend; that she was incompetent and unable to deliver as a minister; and was not worthy of holding public office. She pleaded that the respondents had acted recklessly, not caring whether the contents were true; and that they took no reasonable steps to establish whether the statement made was true.

[4] The respondents pleaded that as a member of Cabinet, the appellant had no *locus standi* to sue for damages for defamation; that the words did not convey a defamatory meaning; that the words were at least substantially true; and that it was in the public interest that the facts were published. In so far as the statement constituted the expression of an opinion, that opinion was alleged to be honestly held and expressed in good faith. In the alternative the respondents pleaded that publication of the statement was protected by qualified privilege in that they were members of the press which is both bound and entitled to make available to the public information, opinions and criticisms about every aspect of political activity, in the public interest. Further, they asserted, s 16 of the Constitution expressly protects the right of freedom of

expression (including freedom of the press) such that the statement was published in the exercise of a duty to inform the public. A further alternative plea was that the statement was published reasonably (without negligence) and in the genuine and reasonable belief that it was true.

[5] The trial court (Joffe J in the Johannesburg High Court) found for the respondents, refusing the action on the basis that the appellant, as a cabinet minister, did not have *locus standi* to sue for defamation where the statement complained of related to the performance of her work as a member of government and was made without malice. The court found also that the words were not defamatory of the appellant since the reader of the M & G report card would already have been familiar with the allegations that were made in respect of the award of the housing contract and that the appellant's reputation had already been tarnished. There had been a great deal of publicity accorded to the matter by many South African newspapers, and the M & G in particular had undertaken an investigation and had published a number of articles during 1997 calling for an explanation of the award.

[6] The appellant appeals against the decision of the trial court with its leave. At issue in the appeal is the balancing of two

fundamental rights, both protected by the common law and enshrined in the Constitution: freedom of expression, on the one hand and dignity, including the right to protect one's reputation, on the other. Should one right, in certain circumstances, prevail over the other? In particular, when dealing with freedom of expression in a political context (political speech) should a member of government's right to protect her reputation be eclipsed by the need for robust criticism and comment in a democratic state where the public's right to be informed, and to free debate, is vital?

THE BACKGROUND

[7] Before turning to the respective allegations of the appellant and the defences raised by the respondents, an explanation of the background to the making of the statement is required. In January 1997, when the appellant was the National Minister of Housing, the Mpumalanga Housing Board ('the Board') purported to award a contract for the construction of houses to Motheo Construction (Pty) Ltd ('Motheo'). Some 10 500 houses were to be built at a total cost of R190 million. At the time when the Board made the decision to award the contract Motheo had not yet been incorporated. It was registered only in February 1997, and the sole director was Dr Thandi Ndlovu. The contract was formally executed in March of that year. The National Housing Board was

ostensibly represented by Mr Saths Moodley who was the chair of the Board; the Mpumalanga Department of Local Government was represented by its chief director, Mr B S Ngwenya; and Motheo was represented by Ndlovu.

[8] Ndlovu claimed to be a close friend of the appellant. They became acquainted with one another when exiled from South Africa during the years of the liberation struggle. The appellant does not deny that they are friends. Ndlovu's sister, Granny Seape, worked for Nedcor Bank Ltd. Nedcor had entered into an agency contract with the various parties to the Motheo contract. It was represented by one Kevin Gibb. Ms Seape was Gibb's assistant.

[9] Towards the end of April 1997, Mr Billy Cobbett, then the Director-General of the national department of housing, who had previously had misgivings about the award of the contract, was informed that Gibb had been suspended by Nedcor. He became concerned about the whole enterprise and immediately referred the matter to the Auditor-General, asking him to investigate and to undertake a forensic audit. Cobbett then contacted the appellant to advise her of Gibb's suspension. He told her that he had referred the contract to the Auditor-General. He requested her not to attend

the public launch of the Motheo project, due to take place the following day. The appellant did not accede to Cobbett's request.

[10] On 25 April – the day of the launch – Cobbett wrote a memorandum to the appellant. He recorded the history of his discussions with Gibb at the beginning of 1997. Gibb, on being appointed to his position at Nedcor, had conceived plans for the rapid delivery of low-cost housing in rural areas. Cobbett had agreed to facilitate the flow of funds from the national department to Motheo in order to ensure the building of the houses in a period of ten months. However, at a meeting in March with various officials from the relevant bodies in Mpumalanga, including Ngwenya, Cobbett had ascertained that the province's funds were heavily overcommitted. It could not afford the cost of the Motheo contract. Cobbett had agreed, however, to attempt to devise a plan to channel other funding to the project, but could not commit national funds to it. Despite this, Cobbett recorded, the appellant had phoned him a week before the Motheo launch and had reported complaints that he was blocking funds for the project.

[11] Of most concern to Cobbett was that he discovered that national funding had been committed to Motheo in January 1997, before Motheo was incorporated. In addition, he complained,

Motheo had a share capital of only R400; it had not ever built a house; the housing contract was one of the largest ever entered into by the state; Ndlovu's sister, Seape, worked for a party to the contract, Nedcor; and the other director of Motheo was a member of the provincial housing board. Moreover, the contract committed national funds without the authority so to do, and in Cobbett's view, contravened proper subsidy procedures. For these reasons, Cobbett stated that he had referred the matter to the Auditor-General.

[12] On 5 May 1997 Cobbett's appointment as Director-General was terminated. The appellant made a statement to the press to the effect that Cobbett had resigned. He denied this, claiming that he had been fired. It is not necessary to deal with this dispute save to say that documents admitted in the court below indicate that he had indeed been dismissed. The dispute became public and much was made of it in the press. In one of the first reports carried by the M & G, written by Stefaans Brummer, Mungo Soggot (a journalist who had investigated the Motheo project, and who testified at the trial) and Peta Thornycroft, the headline read: 'Why minister axed her housing boss'. The byline read: 'Joe Slovo's handpicked Director General, Billy Cobbett, asked the auditor general to investigate a R185-million housing project in Mpumalanga – and

lost his job'. The report referred to Ndlovu's friendship with the appellant and to the fact that her sister had worked for Nedcor, under Gibb. It also referred to a statement by Ndlovu that the appellant was her 'mentor'.

[13] Other newspapers also carried reports on the Motheo project, on the appellant's relationship with Ndlovu and on the firing of Billy Cobbett. They are far too numerous to discuss in detail and there is no reason to do so. Suffice it to say that all questioned the dismissal of Cobbett and many mentioned the appellant's friendship with Ndlovu. There was editorial comment too. In the Sowetan (26 May 1997) the editorial mentioned the allegation that the appellant had dismissed Cobbett after he had expressed 'unhappiness' in respect of the award of a contract to a friend. It stated: 'there appears to be prima facie evidence pointing to nepotism and lack of transparency in the housing tender system that can be tested only by a commission of inquiry'.

[14] Business Day and the Citizen, for example, reported on 29 May that the appellant had claimed that it was at her request that Cobbett had referred the Motheo contract to the Auditor-General for investigation. And in Parliament she was directly accused of nepotism – a charge reported in several papers subsequently.

Indeed, the Sowetan of 3 June 1997 published a cartoon about the Motheo affair, depicting a house of cards, one of which, at the bottom, is labelled 'Sankie's nepotism'.

[15] The press pointed out too that what the appellant had said in Parliament (that she had encouraged Cobbett to refer the Motheo contract to the Auditor-General) was in conflict with statements she had previously made to the press. Business Day commented in this regard (30 May 1997) that she was guilty of an 'astonishing reinterpretation of events surrounding the deal involving her personal friend, Thandi Ndlovu'. There were calls for an explanation as to Cobbett's position. Business Day of 7 July stated that the public 'had not been told who lied – Cobbett or the Minister – about the circumstances of his departure'.

[16] Reporters of the M & G wrote on 30 May that there was a 'web of cozy relationships spanning central government, provincial government and the private sector'. The report referred in this regard to the friendship of the appellant and Ndlovu, the 'close working relationship' between the appellant and Gibb, and the fact that Ndlovu's sister worked for Gibb at Nedcor. It reported that Mr Barney Mthombeni, a member of the Board at the time when the

contract was awarded, had subsequently become a director of Motheo and as a result had been dismissed from the Board.

[17] The Auditor-General filed his report on 28 August 1997. He found that there were many irregularities attendant on the award of the housing contract to Motheo, and recommended the appointment of a commission of inquiry to investigate the allegations about the relationships between the appellant and her friends who might have benefited improperly. The terms of the report were widely publicised, and the press called for answers to questions relating to the appellant's integrity.

[18] A provincial commission of inquiry was set up by the Premier of Mpumalanga in September 1997. It was chaired by Mr H R Dreyer. The terms of reference were limited to the role of the provincial authorities in the award of the Motheo contract. The commission was not mandated to inquire into the appellant's role in the award of the contract and indeed did not do so. It examined the procedures followed by the provincial authorities, and concluded that there had been numerous irregularities. Among these was that when the Board resolved to award the contract to the then non-existent company, the Board was not quorate, and there was some confusion as to its membership. The minutes

reflected people present at the meeting who were not members of the Board, and the attendance register did not tally with the minutes.

[19] Various role players gave evidence to the commission. Moodley told the commission that the province was interested only in an 'emerging developer', and that he had been given the names of Motheo and Ndlovu by Gibb. However, there was no competitor in the field. Moodley said that Motheo's lack of track record was not relevant. What was important was that the company was headed by a woman who was interested in rural housing. Gibb confirmed in his evidence that Ndlovu's name had come from him, as the representative of the financial backer of the project, Nedcor. There had been no evaluation done of Motheo after he had proposed Ndlovu. The evidence was widely covered by the press. At the same time, the refusal of the national government to appoint a commission with power to inquire into the appellant's role was widely criticised. A report of Beeld on 14 October 1997 referred to the evidence of a Mr Piet du Plessis, the Mpumalanga Director of Housing, who had apparently said that the province's officials had been comforted by the fact that the appellant had herself 'driven' the Motheo project, and had been personally involved. The same report did, however, state that the appellant had previously denied

any involvement, and had refused to comment when evidence was given to the Dreyer Commission.

[20] Cobbett's evidence before the commission was also widely reported. On 23 October 1997 The Star carried a report entitled 'Ex-housing chief says he was fired because he queried deal'. The subheading read: 'Inquiries about Mpumalanga's acceptance of R198-million tender by unknown contractor with no money led to loss of job'. The report referred to Cobbett's statement that he had 'hit a panic button' when he had heard of Gibb's suspension by Nedcor, and had contacted Ngwenya, who made conflicting statements to him about whether the contract was to be funded by Nedcor. He was reported to have said that he had advised the appellant not to participate in the launch of the Motheo project because of his concerns. 'She chose to ignore me' he said. 'I subsequently lost my job for questioning the proceedings and the sequence of how the tender was awarded.' Similar reports were published by other newspapers. The commission itself did not deal with the appellant's role since it was outside its terms of reference.

[21] The Dreyer commission report was filed on 4 November 1997. It reported, as I have said, several irregularities in the award of the Motheo contract, but stressed that it was not mandated to

inquire into the involvement of the appellant and the national department. Again, there were numerous press reports dealing with the commission's findings and the mystery still shrouding the appellant's involvement with Motheo.

[22] The Public Protector, who was also asked to investigate the matter, produced an inconclusive report. It appears that only Cobbett had been questioned and the Member of Parliament who had called for the investigation had failed to produce any evidence to substantiate her complaint. In any event, the report was made only in January 1999. By the end of 1998 it was clear that the Motheo project had failed. A report in the Sunday Times on 13 September 1998 claimed that only two families had been housed. The report was entitled 'The village of rubble and broken dreams'. It referred back to the relationships between the appellant, Gibb and Ndlovu, and to the dismissal of Cobbett.

[23] It is against this background that the report card that is alleged to be defamatory of the appellant was published in December 1998. The author was Mr Howard Barrell, then the political editor of the M & G. Such report cards had been a feature of the M & G for a number of years. Barrell gave evidence that it was an important feature on which he worked hard. Because it

was written for the last edition of the M & G for each year, it would have a shelf-life longer than that of the usual edition – the following year's first edition would be published only in the second week of January. It was also anticipated that readers would pay more attention to the feature than they would to a standard article simply because, over the Christmas holiday period, they would have more time to read. The report cards were also written in a tone appropriate to the festive season: they were, according to Barrell and Soggott, who gave evidence for the M & G, 'irreverent, snappy and robust' accounts of the views of the M & G on the performance of all cabinet ministers through the year under review. They both testified that the report cards did not refer to any new information: they did no more than comment on facts already in the public domain.

[24] As I have earlier indicated, the trial court found that the appellant did not, as a cabinet minister, have *locus standi* to sue for defamation of her when the words complained of related to the performance of her work. It found also that the words did not have defamatory effect. I shall deal first with whether the words were defamatory.

WERE THE WORDS COMPLAINED OF DEFAMATORY ?

[25] The test for determining whether words published are defamatory is to ask whether a 'reasonable person of ordinary intelligence *might* reasonably understand the words . . . to convey a meaning defamatory of the plaintiff. . . . The test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply' (per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate*[1]).

[26] One must have regard also, however, to what the ordinary reader of the particular publication would understand from the words complained of. A clear statement of this principle is to be found in *Channing v South African Financial Gazette Ltd*[2] a passage relied on by Joffe J in the court below. In *Channing* Colman J said, with reference to the *locus classicus* in point, *Johnson v Rand Daily Mails Ltd*:[3]

'From these and other authorities it emerges that the ordinary reader is a "reasonable", "right-thinking" person, of average education and normal intelligence; he is not a man of "morbid and suspicious mind", nor is he

[1] 1994 (2) SA 1 (A) at 20E-G.
[2] 1966 (3) SA 470 (W) at 474A-C.

"super-critical" or abnormally sensitive; and he must be assumed to have read the articles as articles in newspapers are usually read. For that assumption authority is to be found in *Basner v Trigger* 1945 AD 22 at pp 35-6. It is no doubt fair to impute to the ordinary reader of the *South African Financial Gazette* a somewhat higher standard of education and intelligence and a greater interest in and understanding of financial matters than newspaper readers in general have. But this, I think, is clear: one may not impute to him, for the purposes of this inquiry, the training or the habits of mind of a lawyer.'

[27] The first question to be asked then is what the ordinary reader of the M & G would have understood when reading the statement 'Her award of a massive housing contract to a close friend . . . continue[s] to haunt the public perception of her'. The appellant's complaint is that the statement indicates that she actually awarded the contract to Motheo whereas she did not. It was the Mpumalanga Housing Board, she contended, that had the authority to conclude such contracts and that did in fact enter into the housing contract with Motheo. Is the appellant correct that the reader of the M & G would have understood the statement to mean that she had been directly responsible for the award? Or as intelligent, well-informed readers would they have understood that the contract was awarded by the provincial housing authorities? The reference to 'her award' might well be understood to mean no

[3] 1928 AD 190.

more than that she was the person overall in charge of the allocation of funds for housing. But the reference to the *award to a close friend* implies more than that: it suggests that she had influenced the authorities who in fact concluded the contract to make the award to her friend in circumstances where such an award would not otherwise have been made. That is an allegation of corruption, no matter whether it took the form of influencing people or making the award directly.

[28] In my view, therefore, the ordinary reader would have understood these words to mean that the appellant was guilty of corrupt behaviour. She had been responsible for the award of a contract, directly or indirectly, that was tainted by corruption in that a contract had been concluded with a close friend of hers, and the circumstances were such that the contract would not have been concluded but for the relationship. The words are in my view defamatory of the appellant. They convey to the ordinary reader of the report card that the appellant was corrupt.

[29] The court below concluded, as indicated earlier, that even if the words were defamatory, they did not have ‘defamatory effect’. Joffe J accepted the evidence of Barrell and Soggott that the readers of the M & G were ‘the most educated group of newspaper

readers in the country'. Barrell testified that the average reader would be a critical thinker, who read several newspapers and listened to radio and television broadcasts. He or she would thus be well-informed about the political issues of the day. The controversy about the Motheo project, and the questions raised about the appellant's involvement in it, would have been familiar to those who read the report card. They would not have learned anything new from it. The court stated:[4]

'The context in which they [the readers of the M & G] would have read the report card was therefore one in which the public perception of the plaintiff was already tarnished. The content of the report card cannot be relied upon to show that plaintiff's reputation was reduced in the estimation of right-thinking readers of the Mail and Guardian and in the result is defamatory. To the contrary, the damage had been done long before the report card appeared'.

[30] The appellant argues that the conclusion is wrong in this respect. She asserts, first, that the allegation that *she* had made the award to Motheo was made for the first time in the report card. Previous publications had been highly critical of her, had questioned whether there was nepotism (cronyism) in the award but had not asserted that she had been personally responsible for the award of the contract to Motheo. And, second, even if such allegations had previously been made, and were in the public

[4] Para 50.

domain, this could not alter the defamatory impact of the statement. It does not lessen its defamatory content.

[31] The finding that the words complained of had no defamatory effect in that they did not cause the readers of the M & G to have a lesser opinion of the appellant is, in my view, not correct. The logical consequence of this reasoning is that the more a plaintiff is defamed the less likely it is that he or she will have an action. Dario Milo states:[5]

'[T]he causation requirement has not received the attention of the courts because, once the plaintiff proves that defamatory material has been published, there is a presumption of damage to reputation (see Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum'* (1998) p 204. What Joffe J [in the court below] appears to be saying . . . is that, given the context of previous media attention and the target audience, the report card was not defamatory. But this seems absurd: taken to its logical conclusion, it means that the more defamatory articles that are published about the plaintiff, the better the chances for the publisher of a later article escaping liability on the ground that his article is not defamatory, given what came before.'

The author suggests that the extent to which a plaintiff's reputation has already been tarnished should be taken into account only in assessing the quantum of damages to be awarded. I agree.

[32] But that is not the end of the inquiry as to the actionability of the defamation, for there are several defences to the action raised by the respondents. I shall deal first with the question whether cabinet ministers, and indeed public officials and politicians, are deprived, by virtue of their status or role in government, of the protection normally afforded to individuals by the law of defamation. I shall then consider whether, even if a cabinet minister is not precluded merely by virtue of his or her status from claiming damages for defamation, there is nonetheless a special defence attaching to comment or information about members of government: that is, whether political speech is to be treated differently. This is not a question that has come squarely before this court since the seminal decision in *National Media Ltd v Bogoshi*.[6] But that case, as I shall show, suggests that as a matter of public policy there may be a defence that the making of defamatory statements about members of government is justifiable in all the circumstances: that greater latitude may be allowed in publishing information about members of government, in so far as the performance of their work is concerned, than is the case with private individuals. And lastly I shall consider whether the respondents' conduct was reasonable in all the circumstances.

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[5] (2003) 120 *SALJ* 282 p 289.

THE RIGHT OF A CABINET MINISTER TO CLAIM DAMAGES FOR DEFAMATION

[33] This case, as I have mentioned, raises fundamental questions about the balance between the right to dignity, including reputation, and the right to freedom of expression. Both rights are now given special protection in the Bill of Rights. Should a class of people (members of government) lose the right to the protection of their dignity and reputation in the interest of public information and debate? In what follows I shall for convenience refer generally to cabinet ministers. But that should not be taken to mean that other members of government, or parliamentarians or officials of state – representatives of government generally – are to be treated differently.

[34] The court below concluded in effect that the appellant had forfeited her right to claim damages for defamation because there should be a general immunity in so far as criticism and reporting of a cabinet minister's performance of her work (political speech) is concerned. The starting point for the learned judge in answering this question was the seminal case in 1946, *Die Spoorbond v*

[6] 1998 (4) SA 1196 (SCA).

South African Railways; Van Heerden v South African Railways.[7] This court held that the Crown (the respondent being an arm of government) cannot sue for damages for defamatory statements that had allegedly injured its reputation. Watermeyer CJ, for the majority, stated:[8]

'[T]he Crown's main function is that of Government and its reputation or good name is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages, such as the railways or the Post Office; it is not something which can suffer injury by reason of the publication in the Union of defamatory statements as to the manner in which one of its activities is carried on. Its reputation is a far more robust and universal thing which seems to me to be invulnerable to attacks of this nature. . . .

If the defamatory statements are false and malicious and cause actual damage or loss to the Administration then, maybe, such loss can be recovered, but the action would not be one based on an injury to the reputation of the Crown, but upon a wrong done which causes loss.'

[35] In a concurring judgment Schreiner JA set out more fully the rationale for the decision. He said:[9]

'[I]t seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the

[7] 1946 AD 999.
[8] At 1009.

country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the State's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the State actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, . . . of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.'

[36] This passage was cited and approved by Lord Keith in the Court of Appeal in *Derbyshire CC V Times Newspapers Ltd*.[10] There the court held that a local authority could not sue for defamation when its administration was the subject of defamatory remarks. The court also cited *New York Times v Sullivan*[11] which had approved the decision in *City of Chicago v Tribune Co*[12] where it was held that the city itself could not sue for libel. Lord Keith stated in *Derbyshire CC*:[13]

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[9] At 1012-13.
[10] [1993] 1 All ER 1011 at 1019d-1020c.
[11] (1964) 376 US 254.
[12] (1923) 307 Ill 595.
[13] At 1018f-h.

'While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.'

[37] *Spoorbond*, it was found by the court below, had stood the test of time. But is a distinction to be drawn between members of government acting as a corporate body, and individual members of government singled out for their conduct? In *South African Associated Newspapers Ltd v Estate Pelser*[14] the court found such a distinction. It held that the then Minister of Justice could claim damages for defamation where the executive of government, of which he was a member, was accused of lack of concern for justice. Although the minister was not named, the court concluded that if criticism was not confined to any policy or decision, but dealt with the motives underlying the policy or the decision, then the reasonable reader would attribute that motive to individuals. If unlawful or immoral conduct was imputed to an individual minister

[14] 1975 (4) SA 797 (A).

then he was entitled to sue. *Spoorbond* did not preclude an action by an individual in these circumstances. Wessels JA stated:[15]

'I might add that, in my opinion, it cannot be said that the reputation of an individual Minister has those "robust and universal" characteristics which, in the case of the Government (as a separate entity), render it invulnerable to criticism of a defamatory nature. His reputation is, indeed, a "frail thing", capable of suffering injury by the publication of defamatory matter regarding his conduct in the management of State affairs.'

[38] The decision in *Estate Pelser* has met with much criticism. It is not necessary to deal with it all here. The principal difficulty with it is the potential chilling effect on freedom of speech to which the decision gives rise. Joffe J in the court below considered that the distinction between cabinet ministers collectively and individually is not tenable. 'After all, government at its highest form comprises a collective of individuals, being the cabinet.'[16]

[39] P Q R Boberg, in 1975 *Annual Survey of South African Law* in his comment on *Estate Pelser*,[17] argued that a distinction should be drawn between the case where a member of government is defamed by reason of his or her association with the policies or decisions of the government, and that where the defamation

[15] At 808B-D.
[16] Para 32.
[17] Pages 194-6.

relates to purely personal matters. Dario Milo[18] in criticising the decision of the court below, takes the view that *Estate Pelser* was simply wrongly decided on the facts. The court should have held, he argues, that the words did not refer explicitly to the minister.

'The solution to the problematic precedent created by *Estate Pelser* should not be for the law to be radically altered to non-suit a plaintiff by mere dint of the fact that he or she is a member of the cabinet. Rather, when confronted with a general criticism of the government or a governmental department, courts should be loath to regard this as an attack upon individual members of the government.'

I agree that *Estate Pelser* was incorrectly decided on the facts. The article about the then minister had not referred to him, nor any individual, expressly. It was critical of government itself and fell to be decided on the *Spoorbond* principle.

[40] The criticisms made by the appellant and by Milo of Joffe J's decision to deny a cabinet minister *locus standi* to sue for defamation when the words complained of relate to performance of work as a cabinet minister are, with respect, well-founded. A blanket immunity for defaming cabinet ministers would undermine the protection of dignity. It would give the public, and the media in particular, a licence to publish defamatory material unless the plaintiff can prove malice. In elevating freedom of expression

[18] (2003) 120 *SALJ* 282.

above dignity in this way the decision simply goes too far. A balance must be struck. That there is no hierarchy of the rights protected by the Constitution is affirmed by the Constitutional Court in *Khumalo v Holomisa*.[19]

[41] O' Regan J said in *Khumalo*:[20]

'In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.

However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality. . . .

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[19] 2002 (5) SA 401 (CC).
[20] Paras 24-28, footnotes omitted.

It has long been recognised in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name. . . .

Under our new constitutional order, the recognition and protection of human dignity is a foundational constitutional value. . . .

The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. . . .

The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.'

[42] The decision of the court below in denying to a cabinet minister *locus standi* to claim damages for defamation is, with respect, incorrect. It does not give sufficient weight to the right to dignity and to not having one's reputation unlawfully harmed. It elevates freedom of expression above that of dignity when there is not, and there should not be, a hierarchy of rights. It denies to a class of people the ability to protect their reputations, save where defamatory statements are made with malice.

[43] How then is the balance between the right to dignity and the right to freedom of expression in a democratic state to be struck when dealing with 'political speech'? I consider that the proper approach to finding the appropriate balance is to recognise that, in particular circumstances, the publication of defamatory statements about a cabinet minister (or any member of government) may be justifiable (reasonable) in the particular circumstances and therefore not unlawful.

JUSTIFIABLE PUBLICATION

[44] In *National Media Ltd v Bogoshi*[21] this court held that in an action against the press for defamation a defendant is entitled to raise 'reasonable publication' as a defence. The publication of defamatory statements will not be 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 a particular time'.[22] '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; . . . . 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

[21] 1998 ((4) SA 1196 (SCA).

public – *Financial Mail (Pty) Ltd v Sage Holdings Ltd & another* . . . '[23]

I consider it preferable to use the term 'justifiable' rather than 'reasonable', but only in order to avoid possible confusion between inquiries as to unlawfulness and as to negligence. However, the terms are in this context generally interchangeable.

[45] The decision in *Bogoshi* relates both to the fault element of the delict of defamation and to the element of unlawfulness. In so far as fault is concerned, the usual rule is that one will be liable for defamation only if one has *animus injuriandi* – the intention to harm the reputation of the plaintiff. But in a series of cases in this court (culminating in *Pakendorf v De Flamingh*[24]) it was held that strict liability (liability without fault) should be imposed on the press. *Bogoshi* held those cases to have been incorrectly decided and introduced a requirement, in so far as the press is concerned, of reasonable publication. The focus in *Bogoshi* was thus the question of fault (negligence as opposed to strict liability). But the court dealt also with the policy considerations that generally have

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[22] At 1212G-H.
[23] 1993 (2) SA 451 (A). The passage from *Bogoshi* is at 1212A-C.

[24] 1982 (3) SA 146 (A).

an impact on the lawfulness of conduct.[25] In introducing a defence of reasonable publication in the law of defamation, the court in *Bogoshi* considered that the development was in accordance with the common law; and that the common law in this regard was compatible with the interim Constitution then in force.[26] Hefer JA said in this regard: '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 freedom of the press, viewing these interests as constitutional values. I believe it does.'[27]

[46] The press will thus not be held liable for the publication of defamatory material where it can show that it has been reasonable in publishing the material. Accordingly, the form of fault in defamation actions against the press is negligence rather than intention to harm.

[47] However, fault need not be in issue at all if in the particular circumstances anterior inquiry shows that the publication is lawful because it is justifiable. *Bogoshi* indicates that the reasonableness of the publication might also *justify* it. In appropriate cases, a defendant should not be held liable where publication is justifiable

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[25] See the comment on *Bogoshi* in Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* pp 224-6.
[26] At 1216E-F and 1217F-H.
[27] At 1217F-H.

in the circumstances – where the publisher reasonably believes that the information published is true. The publication in such circumstances is not unlawful. Political speech might, depending upon the context, be lawful even when false provided that its publication is reasonable. (See in this regard the test for reasonableness in *Bogoshi*[28] cited above.) This is not a test for negligence: it determines whether, on grounds of policy, a defamatory statement should not be actionable because it is justifiably made in the circumstances.

[48] There are a number of traditional defences to an action for defamation. In *Argus Printing and Publishing Co Ltd v Esselen's Estate*[29] Corbett CJ explained the reasons underlying the standard defences thus:

'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

[28] At 1212A-C.
[29] 1994 (2) SA 1 (A).

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.'

[49] Hefer JA in *Bogoshi*[30] took the view that the list of defences is not closed. Rather than citing instances of special defences formulated over the years, the court looked at the question of unlawfulness from the vantage point of policy and principle:

'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 [*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A)] 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.'

[50] In *Holomisa v Argus Newspapers Ltd*,[31] in a judgment presciently foreshadowing *Bogoshi* as regards the availability of a defence based on absence of negligence, Cameron J held that a defamatory statement 'which relates to "free and fair political

[30] At 1204C-E. See also the comment in *Bogoshi* at 1209A-B on Corbett CJ's approach to defences.

activity" is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made'. This statement was endorsed in *Bogoshi* save in so far as the incidence of the onus is concerned. The court in *Holomisa* did not, however, consider it correct to import into our law the so-called *Sullivan* principle (*New York Times Co v Sullivan*)[32] that defendant press members will not be liable for defamatory statements made of public figures unless the plaintiff can show that the statement was made with actual malice. Such a principle would give far too little protection to the right to dignity. The approach preferred in both *Holomisa* and *Bogoshi* is that of reasonable publication. Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum*',[33] commenting on *Bogoshi* writes: 'The test of reasonableness or public (legal) policy is a supple criterion which can ensure that the law of delict is able to meet the needs of a changing society. . . . The accommodation of freedom of expression under the unlawfulness inquiry is now firmly acknowledged by the Supreme Court of Appeal.'

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[31] 1996 (2) SA 588 (W) at 618E-F.
[32] 376 US 254 (1964).
[33] Page 208.

[51] The considerations to be taken into account in assessing the justifiability of the publication of defamatory material (by the press in particular) are described by Hefer JA in *Bogoshi* as follows:[34]

'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 and 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

[34] At 1209H-I.

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. . . .” ‘

[52] In deciding in *Bogoshi* that *Pakendorf* (above) had been incorrectly decided, and that publication by the press of defamatory statements would not be regarded as unlawful if, upon a consideration of all the circumstances, it was found to have been reasonable to have published the facts in the particular way at the particular time,[35] this court did not expressly hold that there is any specific defence relating to political speech. Nonetheless this court did approve a number of decisions in other jurisdictions that have

[35] At 1212G-H.

held political speech to be in a special category. Those cases are discussed below.

[53] The question that arises in this case, however, is whether special principles should be invoked to protect the press, or for that matter individuals, when they make defamatory statements about a member of government. The *Reynolds* decision in the Court of Appeal (referred to by Hefer JA in *Bogoshi*) was confirmed by the House of Lords.[36] I refer to the House of Lords decision as *Reynolds 2.* The House of Lords declined to recognise a special defence of political speech. It differed in this regard from the Australian High Court decision in *Lange v Australian Broadcasting Corporation*[37] (a case approved by Hefer JA in *Bogoshi*), finding that the common law should not develop 'political information' as a generic category of information the publication of which attracts a qualified privilege irrespective of the circumstances. So too, decisions elsewhere in the Commonwealth (*Theophanous v Herald & Weekly Times Ltd and Another,*[38] *Stephens and Others v West Australian Newspapers Ltd*[39]) were considered in *Reynolds 2* not to reflect the English law. And in *Lange v J B Atkinson and*

[36] [1999] 4 All ER 609 (HL); [2001] 2 AC 127.The references that follow are to the All ER.
[37] (1997) 189 CLR 520.
[38] (1994-1995) 182 CLR 104.
[39] (1994-1995) 182 CLR 211.

another (New Zealand)[40] the Privy Council pointed out that in the *Reynolds* decision of the Court of Appeal the approach of the Australian and New Zealand courts to political speech had been rejected.

[54] Lord Nicholls said in *Lange v J B Atkinson*,[41] commenting on his earlier speech in *Reynolds 2,* that a different, simpler approach had been followed in that case: whether a publication is in the public interest (that is, whether there is a duty to publish to the intended recipients) 'depends upon the circumstances, including the nature of the matter published and its source or status'.

[55] Since *Lange v J B Atkinson* had been decided by the New Zealand Court of Appeal before the decision of the House of Lords had been handed down in *Reynolds 2*, the Privy Council referred the matter back to the Court of Appeal for further hearing in the light of the recently-enunciated English approach. Lord Nicholls pointed out, however,[42] that 'one feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a *value judgment*

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[40] [1999] UKPC 46. It is of interest that the decisions of the House of Lords in *Reynolds* and of the Privy Council in *Lange v Atkinson* were handed down on the same day, and that the same law lords sat in both cases.

[41] Above, para 15.

which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press' (my emphasis). For that reason the court considered it inappropriate to determine the matter: the courts of New Zealand, it said, were 'better placed to assess the requirements of the public interest in New Zealand' than was the Privy Council.[43]

[56] The House of Lords in *Reynolds 2* considered that the common law principle of qualified privilege, based on a consideration of all the circumstances of the publication, enables a court to give appropriate weight to the importance of freedom of expression. Essentially what was to be considered was whether the public had a right to know the particular information. The case related to statements about the plaintiff, formerly the Prime Minister of Ireland. He had in effect been called a liar (the article concerned was entitled 'Why a fib too far proved fatal for the political career of Ireland's peacemaker and Mr Fixit'). Although the information published about the plaintiff was undoubtedly in the public interest, publication had taken place without giving the

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[42] Para 16.

[43] The New Zealand Court of Appeal confirmed its earlier decision in *Lange*: [2003] NZLR 385. It considered that qualified privilege did extend to political speech, which constituted a particular class, and that the law in England was different in this regard. The judgment is one written by the full court. Reasonableness of the publication is not the test to be used, however. Gratuitous slurs on politicians would be actionable because the privilege had been

plaintiff any opportunity to explain his conduct. The court held that qualified privilege therefore did not attach to the publication in the circumstances.

[57] The House of Lords thus declined to recognise a 'new category of occasion when privilege derives from the subject matter alone: political information'.[44] Political information, Lord Nicholls held, adopting the Australian definition in *Lange* (above) is 'information, opinion and arguments concerning government and political matters that affect' the public. However, despite the rejection of a special category of privilege in the form of political information, Lord Nicholls did make it clear that established categories of qualified privilege are not exhaustive. Such categories are 'no more than applications, in particular circumstances, of the underlying principle of public policy'.[45] That court did recognise, however, that in different jurisdictions different considerations might come into operation.[46]

[58] In Australia and New Zealand, as I have indicated, political speech has been recognised as being in a different class because of constitutional considerations. Brennan CJ in *Lange v Australian*

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abused, and not because the publisher had acted unreasonably. The essential test is the interest in making the statement, and the interest in receiving it.

[44] At 621e-g.

[45] At 616e-f.

Broadcasting Corporation (above, not approved in *Reynolds 2)* speaking for the court held that each member of the 'Australian community' has an interest in both disseminating and receiving information and opinions concerning government and political matters that affect Australians. 'The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion . . . about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege.' The finding was based largely on the requirements of the Australian Commonwealth Constitution, and is subject to the qualification that publication must be reasonable in order to protect the reputations of those defamed.

[59] The High Court of Australia in *Lange* approved the decisions in *Theophanous v Herald & Weekly Times* and *Stephens v West Australian Newspapers Ltd* (above, also discussed and not followed in *Reynolds 2*). In both those cases the courts had recognised a special category of qualified privilege in respect of political information disseminated in the press. In *Theophanous* it was held that the Commonwealth Constitution allowed the

[46] See also the speech of Lord Steyn at 630g-j.

publication of material discussing government and political matters, and of information concerning members of Parliament which relates to the performance of their duties as members of Parliament; and in relation to the suitability of persons for office as Parliamentarians. Publication would not be actionable if the defendant proved that it was unaware of the falsity of the publication; it did not publish the material recklessly, not caring whether it was false; and the publication was *reasonable* in the circumstances.

[60] The High Court in *Lange* adopted the approach to the interest in receiving political information formulated by McHugh J in *Stephens*:[47]

'In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in

public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.'

[61] Of particular importance in this matter is the approach to reasonableness enunciated by Brennan CJ in *Lange*.[48]

'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.'

[62] This passage was approved by Hefer JA in *Bogoshi.*[49] The court there held (*contra Holomisa*, above) that the defendant bears

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[47] (1994-1995) 182 CLR 211 at 264.
[48] (1997) 189 CLR 520 at 574.
[49] At 1211F-H.

the onus of proving reasonableness. In the inquiry as to the reasonableness of the publication, account must be taken of the tone of the publication – whether there is an unnecessary sting attached; the nature of the information published; the reliability of the source; and steps taken to verify the information.[50] These questions relate both to unlawfulness (the unnecessary sting or the gravamen of the statement) and to fault – negligence – (steps taken to verify the information). But the inquiries inevitably overlap.

[63] That political information or speech should be treated differently, and members of government expected to be more vulnerable to robust criticism, is also the view of the European Court of Human Rights in *Lingens v Austria*[51] affirmed by that court also in *Oberschlick v Austria*[52]. The court said in *Lingens*:

'The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) [of the European Convention of Human Rights] enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in

[50] At 1212H-J.
[51] (1986) 8 EHRR 407 (para 42).
[52] (1991) 19 EHRR 389 (para 59).

such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.'

This dictum was approved by Lord Steyn in *Reynolds 2*.[53]

[64] In my view, the reasons advanced in *Lange* and *Lingens*, as well as those underlying the decision in *Spoorbond*, for recognizing that the defamation of government and members of government might be justifiable in certain circumstances, and thus lawful, are compelling. They require that there be a special defence attaching to political information, such that the publication of defamatory matter in circumstances where it is justifiable (reasonable) is not actionable.

[65] 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: that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: it is one of the founding values expressed in s 1(d) of our Constitution:

[53] At 635e-j.

'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, *to ensure accountability, responsiveness and openness*' (my emphasis).

And see further s 92(3)(a) read with s 195 (1)(a) to (f) and s 195(2) of the Constitution which govern the basic values and principles of public administration. In *Holomisa* Cameron J said:[54]

'Our constitutional structure seeks to nurture open and accountable democracy. Partly to that end, it encourages and protects free speech and expression, including that practised by the media. If the protection the Constitution affords is to have substance, there must in my view be some protection for erroneous statements of defamatory fact, at least in the area of "free and fair political activity".'

[66] This court has in several cases recently, when dealing with the Aquilian action for damage inflicted negligently, stressed the importance of the state's accountability to the public in finding state action to be unlawful. See, in particular, *Minister of Safety and Security v Van Duivenboden*;[55] *Van Eeden v Minister of Safety and Security*;[56] *Premier, Western Cape* v *Faircape Property Developers (Pty) Ltd*;[57] *Minister of Safety and Security v Hamilton*;[58] and *Minister of Safety and Security and another v*

[54] At 616I-J.
[55] 2002 (6) SA 431 (SCA).
[56] 2003 (1) SA 389 (SCA).
[57] 2003 (6) SA 13 (SCA).
[58] 2004 (2) SA 216 (SCA).

Carmichele.[59] See also the decision of the Constitutional Court in *Carmichele v Minister of Safety and Security*[60] on wrongfulness in the law of delict in the light of constitutional values. The state, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the state do in discharge of their duties. And the public is entitled to call on such officials, or members of government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice.

[67] That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations.[61] As Burchell puts it:[62]

'There are limits to freedom of political comment, especially in regard to aspects of the private lives of politicians that do not impinge on political competence. Politicians or public figures do not simply have to endure every infringement of their personality rights as a price for entering the political or public arena, although they do have to be more resilient to slings and arrows than non-political, private mortals.'

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[59] 2004 (3) SA 305 (SCA).
[60] 2001 (4) SA 938 (CC).
[61] See Burchell op cit p 229. 'It has for many years been accepted that greater latitude must be given to freedom of expression on political matters. However, although politicians may, in one sense, be fair game for criticism, it is not completely open season in the political veld.'
[62] Loc cit.

[68] But where publication is justifiable *in the circumstances* the defendant will not be held liable. Justifiability is to be determined by having regard to all relevant circumstances, including the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information (this factor would play an important role too in considering the distinct question whether there was negligence on the part of the press, assuming that the publication was found to be defamatory); and whether the person defamed has been given the opportunity to comment on the statement before publication. In cases where information is crucial to the public, and is urgent, it may be justifiable to publish without giving an opportunity to comment.

[69] Was the publication of the M & G report card in respect of the appellant justifiable in all the circumstances, such that the respondents may invoke the defence of justifiable political speech? The executive authority of the Republic is vested in the President who exercises it 'together with the other members of the cabinet' (s 85 of the Constitution). Members of the cabinet are accountable both collectively and individually to Parliament for the exercise of

their powers and the performance of their functions (s 92(2)). They are also tasked with the attainment of an accountable public administration. They must act in accordance with policy as determined by the cabinet. Cabinet ministers thus represent government at the highest level. Freedom to discuss and criticise government – the country's affairs – must include the freedom to discuss the conduct of individual cabinet ministers. The M & G, and all the other newspapers and media that commented on and criticised the conduct of the appellant were entitled, indeed obliged, to do so. Was the statement that 'her award of a massive housing contract to a close friend' in keeping with that right and duty, or did it go too far?

[70] Earlier in the judgment I set out at length some of the statements made about the appellant and the Motheo project. A reading of them shows that the press, including the M & G, repeatedly called for an explanation from the appellant of a contract awarded under her auspices as National Minister of Housing. It is common cause that the contract was concluded without the necessary procedures having been followed. The Board that purported to award it was not quorate when the decision to make the award was taken. The company to which it was awarded did not yet exist, let alone have any track record of

building houses. The person (Gibb of Nedcor) who had undertaken to fund the project in part was, to the knowledge of the appellant, under suspicion. The Auditor-General reported adversely on the contract, as did the Dreyer commission of inquiry. The press called for explanations from the appellant, especially as to why she had fired Mr Cobbett, and received no response. They called for an inquiry that would focus on her role in the award to Motheo. There was no response. They knew she was in overall charge of housing nationwide[63] and could and should have stopped the contract at the outset. The call for a commission of inquiry had been dismissed. There was no point in again seeking a response from the appellant. She had stated publicly more than once that she had had nothing to do with the award.

[71] There was also no point in asking Moodley or Gibb about the role of the appellant in the whole affair: their evidence to the Dreyer commission and their public statements pointed to the prospect of another denial. Yet the obvious question was how Gibb had come to know of Ndlovu. In the light of all the information about the links and friendships between the appellant and Ndlovu, the appellant and Gibb, and Ndlovu's sister (Seape, who worked for Gibb at Nedcor) and Gibb, it was reasonable for the M & G to

[63] Housing is one of the areas of concurrent national and provincial legislative competence:

believe that the appellant had influenced the choice of Motheo, Ndlovu's company, as the housing developer. And it could not have been expected of the M & G to hold its own commission of inquiry. The respondents' publication of the defamatory statement was, in all the circumstances, justifiable.

REASONABLE PUBLICATION

[72] As to the reasonableness of the respondent's belief and the issue of fault, much of what has been said above is relevant here too. It must also be remembered that the question now is not: was the appellant's involvement in the choice of Motheo (Ndlovu) the only reasonable inference (as it would be for liability in a criminal case), or the most probable inference (as for liability in a civil case)? It is simply: was it a reasonable inference for the respondent to draw given, in particular, all the press reportage and the Dreyer report?

[73] The essential question at the time, as I have said, was who, in late 1996 or early January 1997, selected Ndlovu, the close friend of the appellant, and the intended director of a company yet to be formed, which had neither financial capacity, nor any experience in, nor knowledge of the construction industry?

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schedule 4 of the Constitution.

Mpumalanga province did not have the funds to expend on the project. It was dependent on the choice of developer being made by the supposed financial backer, Nedcor, or the national ministry. Nedcor's later rejection of Gibb's initiatives and Cobbett's disapproval of the entire scheme reasonably show that the choice of Ndlovu must have come not from them, but from an ostensibly initially authorised Nedcor operative (Gibbs or Ndlovu's sister) or from someone in the ministry. Given the links between Gibb, Seape, Ndlovu and the appellant, it was reasonable to infer that Ndlovu's name would not have come from Gibb alone. The obvious inference to be drawn was that Gibb knew that the name that he suggested would be acceptable to the ministry. But whether the name came from Gibb or Ndlovu herself, or from her sister Seape, ultimately authoritative ministerial acceptance, in the absence of Cobbett's involvement, was obtainable from only one person. That was the appellant. She had already recorded a denial of involvement and nobody could expose her to cross-examination or interrogation in any available form of inquiry. It was also reasonable to conclude that any other informants either did not know enough to answer the question, or would not alter the stance, supportive of the appellant's denial, which they had already made public in the press or before the Dreyer commission.

[74] The tone of the report card was undoubtedly irreverent. It was critical of the performance of all members of government, even those to whom it awarded 'good grades'. It was an overall assessment of performance over the year under review. It assumed knowledge of political events over the year. It did not purport to convey new information. And it relied on the myriad of reports made in a multitude of papers over the course of the year, all calling for an explanation from the *appellant herself* of the Motheo contract. Admittedly what was said was stated to be fact, not opinion, but it nevertheless was clearly proffered as political criticism. And it concerned the actions of a public figure in relation to a major political talking-point. Thus even if the report were to have conveyed the impression that the appellant had personally made the award and signed the contract, the conduct of the writer and the editor, the second respondent, was reasonable in all the circumstances.

CONCLUSION

[75] Accordingly I find that the publication of the defamatory article was not unlawful, because it was justifiable in all the circumstances, and that it was not negligent. The report card constituted political speech that was justified and reasonable in all the circumstances. The defamation is thus not actionable.

[76] It is thus not necessary to consider the respondents' further arguments in relation to the introduction of new remedies (the *amende honorable* – apology in suitable form to the plaintiff, and setting the facts straight – or a substantial reduction in the award of damages) for politician plaintiffs, as a means of achieving an appropriate balance between the competing rights of freedom of speech and dignity.

[77] The appeal is dismissed with costs including those occasioned by the employment of two counsel.

C H Lewis
Judge of Appeal

Concur: Howie P

PONNAN AJA (concurring in the order of Lewis JA, but for different reason):

[78] An ostensibly easy question, first articulated by Lord Atkin in *Sim v Stretch*[64] and adopted repeatedly by our courts, namely, ' ... would the words [complained of] tend to lower the plaintiff in the estimation of right thinking members of society generally ...', is a salutary starting point. The answer it yields, is, in my view decisive of the present appeal.

[79] The test is an objective one. The standard is the ordinary reader with no legal training or other special discipline, variously described as a 'reasonable', 'right thinking' individual of 'average education' and 'normal intelligence'. It is through the eyes of such a person who is not 'super-critical' or possessed of a 'morbid or suspicious mind' that I must read the report card.

[80] The ordinary reader of the M & G, so we are told, is ' ... highly educated, informed and critical'. It is someone who keeps abreast of current affairs by reading an assortment of newspapers, listening to the radio and viewing television. It would thus be fair to impute to such a person a higher standard of education and intelligence and a greater interest in and understanding of national

[64] [1936] 2 All ER 1237 (HL)

affairs than newspaper readers in general in this country. (see *Channing v South African Financial Gazette & others* 1966 (3) SA 470 at 474A.) But, it is clear that one may not impute to such a reader, for the purposes of this enquiry, the training or habits of the mind of a lawyer.

[81] ‘In an era when rebellion for its own sake is the fashion and revisionism its intellectual style, values which used to be taken for granted are re-appraised so frequently and ferociously that to identify the "right-thinking", and to postulate some general accord among them, is a difficult enough task in a homogeneous community. The problems are compounded enormously in a mixed country like South Africa, with its variety of races, cultures, languages and religions, and its wide social and economic differences. No single group has a monopoly of such a society's "right-thinking" members, and the "mythical consensus" must encompass them all. Subjectivity inevitably intrudes whenever this is sought. A Judge would doubtless hesitate to see himself as the epitome of all "right-thinking" persons, or to say so at any rate. He is seldom likely, on the other hand, to attribute to the "right-thinking" a viewpoint sharply in conflict with his own. More often he decides what he

> personally thinks is right, and then imputes it to the paragons. To others, however, the tenets thus decreed may seem merely the innate prejudices of the group or class from which he has sprung. That they indeed are is the danger against which he must guard.'

(Per Didcott J in *Demmers v Wyllie & others* 1978 (4) SA (D) 629 A-D.)

[82] The Minister's complaint in this matter is a very narrow one, it is that she did not award the housing contract to Motheo. The award of the contract had been made by the Mpumalanga Housing Board, accordingly, so it was argued, the report card should not have attributed it to her. The logical starting point is whether the words complained of convey the defamatory meaning which the plaintiff seeks to place on them. Properly understood, so it was submitted, the reference to 'her' award of the contract carried with it an imputation of ‘corrupt nepotism’, implying as it did, that she had awarded a lucrative contract to a close friend. That, according to the Minister’s counsel, was the meaning to be attributed to the report card.

[83] It is indeed so that the Minister did not award the contract to Motheo. Nor could she. It was after all a provincial housing

contract which had been awarded by the provincial housing authority. Readers of the M & G would have known that. In that context they would have understood the reference to 'her award', not as her having personally awarded the contract, but, as her possibly having influenced the award of the contract.

[84] There was a widely held public perception that the Minister had used her influence to secure a lucrative contract for a close friend. Cartoons, caricatures and editorials accompanied lead articles in national, daily and weekly newspapers. Vivid journalese was employed to describe the Motheo scandal as it came to be known, which dominated the print media for a protracted period prior to the publication of the report card by M & G. The report card, it bears noting, was a 'snappy', 'irreverent' and ‘robust’ assessment of the performance of cabinet ministers during the year under review. It did not purport to add anything to what was described in the evidence as the then ‘prevailing political folklore’. Readers of the M & G would not have attached any significance to the reference 'her award' instead of the more apt 'the award'.

[85] It is fair to say, that there was at that time a public perception created by the extensive reportage, long before the publication of the report card, that the Minister may indeed have been guilty of

nepotism. Those allegations had repeatedly been made in the media amidst strident calls for a full, fair and proper inquiry into her role in the scandal. Not only did those calls go unanswered, but the Minister's evasive and contradictory responses did little to erode that perception. Properly understood, the words complained of were no more than a reference to the role she had played in the matter as revealed by the information already in the public domain. Views already shaped by the preceding avalanche of publicity would not have been altered by the report card. The report card was intended to be allusive rather than specific. It was evidently designed for entertainment rather than instruction. It sought to be irreverent rather than informative. So construed, although the matter is by no means free from doubt, the Minister was not disparaged by the words complained of.

86] In *Pienaar & another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318 Ludorf J said '… The Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that, the public and readers that debate political matters are aware of this.' Those sentiments assume heightened significance in a fledgling democracy such as ours struggling to rid itself of its securocratic

and censorious past. The Minister has been too sensitive about the report card. She is in her own right a public figure who at the relevant time was entrusted with a key national portfolio. The true enquiry relates to the manner in which the report card would have been understood by those readers of it whose reactions are relevant to the action. In my view, it cannot be said that to those readers it bore a defamatory meaning. It follows that the report card was not defamatory of the Minister.

[87] I accordingly concur, albeit for different reasons, in the order proposed in paragraph 77 of the judgment of Lewis JA. I also express my concurrence with paragraphs 33 to 42 of my Sister's judgment.

V M PONNAN

ACTING JUDGE OF APPEAL

MTHIYANE JA (dissenting):

[88] I have read the judgments of my colleagues Lewis JA and Ponnan AJA and regret that I am unable to agree with either's conclusion. In what follows I set out my approach to the matter.

[89] The appellant, then the National Minister of Housing, instituted a defamation action in the Johannesburg High Court against the first and second respondents. The action arose out of a statement in a 'report card' published in the Mail and Guardian of 24 December 1998. The statement read:

'Why is she still in cabinet? She has shown she cannot deliver in one of the key delivery ministries. Her award of a massive housing contract to a close friend and the sacking of former Director-General, Billy Cobbett, continue to haunt the public perception of her.'

[90] The appellant relied on only that portion of the statement which accused her of having awarded a massive building contract to a close friend. The appellant pleaded that the said statement, in the context of the 'report card', was per se defamatory and published *animo injuriandi*. In the alternative, she alleged that the

statement was intended and understood by readers of the 'report card' and by the general public to mean, *inter alia*, that she:

'(a) is of a base moral standard;

(b) is a dishonest person and that she would dishonestly award a massive housing contract to

a close friend of hers;

(c) is incompetent and is unable to deliver as a minister;

(d) is not worthy of holding public office.'

[91] The appellant alleged further that, in publishing the statement:

'(a) the defendants were reckless in that they did not care whether the contents were true or false;

(b) they took no reasonable steps to establish and/or to investigate the truth of the allegations contained in the article; and

(c) the defendants failed to ensure that enquiries were directed to the plaintiff and/or that a response was sought from the plaintiff.'

[92] In their plea the respondents denied that the statement, in the context of the report card, was defamatory of the plaintiff or that it conveyed the meaning attributed to it by the appellant. They also raised other defences: reasonableness, qualified privilege, and the defence of truth and public benefit.

[93] The appellant's action was dismissed by the court *a quo* (Joffe J) on two grounds: first, that as a cabinet minister the appellant had no *locus standi* to sue for defamation, and secondly, that she had not been defamed because by the time the statement was published, her reputation had already been tarnished by the past reportage on the Motheo contract. The learned judge found that the context in which the readers of the Mail and Guardian would have read the 'report card', was one in which the public perception of the appellant was already tarnished and the damage done. The issues relating to the other defences were not addressed in the judgment.

[94] The appeal raises four questions: first, whether a cabinet minister has a right in law to sue for defamation. Secondly, whether or not the statement was defamatory of the appellant, in the context of the reportage of a year and a half on a scandal concerning the award of the housing contract which was found to be irregular in several respects. Thirdly, whether or not in the circumstances of this case, the conduct of the respondents fell within the scope of the reasonableness defence (or remedy) set out in *National Media Limited v Bogoshi.*[65] Fourthly, whether this

[65] 1998 (4) SA 1196 (SCA) at 1212 H – 1213 A-C.

court should develop the common law in order to provide for a defence that would protect both the maker and publisher of the defamatory statement as well as the victim of the defamation.

[95] The accusation that the appellant awarded the Motheo contract to a close friend was unproven. With that, the defence of truth and public benefit, in my view, fell by the wayside. I deal fully with this aspect later in the judgment. During argument in the appeal before us, counsel for the respondent was constrained to submit that the defence of truth and public benefit was legally suspect. That approach, it seems to me, in the context of the present matter, was informed by the very nature of the defence contemplated in *Bogoshi*. It is meant to protect publication of an untrue statement (not a true statement), in circumstances where there is no fault (or unreasonableness) on the part of the maker or publisher. In the absence of proof, the accusation against the appellant must, in my view, be approached on the basis that it is untrue.

[96] I deal first with the question whether the appellant, as a cabinet minister, has *locus standi* to sue for defamation. The respondents contend that the appellant lacks *locus standi* to sue. They submitted that the decision in *Die Spoorbond and Another v*

South African Railways[66] to the effect that the state cannot claim damages for defamation for injury to its reputation, should be extended to cabinet ministers so as to preclude them from suing for defamation. In developing his argument counsel for the respondents stressed the need to protect the freedom of every person to comment, without inhibition, on the management and conduct of the country's affairs to avoid the chilling effect of defamation actions by cabinet ministers. For this submission reliance was placed on the judgment of the House of Lords in *Derbyshire County Council v Times Newspapers Ltd and Others*[67] where the principles laid down in *Spoorbond* were followed and extended to local authorities - in the case in question to the Derbyshire County Council. Counsel urged that the decision in *South African Associated Newspapers Ltd and Another v Estate Pelser*,[68] where this court declined to extend the *Spoorbond* rule to actions for defamation by cabinet ministers, should not be followed.

[97] There is a lot to be said for counsel's criticism of the decision in *Pelser*. The facts in that case were briefly the following: two persons, one white and the other black, were sentenced to death for the same crime. The State President (as the head of the state

[66] 1946 AD 190.

was then called) granted a reprieve to the white murderer but not to the black one. The black man was executed. The Sunday Times, a newspaper published by the first defendant in that case, printed an article in which the late Professor Barend van Niekerk was quoted as having remarked:

'The execution of [the black man] must fill all South Africans with shame.'

For reasons that are difficult to comprehend the court rejected the argument by Mr SW Kentridge SC, for the newspaper publisher, that the above statement was, on its correct interpretation, not capable of being read as defamatory of Minister Pelser. I agree with Lewis JA that *Pelser* was wrongly decided on the facts.

[98] I do not agree with the submission that the principle in *Spoorbond* should be extended and that cabinet ministers should be barred from suing for defamation. In my view, that approach would undermine the protection of an individual's right to dignity, which includes reputation, and elevate the right to freedom of expression above the right to reputation. Under our law the right to reputation equally enjoys protection. The 'recognition and protection of human dignity is a foundational constitutional value,' and the right to human dignity entrenched in the Constitution

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[67] [1993] 1 All ER 1011 (HL).

'values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.'[69] Even though the right to reputation is not protected *eo nomine* as a fundamental right, it is considered to be part of the right to respect for, and protection of, the dignity of an individual, which is protected by s 10 of the Constitution.[70] It is therefore crucial to strike a fair balance between the right to freedom of expression,[71] and the right to dignity[72] and reputation, so that one right is not accorded more value than the other. The tension between the two competing constitutional rights has, for now, been resolved adequately in defamation matters by the application of the principles laid down in *Bogoshi*.[73]

[99] In my view, ministers of state, as everybody else, are not above criticism in relation to the execution of their duties as members of government – and such criticism is indeed a good thing for purposes of public debate and discussion in an open and democratic society. In fact the end-of-the-year 'report card' devised by the respondents, properly utilized, might prove to be a useful exercise to encourage members of government to keep their wits

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[68] 1975 (4) SA 797 (A).
[69] See *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at paras 26 and 27.
[70] See Lawsa (1) par 270.
[71] Protected under s 16 of the Constitution.
[72] " " s 10 of the Constitution.
[73] See *Khumalo* at para 39.

about them on issues of public concern. But unchecked, unjustifiable imputations of dishonesty detract from a proper exercise of the right to freedom of expression and disrupt the balance referred to in para 98 above. I consider fair reporting and the retention by a cabinet minister of the right to sue, not to be strange bed fellows. They can easily subsist side by side, without the right to freedom of expression being compromised. In my judgment, the appellant does have *locus standi* to sue for defamation.

[100] I now turn to the effect of the past reportage on the appellant's claim. The court *a quo* held that the appellant failed to establish that she had been defamed because by the time the 'report card' was published, damage had already been done. This finding is supported by the respondents.

[102] I do not agree. The test whether the appellant's reputation was lowered in the estimation of right thinking readers is an objective one. The question in the present matter is how the reasonable reader of the Mail and Guardian would have understood the statement in the 'report card', in the context and against the background it was published. The test envisages that the words in the statement are to be construed 'in their context',

and the meaning thereof determined by reference to 'what they would convey to ordinary reasonable persons, having regard to the sort of people to whom the words were or were likely to be published.'[74] I do not see the relevance of the *dictum* of Didcott J in *Demmers v Wylie and Others*,[75] referred to by my colleague, Ponnan AJA (para 81) in his judgment, in the context of the present matter. In that part of the judgment in *Demmers*, Didcott J was dealing with the difficulties associated with identifying a 'right-thinking reader' in a non-homogenous community such as ours. No such problem is encountered in the present matter. The right-thinking reader we are concerned with is the ordinary reader of the Mail and Guardian. The issue before us is what the statement in the 'report card' would have conveyed to that reader, having regard to the above test.

[103] In my view, the conclusion reached by the court *a quo* on the effect of the past reportage is flawed in two respects: first, it ignores the fact that the allegation that the appellant had awarded the contract to Motheo was a novel statement. Secondly, any perspective earlier held of the appellant by readers of that reportage, could not have been caused by a belief that she had

[74] *Johnson v Beckett and Another* 1992 (1) SA 762 (A) at 773 B-D; *Johnson v Rand Daily Mails* 1928 AD 190 at 204; *Channing v SA Financial Gazette Ltd and Others* 1966 (3) SA 470 (W) at 474 A–C; *Botha en 'n Ander v Marais* 1974 (1) SA 44 (A) at 48 D-F.
[75] 1978 (4) SA 619 (DCLD) at 629 A-B.

indeed made such an award, as no assertion of such a fact had ever been made.

[104] Mr Howard Barrell, the writer of the 'report card', testified that readers of the Mail and Guardian were on the whole the most educated group of newspaper readers in the country. He described the typical reader as 'a highly educated, informed and critical individual', who probably reads three or four different newspapers and regularly listens to the radio and watches television. The readers of the Mail and Guardian, he said, base their judgments on the information they receive from a variety of sources and do not uncritically accept what they read.

[105] In my view, that type of reader would have realized that the avalanche of past reportage conveyed no more than a suspicion of nepotism, and that the reportage cried out for an investigation to establish the appellant's involvement, if any, in the award of the Motheo contract. That class of reader, given his or her ability to discern and analyse, is not likely to have accepted the past reportage as asserting that the Motheo contract had been awarded by the appellant or that she had played a role in the award of the contract.

[106] But, when the report of 24 December 1998 appeared, suggesting that the appellant had awarded the contract, it seems to me that the reader, in considering the new information objectively (as a right-thinking reader), would have compared it with what had been gleaned from the earlier reportage, and would have been led to conclude that the appellant had in fact done what was alleged: that the report meant that she had influenced the process of awarding the contract or played a role in its award to a close friend because the 'report card' now says so (something not stated previously). Although the average reader of the Mail and Guardian would have been aware that the award of housing contracts was a provincial competency, he or she was now being told pointedly that the appellant had caused the contract to be awarded. From this latest statement the reader would have concluded that the Mail and Guardian was now in possession of information that linked the Minister directly with the nepotistic award of the contract. This, because even the earlier reportage of the Mail and Guardian, and indeed other newspapers, had not carried a story that linked the appellant directly to the award of the Motheo contract. As all the other newspapers had done, the Mail and Guardian had simply raised questions calling for answers. It is true, as stated by Lewis JA (para 23), that Barrell and Soggot, called as witnesses for the respondents, maintained that the report

card did not refer to any new information. But when Barrell, in particular, was challenged by counsel for the appellant to point to any prior media statement, if any, implicating the appellant in the award of the contract, he was unable to do so.

[107] In my view, the latest statement was novel and lowered the appellant's reputation in the eyes of the right thinking reader of the newspaper. I consider the earlier reportage to be relevant to the assessment of *quantum* rather than as a complete defence to the defamation action. It is one thing to say that a person has a bad reputation, but quite another to conclude or imply that such person has none at all to protect – which is the effect of the finding of the court *a quo* in so far as the appellant is concerned. Even in cases where a person's reputation has sunk to its lowest ebb, that factor does not constitute a complete defence.[76]

[108] Although the earlier reportage was critical and sometimes strident, in the present matter it never included an allegation that, whether directly or indirectly, the appellant had awarded the contract to Motheo. In my view, previous defamations (even of an identical kind) cannot and do not render what was defamatory to be not defamatory. The relevance of earlier defamations is

confined to the topic of damages, where it would be a factor to be contextualized in the course of an assessment of *quantum*. The statement in my colleague, Ponnan AJA's judgment (para 84), that there was 'a widely held public perception that the Minister had used her influence to secure a lucrative contract for a close friend' is, in my view, not borne out by the facts nor by the past reportage. On the contrary, the past reportage merely raised suspicion and called for answers.

[109] The proposition that the appellant awarded, or caused the contract to be awarded, is unproven. The respondents did not attempt to adduce evidence to establish that fact. Instead Barrell, in his evidence, was driven to assert that an inference was to be drawn from a range of surrounding circumstances. When Barrell was invited to substantiate his accusation (that the appellant had awarded the Motheo contract) during cross-examination, he stood by his bare assertion and, rather than provide proof, challenged counsel and said: '[P]lease eliminate my conclusion, please prove me wrong'. I agree with Lewis JA (para 28), that the ordinary reader of the Mail and Guardian would have understood the words complained of to mean that the plaintiff was guilty of corrupt behaviour. Such serious accusation cannot, in my view, be

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[76] Cf *Grobbelaar v News Group Newspapers Ltd and Another* 2002 (4) All ER 732 (HL) at 733

regarded as mere political criticism. In my view, that conclusion was reached without any factual basis. Accordingly, having failed to show that the allegations are true, the respondents can only escape liability if their conduct in publishing the defamatory statement, can be brought within the *Bogoshi* defence.

[110] In *Bogoshi*[77] Hefer JA said:

'[T]he 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 a particular way and at a particular time. It is for the respondents to prove all the facts on which they rely to show that the publication was reasonable and that they were not negligent.'[78]

Dealing with how the test was to be applied Hefer JA continued:

'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 318 C-E), and that *the tone in which a newspaper article is written*, or the way in which it is presented, sometimes provides additional,

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(f) - (g).

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 had a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper*. Professor 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 the 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 at 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.'[79] [Emphasis added].

[111] In the statement complained of the appellant is accused of awarding the contract to a close friend. None of the guidelines suggested in *Bogoshi* was followed by the respondents before

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[77] at 1212G.

publishing the offending statement. The appellant was not offered an opportunity to respond to the allegations. I agree, though, with Lewis JA, that it may not have been necessary to offer her such an opportunity in view of her repeated denial that she had anything to do with the awarding the contract to Motheo. But, what of the other role players? The respondents could have checked with Cobbett or the members of the Provincial Housing Board, in particular its Chairman, Mr Saths Moodley, whether the appellant had been involved in the awarding of the contract. No attempt was made to interview either Cobbett or Moodley or the Mpumalanga Director of Housing, Mr Piet Du Plessis (or any other Board member) for their impressions. The remarks by Du Plessis (referred to in para 19 of Lewis JA's judgment) that he understood the project to have been 'driven by the Minister', which were accorded prominence in the press when he testified before the Dreyer commission, were intended to exculpate himself and should not have been taken at face value. In any event, the said remarks did not assert knowledge that the appellant had indeed made herself culpably involved. Barrell was, in his own words, not even aware of the context in which Du Plessis made his remarks. Had Cobbett been interviewed Du Plessis' allegations would have been shown to be false because, on the evidence on record, there is no reason to

[78] See *Bogoshi* at 1215 I.

believe that Cobbett himself would have said that the appellant was involved in the award of the contract to Motheo. This is fortified by what Cobbett told the Public Protector. According to the Public Protector's report to Parliament, Cobbett said that he had no reason to believe that the appellant had been involved in the award of the contract. In her judgment Lewis JA (para 22) says that the Public Protector produced an inconclusive report. In the light of what I have said above, I am not certain in what respects the report was inconclusive.

[112] The respondents could easily have checked these facts but failed to do so. There is no suggestion that they were under pressure to meet any deadline. Barrell testified that he had worked on the 'report card' for some time. There is no suggestion that Cobbett and the members of the Provincial Housing Board, in particular, its Chairperson, Mr Saths Moodley, were not available and accessible to the respondents, nor that they would not have been able to throw light on whether the appellant had played any role in the award of the contract. Lewis JA (para 71) concludes that there was no point in seeking further information from Mr Moodley or Mr Gibb about the role of the appellant in the whole affair, because their evidence to the Dreyer Commission and their public

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[79] See *Bogoshi* at 1212 H-J – 1213A-C.

statements pointed to the prospect of another denial. This conclusion, together with the other factors mentioned in paras 70 and 71, have led Lewis JA to conclude further that it was reasonable for the Mail and Guardian to believe that the appellant had influenced the choice of Motheo, Ndlovu's company, as the housing developer. The suggestion, it seems to me, is that where the press does not get a response to its calls for an inquiry into allegations about the conduct of a cabinet minister which might, if true, amount to corrupt behaviour, and it (the press) believes that the answers it would receive from persons who can throw light on the issue would not be to its satisfaction, or would not confirm a suspicion of corrupt behaviour, it would be reasonable for the press to publish false assertions which are defamatory of such cabinet minister. Not only would this suggestion enable the press to ignore the requirements for reasonableness set out in *Bogoshi*, but it would, in my view, also lead to abuse.

[113] When the story broke in May 1997 the appellant dealt with the matter fully in Parliament. She made it clear that she did not interfere in the provincial process of awarding contracts and did not sit on the Provincial Housing Board.[80] She added that she did not even live in Mpumalanga. In her judgment Lewis JA (para 71)

raises some concern about the relationships between the plaintiff and the various role players in Motheo. I am not certain how these relationships could provide a basis for the conclusion by the Mail and Guardian, that the appellant had influenced the choice of Ndlovu's company. The degree of contact between the Motheo players and the appellant was not materially different to their contact with Cobbett. From the appellant's public statements in Parliament[81] it is clear that her contact with certain business and political people was unavoidable. But, as the appellant pointed out this did not mean that they were now, because they were acquainted with her, disqualified from tendering for contracts. The rhetorical question posed by Lewis JA as to how Gibb came to know Ndlovu seems to me, at best for the respondents, to be neutral. In any event Ndlovu's sister, Seape, worked for Gibb at Nedcor. I have not been able to find anything in the record to suggest that it was the appellant who brought the two together. So also is the case of the other links and relationships which appear to cause my colleague some concern.

[114] Not only did the respondents fail to consider all the facts known to them, they chose to rely on certain selected facts which were consistent with (but not conclusive of) the proposition

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[80] See Debates of National Assembly (Hansard), First Session – Second Session – Second

favoured by them, and ignored the rest. They ignored the fact that Cobbett never suggested that the plaintiff acted nepotistically and that the formal process of awarding tenders had no place for the role of the appellant. Nowhere is it even suggested how the appellant would have influenced the choice of Motheo as the housing developer when there was no competitor in the field. The National Ministry was not involved in the evaluation, selection and awarding of contracts – a fact which resulted in a material distance between the Ministry and the Provincial decision-makers. The respondents also overlooked the fact that the failure by the Provincial Housing Board to follow the guidelines and the gross irregularities it perpetrated, were not demonstrated to be at the instance of the appellant. The appellant's public statements on the question, for example in Parliament, where she put her perspective of the relationship with the Motheo players, were totally ignored. Neither Barrell nor the second respondent read or had regard to *Hansard* (especially where the minister made a public statement on these issues[82]).

[115] In certain instances the respondents plainly distorted facts to fit in with the view they had formed of the appellant. For example, they distorted the meaning of Cobbett's letter to imply that the

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Parliament, column 3468 (Thursday 29 May 1997).

appellant had expressed her own opinion that Cobbett was blocking funds, when, on a proper reading, her remarks were understood by Cobbett to be a report to him of criticism by others. In his letter to the appellant Cobbett wrote:

'As you will recall, you [referring to the appellant] phoned me in my car on the night of the 17th April, saying that you had received a complaint from Mpumalanga that I was obstructive and 'blocking' the funds. I indicated my belief in the correctness of my approach, and that of my officials, but undertook to keep the issue alive.'

Nowhere does Cobbett say it was the appellant who accused him of blocking the funds, as stated by Barrell in his evidence-in-chief. All the appellant did was to relay this complaint to Cobbett.

[116] The *ipse dixit* of Barrell that his own opinion of the appellant as having awarded the contract to her friend was also held by others, is unsupported even by the slightest corroboration. In contrast, other press articles say no more than that deeper investigation would be appropriate. In my view, the respondents could never have held a reasonable belief that the appellant had influenced the award of the contract to Motheo. They have accordingly failed to bring themselves within the *Bogoshi* defence.

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[81] See Hansard Column 3465-3466.

[117] In her judgment, Lewis JA deals extensively with the question whether special principles should be invoked to protect the publisher of defamatory statements about members of government. In *Holomisa v Argus Newspapers Ltd*[83] Cameron J held that a defamatory statement which relates to free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made. Except for placing the *onus* on the defendant to prove reasonableness, I consider that the same view was expressed by Hefer JA in *Bogoshi*, although in the latter case the court was not dealing with so-called political speech. I agree with Lewis JA (in para 64) that publication of political information which is defamatory in circumstances where it is justifiable (reasonable) is not actionable. Although this court has hitherto not dealt with the practical workings of the defence of reasonableness in political speech, I do not, however, consider this to be a special defence outside of or in addition to what was said in *Holomisa*[84] and ultimately endorsed in *Bogoshi*.[85] As it was stated in *Bogoshi* (see para 110 above) 'greater latitude is usually allowed in respect of political discussion'. With such recognition, political speech is, in

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[82] Ibid.
[83] 1996 (2) SA 588 (W).
[84] Ibid.
[85] at 1212 H-J.

my view, adequately catered for in the defence of reasonableness introduced in *Bogoshi*.

[118] I turn to the fourth and final issue: whether the common law should be developed so as to provide for a defence that would go beyond *Bogoshi*. It was submitted by counsel for the respondent that the proposed defence *cum* remedy (an order that an apology be published) would protect both the publisher and the maker of the defamatory statement as well as the victim, and would be cast in the form of an order compelling the maker or publisher of the statement to publish an apology.

[119] I do not think that there is any merit in the submission. While I can understand that a plaintiff who complains that he or she has been defamed may well wish to claim, either as his or her sole remedy, an order that an appropriate apology be published, or such an order in addition to an award of damages, I do not see on what basis a defendant, who was at all times free to publish an apology and thereafter to plead that as a result thereof any damage suffered by the plaintiff had either been completely eliminated or at least substantially reduced, but has not done so, can rely in a case such as the present, on the new ‘defence’ for which counsel for the respondents contended.

[120] In my view the appellant's claim should have succeeded on the merits. I would consequently allow the appeal with costs.

[121] In view of the fact that this is a minority judgment, I do not consider it necessary to deal with the question of quantum of damages.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR: MPATI DP