REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 01144/21

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE **DATE** 28 / 5 / 2021

In the matter between:

MARIA DA CONCEICAO DAS NEVES CALHA RAMOS Applicant

and

INDEPENDENT MEDIA (PTY) LTD First respondent

SIFISO MAHLANGU Second respondent

INDEPENDENT NEWSPAPERS (PTY) LTD Third respondent

INDEPENDENT ON LINE Fourth respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. Under our Constitution both the right to dignity and the right to freedom of expression are accorded protection. Under section 10: "*Everyone has inherent dignity and the right to have their dignity respected and protected.*" Section 16(1)(a) guarantees freedom of expression which includes "*freedom of the press and other media*". Both of these rights are central to our constitutional dispensation.

2. Section 1(a) of the Constitution identifies human dignity as one of the foundational values of our democratic state. It is aimed at fostering respect for "*the intrinsic worth of all human beings*".[1] The right to dignity under the Constitution protects both the individual's sense of self-worth as well as the individual reputation of each person, in other words, the public's estimation of the worth and value of a particular individual.[2] In this latter sense, the right to dignity is most commonly protected under the umbrella of our law of defamation.

3. In this matter, the applicant's cause of action is founded on defamation. Ms Ramos avers that her reputation has been harmed by the publication of a defamatory article that appeared (and continues to appear) on various media platforms associated with the respondents. She seeks, among others, interdictory relief to protect her rights.

[1] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) at para 35
[2] *Khumalo & Others v Holomisa* 2002 (6) SA 401 (CC) at para 27

Ms Ramos is a well-known public figure having served in prominent positions in both the public and private sectors.

4. The respondents are the editor of The Star newspaper (Mr Mahlangu), in which the article first appeared, the publisher of that newspaper (Independent Newspapers (Pty) Ltd), and Independent Online SA (Pty) Ltd, being the publisher of the digital platform IOL, on which the article also appeared. The respondents are active members of the mass media. Unsurprisingly, they raise the right to freedom of expression and the press as a core component of their opposition to Ms Ramos' application. Indeed, the respondents say that the case is primarily about media freedom.

5. There is weighty authority supporting the importance of freedom of the press in society. Even before the advent of our democratic state, our courts acknowledged this. So, for example, in the 1950's, this Division held that:

> "Although conscious of the fact that I am venturing on what may be new ground I think that 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 of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expression that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses!"[3]

6. The Constitutional Court has noted the importance of "untrammeled" public debate about public figures who seek office, albeit within constitutional bounds. In *The Citizen v McBride*, the majority of the Court, per Cameron J noted that:

> "Public debate in South Africa has always been robust. More than 50 years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, '(s)trong epithets are used and accusations come readily to the tongue'. The court also found that allowance

[3] *Pienaar & Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 308C-E

must be made 'because the subject is a political one, which had aroused strong emotions and bitterness', of which readers were aware, and that they 'would not be carried away by the violence of the language alone'. These words are still apt today. Public discussion of political issues has if anything become more heated and intense since the advent of democracy. A constitutional boundary is the express provision in the Bill of Rights that freedom of expression does not extend to hate speech. Another is the legitimate protection afforded to every person's dignity, including their reputation. But, so bounded, it is good for democracy, good for social life and good for individuals to permit maximally open and vigorous discussion of publicc affairs."[4]

7. However, as important as freedom of the press is, it is trite that it must be balanced against other constitutionally protected rights. As expressly noted in the dictum cited above, one of the common law and constitutional boundaries imposed on freedom of the press is the protection of dignity and reputation. What this means is that what the present case is really about is neither the primacy of media freedom, nor that of the protection of dignity and reputation. The case is about the lawful balance to be struck between these two competing sets of rights.

THE ARTICLE

8. On 9 December 2019 the Star published the following article (the article) in its print edition:

"RAMOS HAS MUCH TO ANSWER FOR

WE MUST be very concerned about Maria Ramos's recent appointment as chairperson of the AngloGold Ashanti board. Ramos has still not accounted for fixing the rand. All the Republic got for her actions was an apology. An apology for rand fixing?
Ramos wasn't criminally charged nor did she face any disciplinary action. But instead she was honoured with a PIC board seat.
While she was the group chief executive for Absa, Ramos was also a donor to President Cyril Ramaphosa's CR17 campaign.
Even with the negative publicity surrounding her, last year she was called into the Public Investment Corporation.
Her recent appointment should not be celebrated.
Absa borrowed money from the then government of national unity to bail out its debtors and form a new bank, the Amalgamation of Banks in South Africa,

[4] *The Citizen 1978 (Pty) Ltd & Others v McBride (Johnstone & Others, Amici Curiae)* 2011 (4) SA 191 (CC) at paras 99-100

thus Absa. Former public protector Thuli Madonsela made it clear that she was not going to investigate the matter. One of advocate Busisiwe Mkhwebane's crimes is that she rattled Absa's cage when she investigated the Absa bailout and the CIEX report.
It's really bizarre that in out (*sic*) society, Mkhwebane is shunned while Ramos is celebrated.
In any other country Ramos would have been charged with treason or corruption, but she won't be.
Rather, she'll be appointed to chair more boards.
With all the talk of fighting corruption, South Africa is a country that applauds and celebrates the corruption of some." (emphasis added)

9. The article also appeared on Independent on Line (IOL), which is accessible on the internet. In the online version, the article carried a photograph of Ms Ramos, with the caption: "*Ramos was never charged for for (sic) fixing the rand but keeps getting rewarded with top jobs*" (emphasis added). In addition, the article was published on The Star's Twitter and Facebook pages. When Ms Ramos instituted her application, the tweet which embedded the article had been retweeted 355 times, quoted 81 times and liked 620 times. There were also 29 reactions, 20 comments and 7 "shares" in respect of the Facebook post.

10. It is common cause that the article appeared as a Leader piece on the Editorial page of The Star. Although it is not clear whether Mr Mahlangu wrote the piece or not, he accepts that he was the Editor of the newspaper at the time and published the article. He also accepts that the views and opinions expressed in the article are his own. As I discuss in more detail later, he takes the view that it was his responsibility as a journalist to express a view so as to contribute to public debate.

CONTEXT OF THE REFERENCES TO "*FIXING THE RAND*"

11. The timing of the article coincided with Ms Ramos's appointment as chair of the AngloGold Ashanti (AGA) board in December 2020. The respondents say that this appointment was of public interest. Ms Ramos does not deny this, nor could she.

However, what she complains of is the thrust of the article linking her personally with the "*fixing of the rand*", and the connotations related to that link drawn in the article.

12. The article itself does not give any background to what was meant by the "*rand fixing*" or "*fixing of the rand*" to which it referred. For that context we have to look outside the article.

13. A media statement by the Competition Commission, dated 15 February 2017, attached to Ms Ramos's founding affidavit explains what was involved in the rand fixing saga, as I shall call it for simplicity's sake. The media statement announced that it was referring a collusion case to the Competition Tribunal for prosecution against no less than seventeen banks, both South African-based and international. The statement went on to explain that:

> "The Commission has been investigating a case of price fixing and market allocation in the trading of foreign currency pairs involving the Rand since April 2015. It has now referred the case to the Tribunal for prosecution.
>
> The Commission found that from at least 2007, the respondents had a general agreement to collude on prices for bids, offers and bid-offer spreads for the spot trades in relation to currency trading involving US Dollar/Rand currency pair. Further, the Commission found that the respondents manipulated the price of bids and offers through agreements to refrain from trading and creating fictitious bids and offers at particular times.
>
> Traders of the respondents primarily used trading platforms such as the Reuters currency trading platform to carry out their collusive activities. They also used Bloomberg instant messaging system (chatroom), telephone conversation and had meetings to coordinate their bilateral and multilateral collusive trading activities. They assisted each other to reach the desired prices by coordinating trading times. They reached agreements to refrain from trading, taking turns in transacting and by either pulling or holding trading activities on the Reuters currency trading platform. They also created fictitious bids and offers, distorting demand and supply in order to achieve their profit motives."

14. It is a matter of fact that one of the banks named in the media statement was Absa, and that, at the time the statement was made, Ms Ramos was its Group Chief Executive. She was also the Chief Executive when the Tribunal's investigation

commenced in 2015, but not at the date from which the Commission found that the collusive scheme commenced, namely 2007.

15. Ms Ramos takes no issue with Absa being linked to the rand fixing investigation by the competition authorities, or the fact that she was the Chief Executive during part of the period over which the Tribunal found that the collusive practices took place. It is common cause that Ms Ramos was publicly reported to have issued an apology in a media statement on behalf of Barclays Africa (in whose stable Absa fell) for its role in the rand fixing saga. On 23 February 2017, Ms Ramos was quoted as saying that: "*We deeply regret that this conduct took place within our organisation*"; and that: "*Those who are found to have contravened our rules and conduct will in due course be held accountable*."

16. Ms Ramos contends in her application that although the link between Absa and the rand fixing saga is a fact, the statements made about her in relation to the rand fixing issue in the article under consideration, and in particular the accusation that she fixed the rand, were based on false facts. In her founding affidavit, she stated that the true facts were as follows:

    16.1. The Competition Tribunal initiated a complaint against several banks in 2017 alleging collusion to fix prices in respect of the Rand-Dollar exchange rate. The matter was referred to the Competition Tribunal.

    16.2. Although Absa was one of the banks implicated in the complaint, the Commission did not seek a fine or any other sanction against Absa. This appeared from the Commission's media statement of February 2017.

16.3. Barclays PLC, which at that time was the controlling shareholder of Absa actually brought the conduct of the currency traders to the attention of the Commission under its leniency programme.

16.4. At that time, Ms Ramos was the Chief Executive of Absa Group Limited, an institution employing approximately 40 000 employees. She was not involved in the day to day running of any business unit within Absa, including the business unit involved in currency trading.

16.5. She was not one of the currently traders concerned and was not involved in "*fixing the rand*".

16.6. She was entirely unaware of the conduct of any of the currency traders at the time. As soon as she became aware of it, she ensured that Absa conducted a thorough internal investigation in order to bring to light all the facts necessary to co-operate with the Commission and to offer Absa's assistance. Ms Ramos says that this led to the Competition Commission's own investigation and action.

16.7. Absa held an internal investigation and disciplined the two employees who were implicated.

16.8. These facts were in the public domain at the time that the article in The Star was published, Absa having issued a press statement to this effect in April 2019.

17. The respondents do not take issue with these facts in any material sense. It is not disputed, therefore, what Absa's role in the saga was or how Absa dealt with it. It is also not disputed that Ms Ramos did not play any active role in the rand fixing. In fact, as I discuss later, the respondents do not contend that she had any personal

role in fixing the rand. Their defence is based primarily on an entirely different meaning ascribed to the statements in the article in question.

THE ALLEGED DEFAMATORY NATURE OF THE ARTICLE

18. Ms Ramos contends that the article contains several untrue statements that are *per se* defamatory of her. She points to the underlined portions in the version of the article I have set out above.

19. The first set of statements in the first two paragraphs of the article, and in the IOL caption, say that Ms Ramos has never been charged for fixing the rand; that instead she gets rewarded with top jobs; that she has never accounted for fixing the rand; in addition to not having been criminally charged, she has not faced any disciplinary action; and instead has been honoured with a PIC board seat. Ms Ramos says that these statements are defamatory in that the reasonable reader would understand them to mean (either expressly or by implication) that she is personally guilty of currency manipulation in the form of fixing the rand, and that she should be held accountable for doing so, through facing criminal charges and disciplinary action.

20. Alternatively, Ms Ramos says that the reasonable reader would understand these statements to mean that there are grounds for suspecting her of fixing the rand or similar criminal or unethical conduct, and that she has engaged in such conduct that justifies criminal charges and disciplinary action against her.

21. According to Ms Ramos, these statements are false, as she was not personally involved in fixing the rand nor is there any basis for suspecting her to have done so that would justify criminal charges.

22. Ms Ramos then points to the second last underlined statement, to the effect that in any other country she would be charged with treason or corruption, but in South

Africa she won't be. She says that these statements are also defamatory as they would be understood by the reasonable reader to mean (expressly or impliedly) that she engaged in conduct that makes her guilty of treason or corruption and that she should face criminal charges for those crimes. Alternatively, they would be understood to mean that there are grounds for suspecting her of engaging in conduct amounting to corruption or treason, and in criminal and unethical conduct that would justify such criminal charges against her.

23. In addition, she says that the reasonable reader would understand the statements to mean that she received some kind of undue political protection from prosecution for those crimes, which accounts for her non-prosecution to date.

24. Finally, Ms Ramos highlights the last underlined statement ("*South Africa is a country that applauds and celebrates the corruption of some*"), read with the statement that says her appointment as chair of the AngloGold Ashanti board should not be tolerated. These statements read together would be understood by the reasonable reader to state or imply that she has engaged in corrupt conduct.

25. In sum, Ms Ramos contends that read as a whole and in context, the article either expressly or implicitly accuses her of:

    25.1. being engaged in the criminal conduct of fixing the rand;

    25.2. being corrupt or engaging in corrupt activities;

    25.3. having engaged in conduct that justifies a suspicion of criminal or unethical conduct;

    25.4. having engaged in conduct that justifies criminal charges being laid against her or her facing disciplinary action;

25.5. committing treason;

25.6. being unethical; and

25.7. acting illegally and unethically without impunity.

26. Ms Ramos asserts that these are false statements of fact that are *per se* defamatory. They do not have a factual basis, nor does the article provide any factual support for them.

27. Further, Ms Ramos charges that the statements were self-evidently made with the intention of defaming her and damaging her reputation. There was also no basis for the respondents to have genuinely believed that she was personally involved in fixing the rand.

28. According to Ms Ramos, even if the respondents did genuinely believe this to have been true, they could no longer have done so after her attorneys sent a letter of demand to them on 17 December 2020 (the letter of demand). In the letter of demand, her attorneys identified the several statements Ms Ramos contended were defamatory of her and false. The letter further indicated that no proof was offered either in the article or elsewhere to justify the allegations made about Ms Ramos. It demanded the removal of the article from the respondents' media sites. It also invited the respondents to indicate which of the statements they maintained were true and, insofar as it was suggested that any statements were opinions, the respondents were invited to set out the true facts on which the opinions were based. Ms Ramos did not receive a response to the letter.

29. As to the harm to her reputation, Ms Ramos says that throughout her personal life she has enjoyed a reputation as a successful public servant, business- and industry-leader who conducts herself with integrity, professionalism, and a commitment to

public service. She served as the Director-General of the National Treasury from 1996 to 2003. Thereafter, and until 2009 she served as Group Chief Executive of Transnet Limited. In 2009 she was appointed as GCE of Absa until February 2019. She became a director of AGA in May 2019. AGA is the third largest gold mining company in the world and is listed on several stock exchanges across three continents. In December 2020, she was appointed as chairperson of AGA's board. In addition to this, she details various other positions she has held on boards and similar entities, both in South Africa and internationally.

30. Ms Ramos contends that she has earned her reputation over many years as a leader of ability and sound integrity who has contributed meaningfully to the economy of Sought Africa. She says that the statements in the article have tarnished her reputation, and will continue to do so for so long as the article appears online and on The Star's social media accounts.

THE RELIEF SOUGHT

31. Ms Ramos does not seek damages. Instead she seeks the following relief:

31.1. A declarator that the statements made about her in the article are defamatory, false and unlawful (the declarator or declaratory relief).

31.2. An interdict (the interdict or interdictory relief) prohibiting the respondents from publishing or republishing:

31.2.1. the article;

31.2.2. any statement that says or implies that Ms Ramos, while employed as the CEO of Absa Bank, participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand.

31.3. An order directing the respondents, within 24 hours of the order, to permanently remove the article from the IOL website, all Twitter accounts controlled by the respondents and all Facebook accounts controlled by the them (the removal order).

31.4. An order (the apology) directing the respondents to publish a retraction and apology on identified media sites in the following terms:

> "On 9 December 2020, Independent Media published an article on the Independent Online website, and in the Star, which contained various false and defamatory statements concerning Ms Maria Ramos. These include that she is guilty of "fixing the rand", that she engaged in conduct that amounts to, and justifies criminal charges for, "treason or corruption", and that she received improper *quid pro quos*. Independent Media unconditionally retracts these false and defamatory statements and apologises unreservedly for any harm caused to Ms Ramos."

THE BASES OF OPPOSITION BY THE RESPONDENTS

32. In opposing Ms Ramos's application the respondents adopted a rather curious approach in their answering affidavit, as well as in their written and oral submissions to the court. As their first line of defence they contended that even if the court found that the article was defamatory (which they denied), Ms Ramos was not entitled to the relief she sought. It was only in the later stages of their defence that they dealt with the merits of their alleged defamatory conduct.

33. In brief, the respondents' first line of defence incorporated the following submissions:

33.1. The interdictory relief is too wide as it would prevent the respondents from publishing statements or opinions that associate Ms Ramos with Absa's fixing of the rand. This would be the case despite the fact that in the future she may be charged with corruption or treason in that respect. In short, it

was submitted that the wide interdictory relief claimed was tantamount to silencing the media and preventing it from fulfilling its constitutional role.

33.2. Ms Ramos has failed to satisfy the requirements for an interdict. She has not shown that she has suffered any harm or that harm is reasonably apprehended. This submission is based on the underlying submission that similar statements about Ms Ramos have been in the public domain since at least 2016, and despite this, she has demonstrated an upward trajectory in her professional career.

33.3. The interdict would serve no purpose because it would only muzzle the respondents while allowing others to continue to publish similar statements to those made in the article, as they had done for a while.

33.4. For similar reasons, even if the court were to find the article defamatory, a declarator to this effect would not serve any practical purpose. It would not prevent others from continuing to publish similar statements to the ones that have been in the public domain for a while, and which were mirrored in the article.

33.5. Ms Ramos has more appropriate alternative relief to that of the interdict. The submission here is that her remedy does not lie in seeking an interdict or declaratory relief "*on issues that have been in the public domain for many years and which she now seeks to dispute*". Instead, her remedy lies in using media platforms to dispute the statements she finds offensive. In this respect, Mr Mahlangu offers to give Ms Ramos a right of reply in as prominent a space as the Leader piece that is the subject matter of the application.

33.6. The submission regarding the apology sought is that the respondents cannot be ordered to apologise for something they did not say. This submission is based on the meaning that the respondents say would be given to the statements in the article by the reasonable reader. As I explain shortly, this meaning is at odds with that posited by Ms Ramos.

34. Despite the invitation by the respondents to consider their first-line defence before the merits of Ms Ramos's case, I do not believe that it would be the correct approach to adopt in this matter. At the heart of the case lies the meaning to be ascribed to the statements in the article about which Ms Ramos complains. It is only once that meaning has been determined that the court can properly make a finding on whether the respondents are correct in their submission that similar statements, in other words, those with the same or similar meaning to the court-determined meaning, have been in the public domain for years. This submission forms the basis of much of the respondents' first line defence.

35. Similarly, it is only once the court has made a determination on the meaning of the statements in the article that proper consideration can be given to the question of whether, as the respondents submit, the interdictory relief is cast too wide. The same considerations apply as regards the submission that the apology is not warranted: whether it is warranted or not depends on the court first determining the meaning of the statements in the article.

36. What the statements in the article mean must be determined on the basis of the well-established principles that apply in the field of defamation. This involves determining the meaning of the impugned statements, and whether that meaning impinges on the applicant's dignity and reputation. It makes sense then that the place to start is not with the respondents' first-line defences, which attack the nature

of the relief sought, but rather with the core of the case, namely the question of whether the statements are defamatory and unlawful. This is how I intend to approach the matter.

37. As far as the respondents' defence to the merits of Ms Ramos's case are concerned, they submit that the statements made in the article carry a different meaning to that contended for by Ms Ramos. They accept that Ms Ramos was not personally involved in rand fixing. But, they say, the article cannot be read as accusing her of being so involved. Instead, the respondents contend that: "*The article clearly calls for Ms Ramos to account not because she was personally involved in rand fixing but, as the Chief Executive Officer of Absa Bank, she was personally responsible*" (emphasis in the original).

38. Mr Mahlangu says that he did not state, nor is it implied in the article that Ms Ramos fixed the rand herself. However, he says it is public knowledge that she apologised for Absa's role, and therefore she must account "*… as the Chief Executive Officer*" (emphasis in the original).

39. In response to the statements identified by Ms Ramos as being defamatory. the respondents deny the defamatory nature of each of them:

    39.1. As to the headline stating that Ms Ramos was never charged for fixing the rand, Mr Mahlangu says that this is simply short-hand for drawing a connection between rand fixing and the fact that Ms Ramos was never charged. He says the latter is a statement of fact, and is not defamatory. If one reads the whole article, as one must, the respondents say that the reasonable reader will find no allegation that Ms Ramos was personally involved in fixing the rand. Instead, the reasonable reader will understand that what the article is saying is that as Chief Executive of Absa, she was

responsible and should be held accountable. This, too, the respondents say, is not defamatory of Ms Ramos, or false and unlawful.

39.2. The statement that she instead gets rewarded with top jobs, according to the respondents, will be read as simply lamenting the lack of accountability by a Chief Executive in relation to a matter of national interest and significance, and that instead of accountability she is appointed to top positions such as that of chair of a multinational commodities company. The respondents say that when understood in this context the statement is not defamatory or false, and is not unlawful.

39.3. According to the respondents, the statement that Ms Ramos has still not been held accountable should be read as a factual allegation that she has not been held accountable for what occurred while she was Chief Executive of Absa. Accordingly, it is not defamatory, or false or unlawful.

39.4. Similarly, in respect of the statement that she hasn't been criminally charged or faced disciplinary action, but instead was honoured with a PIC Board seat, the respondents say that the first part of the sentence is an undenied statement of fact, and the second is an opinion lamenting the lack of accountability of a Chief Executive officer. The respondents say that Ms Ramos may disagree with the opinion, but she has no right to censor it. Thus, the statement is not defamatory, or false or unlawful.

39.5. As far as the statement that: "*In any other country Ramos would have been charged with treason or corruption, but she will not be. Rather, she'll be appointed to chair more boards*" is concerned, the respondents say is not defamatory, or false or unlawful. Mr Mahlangu says that is an opinion based on his world outlook and on his own assessment of facts that are already in

the public domain. These facts relate to the favourable treatment of some people with a public profile and the disdainful treatment to which others are subjected.

39.6. Mr Mahlangu also says that the statement that: "*(w)ith all the talk of fighting corruption, South Africa is a country that applauds and celebrates the corruption of some*," is his opinion based on his assessment of facts that are in the public domain. He points to what he says is the different treatment of the current Public Protector, who was charged in court with perjury only a few months after charges were laid, and Ms Ramos who has not been charged even though a political party laid charges against her in 2016. The latter averment refers to a media report to the effect that the political party, Black First Land First (BLF), laid charges against Ms Ramos, along several other business leaders, in 2016. I will revert to this issue later.

40. It is the respondents' case that on their proposed ordinary meaning of the article, it is not defamatory. It is not an ordinary news report, but is a Leader piece, found on the opinion page of the newspaper. It is an opinion of the editor, indicating the editorial stance of the editor, based on his political, social analysis. The respondents say that Ms Ramos is someone who is in the public political eye, and by taking such a position she has opened herself up to public scrutiny. As such, she should display a greater degree of tolerance to criticism than ordinary individuals. The respondents submit that the reasonable reader of ordinary intelligence would understand the meaning in the "*fraught political context*" in which it was written and thus it would not lower Ms Ramos in the eyes of right-thinking members of society.

GENERAL LEGAL PRINCPLES APPLICABLE TO DEFAMATORY STATEMENTS

41. Defamation is the wrongful and intentional publication of a defamatory statement concerning the plaintiff. The statement need not be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. The defendant may then raise a defence to rebut the unlawfulness or the intention. The most commonly raised defences to rebut unlawfulness are that the publication is true and in the public benefit, or that the publication constituted fair comment.[5] As far as the media is concerned, the defence of reasonable publication may be available.[6]

42. The onus on a defendant to rebut one or the other presumption (of unlawfulness or intention) is a full onus: it is not only the duty to adduce evidence, but instead is an onus that must be discharged on a preponderance of probabilities. A bare denial is not sufficient. The defendant must plead and prove facts sufficient to establish the defence.[7]

43. To determine whether a statement is defamatory entails a two-stage process. The first stage of the inquiry involves having regard to its meaning. The primary meaning of a statement is the ordinary meaning given to the statement in context by a reasonable person.[8] The test for determining the ordinary meaning of the statement is objective, and not subjective. Thus, the court is not concerned with the meaning the maker of the statement intended to convey, or the meaning given to it by the persons to whom it was directed. The test is what meaning the reasonable reader

[5] *Khumalo*, n2 above, para 18
[6] *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA)
[7] *Le Roux v Dey* 2011 (3) SA 274 (CC) at para 85
[8] *Le Roux*, above n7, para 87

of ordinary intelligence would attribute to the statement. It is understood that this reader would understand the statement in its context, and that she would have regard not only to what is expressly stated, but what is implied.[9]

44. The Supreme Court of Appeal has cautioned that it must be borne in mind that the ordinary reader has no legal training or other special discipline. And further, that:

> "… a court that has of necessity subjected a newspaper article under consideration to a close analysis must guard against the danger of considering itself to be 'the ordinary reader' of that article."[10]

45. If the statement is ambiguous in the sense that it can bear one meaning that is defamatory and others that are not, the normal standard of proof in civil cases is applied. If the defamatory meaning is more probable than the other, the defamatory meaning will have been established as a matter of fact. If the non-defamatory meaning is more probable, then the plaintiff will have failed to satisfy the onus she bears.[11]

46. Once the meaning of the statement has been established, the court moves to the next stage of the inquiry, which is to determine whether the meaning is defamatory. The question is whether it is likely to injure the good esteem in which the plaintiff is held by the reasonable or average person to whom it is published.[12] Statements attributing guilt or dishonest, immoral or dishonourable conduct to a plaintiff are common examples of statements of this nature. So too are those that belittle a plaintiff or that render her less worthy of respect by her peers.[13] The court does not

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[9] *Le Roux*, above n7, para 89

[10] *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA), para 11, and citing *Ngcobo v Sheme & Others* 1983 (4) SA 66 (D) at 71 C-D

[11] *Le Roux*, above n7, para 91(b)

[12] *Le Roux*, above n7, para 91

[13] *Le Roux*, above n7, para 91

consider evidence of whether an actual observer thought less of the plaintiff. The test is rather whether it is more likely, or more probable than not, that the statement will harm the plaintiff.[14]

ARE THE STATEMENTS DEFAMATORY?

The meaning of the statements

47. The first step is to determine the meaning of the statements Ms Ramos asserts are defamatory of her. This involves the question of what meaning the reasonable reader of ordinary intelligence would give to them when reading them in context. It is plain from my earlier discussion of each party's case that they diverge sharply in their response to this question.

48. The crux of this divergence lies in whether the statements should be interpreted as saying, expressly or impliedly, that Ms Ramos was personally involved in the rand fixing, and that she should be held criminally liable for it personally, or whether they should be interpreted as saying that she was not personally involved, but must be held accountable because she was the Chief Executive of Absa at the time of the rand fixing. Ms Ramos contends for the former meaning, and the respondents for the latter.

49. It is worth reiterating that it is not what Mr Mahlangu meant to say in the article that is determinative of the meaning. Mr Mahlangu's *ex post facto* explanation of the statements in the article carries no weight unless it accords with an objective assessment of the meaning gleaned by the reasonable reader of ordinary intelligence. To find this meaning, we must look at what the article actually does

[14] *Le Roux*, above n7, para 91

and does not say, while at the same time placing ourselves in the shoes of that reader.

50. There is no express indication in the article that it is about corporate responsibility or accountability, as the respondents aver. Nor can this meaning be implied.

51. An overriding feature of the article is that the language is emphatically directed at Ms Ramos in her personal capacity. The headline is: "*Ramos has much to answer for*" (my emphasis), not: "*As ex-Absa CEO, Ramos, has much to answer for.*" Of course, one must read beyond the headline. But the content of the article only serves to underline what is portended in the headline. It says "*Ramos*" (my emphasis) has still not accounted for fixing the rand, and all that South Africa got for "*her*" (my emphasis) actions was an apology. It does not say or imply that the actions complained of were those of Absa, and that as Chief Executive, Ms Ramos should account. It says that "*Ramos*" (my emphasis) wasn't criminally charged nor faced disciplinary action, but instead "*she was honoured*" (my emphasis) with a PIC board seat. The article states that in another country "*Ramos would have been charged with treason or corruption, but she won't be*" (my emphasis).

52. If there was something in the article to link these personal references to Ms Ramos with Absa's role in the rand fixing, it might have been arguable that the reasonable reader would have understood that the statements were directed at her in her corporate, and not her personal, capacity. But there is no such link. The article does not explain or give any background to the rand fixing it refers to. In fact, it does not mention Absa's role in the rand fixing at all, or the fact that Ms Ramos was Chief Executive of Absa at the relevant time.

53. The only link drawn between Absa and Ms Ramos in the article is the statement that when she was Chief Executive of Absa she donated to the President's CR17

campaign. The article does not link this fact to the rand fixing. Ms Ramos makes no complaint about the statement of fact that she donated to the CR17 campaign. Her complaint is that the article says or implies that she should face criminal punishment for rand fixing, not for donating to the CR17 campaign.

54. Apart from this reference to Absa, the bank is only referred to again in connection with the "*Absa bailout*" issue discussed in the article. The article draws no link with Ms Ramos in this respect. It is well documented that the bailout issue is historic, and took place years before Ms Ramos became Chief Executive of Absa.

55. Without the linguistic and contextual link by the writer between Absa, rand fixing and Ms Ramos as the Chief Executive at that time, the reasonable reader could not be expected to, nor would she, understand the article to mean that it was about Ms Ramos's corporate responsibility, rather than her personal involvement in and responsibility for the corrupt and treasonous conduct articulated. This conclusion is not based on an overly close analysis of the statements made in the article. It is based on a plain and simple reading of the statements in the context of the article as a whole.

56. It was submitted by the respondents that the ordinary reader would never understand that a Chief Executive of a bank would have been involved in rand fixing personally, and therefore the statements could never have the meaning contended for by Ms Ramos. The obvious difficulty for the respondents with this submission is that the reader is not told that she was Chief Executive at the time, or that Absa was involved in rand fixing. The article appeared in late 2020. The rand fixing saga was in the media in February 2017, and although it may have surfaced now and again in the media, it was not what one would call a current affairs item when the article appeared. Given this time lapse, without the proper context being drawn by the

writer, the reasonable reader would not independently have understood that Ms Ramos was the Chief Executive when the rand fixing occurred and that for this reason (and despite the directed personal references to her and her actions) she could not have been personally involved.

57. Instead, the reasonable reader would understand what the ordinary language and context of the article told her. The writer was asserting that Ms Ramos was personally involved in manipulating the Rand/dollar exchange rate, or "fixing the rand" as the article called it. This is clear from the statement that she had not accounted for "*her actions*" in "*fixing the rand*". And, crucially, the writer was also saying that these actions on her part were criminal, and that she deserved to be criminally prosecuted on charges of corruption or treason for her part in the rand fixing saga.

58. These are serious allegations, pointing to individual/personal criminal accountability. If it is stated, as it was in this article, that charges of corruption or treason are warranted against someone, the non-legal, reasonable reader will understand this to mean that the person should be charged for their personal wrongdoing, not the wrongdoing of their company for which they had oversight responsibility: treason is not something the layperson normally would associate with companies. In order for the reader to understand corporate criminal responsibility, the requisite explanation or context would have to appear from the article. It is simply absent in this one.

59. I do not agree with the respondents' submissions that the article would be understood to mean that Ms Ramos should be held accountable, as Chief Executive with oversight responsibilities at the time, for Absa's role, or those of its employees, in the rand fixing saga. The tenor of the article read as a whole and in context would not be understood by the reasonable reader to be a piece about corporate

involvement and liability. The reasonable reader would understand it to mean that it was about Ms Ramos's personal involvement in rand fixing and that this involvement justified serious criminal charges against her in her personal capacity. The reasonable reader would also understand the article as meaning that despite these charges being justified, Ms Ramos, unlike other public figures, enjoyed undue, corrupt protection from the might of the law.

The false and defamatory nature of the statements

60. The defamatory nature of these statements speaks for itself. Ms Ramos is a business leader of high standing, both nationally and internationally. This is plain from her *curriculum vitae*. Self-evidently, statements to the effect that Ms Ramos was involved in currency fixing warranting charges of treason and corruption against her would tend seriously to lower her esteem in the eyes of her peers and the public. It is not necessary to give any expanded reasons for reaching this conclusion. Our courts have recognised that:

> "… the reasonable, normally intelligent, right thinking member of society, when he hears that a man known to him has been charged with a crime, will withhold final judgment on that man. But, temporarily at any rate, the news will tend to lower that man in his estimation, and diminish his willingness to associate with him.
>
> On general principles … it seems to me that it is defamatory to say of a person that he has been, or is about to be charged with a crime, although in certain circumstances, a defendant can escape liability for such a publication."[15]

61. In *Modiri v Minister of Safety and Security*[16] the Supreme Court of Appeal found that the respondent "*rightly*" did not dispute that statements reporting that the appellant

[15] *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) at 565C-D, which cited the following further authorities: *Clark v Roodt* 1908 EDC 303; *Schoeman v SA Associated Newspapers Ltd* 1962 (1) SA 672; *Luyt v Morgan; Luyt v King Printing Company* 1915 EDL 223

[16] 2011 (6) SA 370 (SCA)

was allegedly involved in drug-dealing, cash-in-transit heists and car thefts were *per se* defamatory.[17] It has also been held that it is defamatory to say that a Minister of Finance is corrupt and should be prosecuted with corruption and similar offences is defamatory.[18]

62. In my view, the same principles dictate that it is *per se* defamatory to say that criminal charges of corruption and treason are justified against Ms Ramos, but that she is likely to escape criminal justice because she enjoys undue protection. Indeed, the respondents did not deny that if Ms Ramos's contentions regarding the meaning of the statements is correct, the statements would be defamatory. Their defence is that the article and statements made in it do not mean what Ms Ramos says they mean, and which I have found them to mean.

63. One must bear in mind, of course, that at this stage we are dealing only with the defamatory nature of statements of this sort. The question of the defences that may be available to the respondents to show that the defamatory statements nonetheless were not unlawful is one that arises subsequently.

64. Before turning to the question of defences, I deal with a further submission made on behalf of Ms Ramos. I have found that the identified statements made in the article bear the meaning contended for by Ms Ramos, and are of a defamatory nature. However, it is submitted on her behalf that even if I may be found to have erred in this regard, it would not lead to a different outcome. In other words, she submits that even on the meaning contended for by the respondents, the statements are defamatory.

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[17] At para 10

[18] *Manuel v Crawford-Browne* 2008 JDR 0242 at para 2

65. As a precautionary measure, and in an effort to provide as much finality to the parties as possible on the issue, I proceed to consider this submission.

66. On the respondents' approach, the article and the impugned statements mean no more than that although Ms Ramos was not personally involved in fixing the rand, in her capacity as Chief Executive she must be held accountable. Instead, she keeps getting appointed to senior corporate positions, despite unanswered questions about Absa's involvement in the rand fixing scandal, despite a criminal case having been opened against her. She seems to be above the law because anyone else in her position would have been criminally charged for their role as Chief Executive of a bank involved in price fixing. Her donation to the President's election campaign seems to be shielding her from accountability as Chief Executive.

67. Even if we are to assume (contrary to what I have found) that the reasonable reader would understand the article to be addressing Ms Ramos's accountability as Chief Executive for Absa's involvement in rand fixing, it seems to me that the implications of the statements are demeaning of Ms Ramos as a recognised business leader. They impugn Ms Ramos's reputation as a leader in the financial sector. At the very least the statements mean that while she was at the helm of Absa she failed in her executive duties by creating a climate where rand fixing could take place. What is more, it judges her failures to be so serious as to warrant prosecution for corruption or treason. This, to me, implies a level of failure of leadership and responsibility going beyond the notion that she is accountable simply because "*the buck stopped with her*," as the respondents asserted in their answering affidavit.

68. Moreover, even on the respondents' meaning, Ms Ramos is accused of enjoying political protection from prosecution as a result of a private donation she made while she was Chief Executive of Absa. This is not the kind of allegation likely to leave

her reputation as a business leader intact. Quite the contrary. It implies that she and the bank she headed are corruptly protected from just prosecution on serious offences. This is not a leadership quality that anyone would applaud.

69. For these reasons, I find that even on a benevolent reading of the statement, and even if I may be found to have erred in rejecting the respondents' averments as to what the statements mean, they nonetheless are of a defamatory nature. It is so that the statements were in a Leader piece on the Opinion pages of The Star. However, this does not save them from bearing a defamatory meaning. Nor does the fact that Ms Ramos is a public figure. Of course, this does not mean that without more the respondents should be held liable. It remains open to them to establish that the defamatory publication of the statements was not unlawful.

DEFENCES

70. Since I have found the statements to be of a defamatory nature, the onus lies on the respondents to rebut the presumption that the publication of the statements was wrongful, or unlawful and intentional. It is at this stage of the defamation inquiry that the focus shifts most noticeably to the balance that must be struck between the interests of Ms Ramos and those of the respondents. The balancing exercise in this context has been described as follows:

> "The general test for wrongfulness is based upon the *boni mores* or the legal convictions of the community. This means that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable. This application of the *boni mores* test involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable. In this balancing process the conflict between the defendant's freedom of expression and the plaintiff's right to a good name demands resolution."[19]

[19] *Waldis & Another v Von Ulmenstein* 2017 (4) SA 503 (WCC) at paras 21-2

71. Essentially, the exercise involves striking a balance between the private interests of the person defamed and the broader public interest served by the right to freedom of expression and the media. Generally, our law recognises that a person may rely on the defences of truth and public interest, fair or protected comment and, when the defamatory matter is published by the media, the defence of reasonable publication.[20] The defence of privileged occasion is also available but is not raised in this case.

Truth and public interest

72. This defence requires the respondents to establish not only that the statements were true but also that their publication was in the public interest.[21] As the respondents say that the article does not mean that Ms Ramos was personally involved in rand fixing and hence must be held to be personally criminally liable, they cannot assert any truth or public benefit in statements to this effect. This means that the defence does not avail them on the meaning I have found must be given to the statements.

73. As a precautionary measure, and in case I may be found to have erred in my conclusion as to the meaning of the statements contained in the article, I consider whether the defence would avail them on their contended-for meaning.

74. The respondents must establish that the sting of the statements is true. In other words, they must show that charges of corruption or treason are justified against Ms Ramos as the representative of Absa for the latter's part in rand fixing. Further, that despite these charges being justified, Ms Ramos has escaped prosecution because

[20] See *Bogoshi*, n6 above, Khumalo, n2 above, and *Economic Freedom Fighters & Others v Manuel* 1 All SA 623 (SCA) at para 65

[21] *Haroldt v Wills* 2013 (2) SA 530 (GSJ) para 27

of her influence in political quarters stemming from her contribution to the President's campaign, and that such influence smacks of corruption.

75. The respondents say that it is a matter of undisputed fact that criminal charges have been laid against Ms Ramos and that she has not yet been prosecuted. She apologised on behalf of Absa for its role in the rand fixing saga. Also, they say that it is undisputed that she contributed to the President's campaign. However, these facts do not establish the truth of the sting. The respondents must show that the sting is true, that is, that, objectively speaking, the charges and prosecution of Ms Ramos are justified and that it is her untoward influence in political circles that is obstructing her prosecution.

76. One must consider what gave rise to the charges against Ms Ramos. They were laid by BLF. This appears from an article on a website, blackopinion.co.za, that the respondents attach to their answering affidavit. It reports that BLF laid criminal charges "*in respect of corruption (which includes state capture) by the following white monopoly capital … interests*" (words in brackets appear in the original).

77. At the same time, the blackopinion article reports that BLF had lodged a complaint with the Public Protector, and requested the then-President, Mr Zuma, to institute a Judicial Commission of Inquiry. It lists no less than nine names against whom the charges and complaints were reported to have been laid by BLF. They include Ms Ramos, as well as the Chair of Richemont, the CEO of Investec, the CEO of Imperial Holdings, and the chair of Business Leadership South Africa. One of the complaints against these persons is to do with alleged manipulation of the currency when Mr van Rooyen was appointed as finance Minister for a short period in December 2015. This was alleged to have been aimed at forcing Mr Zuma to fire Mr van Rooyen and

to hire Mr Gordhan as Finance Minister "*which cost the country R500 billion in two days*".

78. The report goes on to state that further charges were laid by BLF in 2017 against 18 banks, including Absa for "*collusion, corruption, fraud, money laundering, and theft*" in that they engaged in criminal activities relating to price fixing and market division. It is reported that BLF believes that "*the banks have not stopped any of their criminal activities - they continue with impunity*". What is more, says the report: "*This is massive corruption that has been swept under the table by the white owned media*". And: "*The fact that Maria Ramos has admitted to Absa's role in the manipulation of the currency, supports the charges against her and 8 others relating to state capture by WMC (White Monopoly Capital), as well as the charges against the 18 banks in respect of their conduct relating to price fixing and market division.*"

79. It is plain from the report that the criminal charges laid against Ms Ramos have political origins. They were laid by a political party and they are founded on a particular political agenda. Whether that agenda is good or bad, right or wrong is not in issue: BLF is entitled to its political opinion and it is entitled to woo voters who may be persuaded by, and agree with, that opinion. However, that does not mean that criminal charges laid against persons who are categorised as contravening BLF's political agenda objectively justify a prosecution against one individual. Still less does it mean that if a prosecution has not been forthcoming (as is the case here) it is because that individual, enjoys undue political influence which is tainted by corruption. One does not have to dig very deep to come up with any number of perfectly valid alternative reasons why the charges laid by BLF have not resulted in any prosecutions against Ms Ramos or any other of the nine individuals identified.

That the charges are politically motivated, without substantive criminal merit, may be one reason.

80. The respondents don't provide any other evidence, save for the attached article, to establish that there is indeed a basis upon which charges of corruption or treason are justified against Ms Ramos, even in her representative capacity. If one considers the facts asserted by Ms Ramos in her founding affidavit, which are set out in paragraph 16 above, there is no basis for the conclusion the respondents seek to draw

81. As I noted earlier, the respondents do not take issue with these facts in any material sense. They say that even if Ms Ramos was not involved in the day to day running of the business units involved, she is ultimately accountable and responsible for the conduct of Absa employees, and that the "*buck stops*" with her as Chief Executive. They say that her averments that she did not have oversight of the activities of the traders involved demonstrates her lack of understanding of governance and accountability issues. Save for these expressed views, the facts averred by Mr Ramos stand uncontested.

82. These facts do not show that charges of corruption or treason are justified against Ms Ramos, even in her representative capacity. It cannot be that the Chief Executive of a bank should be charged with the serious offences of corruption or treason based solely on the fact that she was Chief Executive at the time that two of its employees engaged in the kind of conduct investigated by the Competition Commission. Ms Ramos's public apology on behalf of Absa cannot be equated to a confession of criminal guilt by any stretch, and the respondents do not suggest that it amounted to one. The respondents do not even attempt to lay any basis for what the criminal law foundation for these charges is, or how it could be said that

the bank (represented by Ms Ramos) is criminally liable in respect of them. This is significant in view of the undisputed facts averred by Ms Ramos. In fact, the reference to charges of treason are studiously avoided by the respondents in their answering affidavit, which is a telling feature of their case.

83. I conclude, for these reasons, that even if, contrary to what I have found, it were to be assumed that the respondents were correct in their contended-meaning of the statements and the articles, the sting of the statements is not true. Consequently, the defence of truth and public benefit does not avail the respondents.

Fair comment

84. The defence of fair comment has four elements. The defamatory statement:

84.1. must be a comment and not a statement of fact;

84.2. it must be fair, meaning only that it must be an honestly-held opinion, not that it is balanced or temperate;

84.3. it must be based on facts that must be true and they must be clearly indicated, or matters of public knowledge; and

84.4. it must relate to a matter of public interest.[22]

85. As with the respondents' first defence, because they do not claim that Ms Ramos was personally involved in fixing the rand, they cannot establish the defence of fair comment on the meaning I have found must be given to the statements in the article. In other words, it is common cause that she was not personally involved in rand

[22] *EFF v Manuel*, above n20, para 38, citing *Crawford v Albu* 1917 AD 102 at 115-7; *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167E-G; *The Citizen 1978 (Pty) Ltd v McBride 2011* (4) SA 191 (CC) at para 80

fixing, and so the respondents cannot claim any truth to statements meaning that she was so involved.

86. However, and again as a precautionary measure, I will consider whether the respondents could establish fair comment as a defence in the event that I may be found to have erred in my conclusion on the meaning of the statements.

87. The article appears on the Opinion page of The Star and is in the nature of a Leader piece. However, not all of the impugned statements in the article can be characterised as comments. What is required of the respondents is for them to show that those statements that are comments are based on facts that are substantially true.

88. Mr Mahlangu says that the article is an editorial opinion, and that the opinions he expresses in it are based on his own assessment of facts that are already in the public domain. Mr Mahlangu also says that negative stories about Ms Ramos, including stories about her role as Chief Executive of Absa at the time of the rand fixing saga, have been in the public domain for some years. He says Ms Ramos does not deny this.

89. The defence of fair comment runs into the same difficulties for the respondent as the defence of truth and public benefit. Despite the respondents' reliance on isolated undisputed facts (the existence of the BLF charge, the absence of a prosecution, the donation, and the Absa apology), the sum of the facts relied on does not justify Mr Mahlangu's comments. For example, and for the reasons outlined in respect of the defence of truth and public benefit, the fact that Ms Ramos has not been prosecuted factually cannot be ascribed to her donation to the President's campaign. These separate facts do not support the concluding comment (if this is what it is) that "*in any other country (Ms) Ramos would have been*

charged with treason or corruption but she won't be. Rather she'll be appointed to chair more boards." This statement is not based on facts that are substantially true.

90. There is a further reason why the defence cannot succeed. The facts relied on by the respondents as the basis for the alleged fair comments are not clearly stated in the article. The article does not tell the reader that Ms Ramos was the Chief Executive of Absa at the time of that the rand fixing occurred. Nor does it say that she apologised on behalf of Absa for its role in the saga. It does not refer to the fact that criminal charges were laid against Ms Ramos (together with eight other business leaders) by BLF.

91. The respondents say that this does not matter because these facts were in the public domain. It is a known fact that Ms Ramos was the Chief Executive of Absa. On the respondents' showing, Ms Ramos's apology on behalf of Absa was reported in the mainstream media. The articles attached to the answering affidavit show that these reports were in 2017, over three years before the article appeared. It is questionable whether the ordinary reader of the article would have remembered the fact that an apology had been made by Ms Ramos.

92. Regarding the publicity surrounding the fact that BLF laid criminal charges, the respondents attach the blackopinion.co.za website article referred to earlier. The article was posted on 14 February 2019. The respondents provide no evidence on how widely the article was publicised or any other information about the website. They do not establish that the BLF charges were a matter of public knowledge more than a year after the website article was posted, and more than three years after the charges were laid.

93. It follows that the respondents have failed to show that the facts relied on by Mr Mahlangu forming the basis of what he says was fair comment were clearly stated

or a matter of public knowledge. While some facts may have been public knowledge, crucial facts were not. These include the fact of the existence of the BLF criminal charges, which was a critical component of Mr Mahlanugu's expressed view that charges of corruption or treason were justified against Ms Ramos, and that she was avoiding prosecution because of undue political protection.

94. For these reasons I find that on the assumption that I may have erred in my interpretation of the meaning of the statements in the article, the respondents would not succeed in establishing a defence based on fair comment, even on their own interpretation.

Reasonable publication

95. This defence has been available to the media since the decision of the SCA in *Bogoshi*. It permits a media defendant to establish that the publication of a false statement was not wrongful by proving that they reasonably believed in its truth and that it was in the public interest that it be published. In other words, a media defendant will be able to rebut the *prima facie* presumption of wrongfulness if they can show that it was reasonable to publish in a particular way at a particular time, albeit that the statements are defamatory and untrue.[23]

96. Consideration must be given to all the circumstances of the case. As the SCA explained in *Bogoshi*:

> "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 … and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the

[23] *EFF v Manuel*, n20 above, para 65

information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information."[24]

And further:

"… the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner also come to mind. The list is not intended to be exhaustive or definitive."[25]

97. The court also cautioned that:

"Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. 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 light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community."[26]

98. The respondents bear the onus of providing evidence to establish the defence of reasonable publication.[27]

99. They accept that Ms Ramos was not involved personally in rand fixing, and they do not call for her to be held personally liable. Consequently, they cannot say that they published statements to this effect (as I have found to be the case) in the honest belief that they were true. This precludes the respondents from successfully establishing the defence of reasonable publication on the meaning I have found the defamatory statements to carry.

100. What of this defence in the context of the alternative interpretation, in the event that I may be found to have erred?

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[24] *Bogoshi*, above n6, 1212H-I
[25] *Bogoshi*, above n6, 1213B-C
[26] *Bogoshi*, above n6, 1212I-J
[27] *Bogoshi*, n6 above, 1218D-E

101. I take into account that the article in which the statements occurred was an editorial opinion piece with political overtones. Ms Ramos is a public figure, both politically, through her having held prominent positions in public sector, and financially, through her positions in the private sector. The article appeared at the time that Ms Ramos was appointed to chair the AGA board. An editorial piece on her appointment was timely. However, the statements made in the article extended beyond that appointment. The article went further than saying that her appointment as chair of AGA must be treated with concern, and not celebration. It said (on the assumption, contrary to my finding, that the respondents' meaning is adopted) that her position as Chief Executive of Absa during the rand fixing saga justified criminal charges of corruption or treason against her, and that she was being protected unduly from prosecution. It also said that instead of being prosecuted she would be appointed to chair more boards, and that her appointments were indicative of corruption being applauded and celebrated.

102. As I have explained in relation to the other defences raised, these defamatory statements are not true. The respondents do not place any evidence before the court to establish that they honestly believed that charges of corruption or treason against Ms Ramos as Chief Executive are justified, save for the fact that BLF laid corruption charges against her and others.

103. The fact that charges were laid by a political party is not evidence of Mr Mahlangu's honest belief that the charges are justified. He provides no evidence on any reliable source with whom he consulted to justify the belief in his statement that in any other country Ms Ramos would be charged with corruption or treason. *Ex post facto*, in his answering affidavit Mr Mahlangu made reference to the Enron and Huawei prosecutions in the United States as examples of corporate executives who had

been found guilty of offences, he said, that were committed by their companies. No references were made to these examples in the article itself, and Mr Mahlangu does not aver that he did this research before he wrote or published the article.

104. In any event, as Ms Ramos established in her replying affidavit, the prosecutions in those cases were not based on corporate responsibility, as stated by Mr Mahlangu. Instead, the executives involved were prosecuted for their individual criminal conduct, and not those of the company they served. Even if Mr Mahlangu had used these examples as a source for his statements (which he does not say), he did not do sufficient due diligence to establish the correct facts. An obvious final point in this regard is that none of these cases involved charges of treason, and Mr Mahlangu does not even hint at any source he may have relied on to establish an honest belief that treason charges against Ms Ramos are justified.

105. In the absence of evidence of the source relied upon by Mr Mahlangu for his honest belief that charges against Ms Ramos are justified, it follows that there is no basis for Mr Mahlangu honestly to have believed in the truth of his further statement that the reason why she is not being prosecuted is because she enjoys undue political protection, tainted by corruption.

106. Furthermore, it is not disputed that Ms Ramos was not given an opportunity to comment on the defamatory statements before they were published. As indicated, this is one of the relevant factors identified in *Bogoshi* in the inquiry as to whether the publication of untrue facts may nonetheless be found to be reasonable and hence not unlawful. Mr Mahlangu offered Ms Ramos the opportunity to have a response to the article published in The Star. The defence of reasonable publication looks at the circumstances existing at the time the article was published. Had Ms Ramos been given an opportunity to comment before publication it is arguable that

the defence may have been available to the respondents. However, an *ex post facto* offer to respond obviously cannot retrospectively make lawful what was from inception a defamatory and *prima facie* unlawful publication. The defence of reasonable publication does not extend so far.

107. Even on the assumption (contrary to my finding) that the respondents' meaning of the defamatory statements must be considered, in my view that would not establish the defence of reasonable publication. The respondents have failed to provide evidence to support a finding that Mr Mahlangu honestly believed in the truth of the defamatory statements, or that he acted reasonably in taking steps to verify that the information at hand justified the defamatory statements. He did not give any opportunity to Ms Ramos to comment on the article before publication, despite the fact that the statements made serious allegations about her criminal liability and her appointments being tainted by corruption. The respondents did not display the standard of professional care expected of members of the media before publishing the defamatory statements, and the defence of reasonable publication would not save the respondents from liability, even if they were to be found to be correct on their interpretation.

REMEDIES

108. In the absence of any valid defence to rebut the *prima facie* unlawful and intentional nature of the defamatory statements, Ms Ramos must be found to have established a breach of her rights to dignity, her good name and her reputation. And so, at last we come to where the respondents wished the court to begin: the question of remedies.

109. Ms Ramos is entitled to an effective remedy,[28] which addresses the consequences of the breach of her rights.[29]

110. What precludes the respondents from successfully establishing this defence on the meaning I have found the defamatory statements to carry is that they have disavowed any belief in it being true that Ms Ramos was personally involved and should be held to be personally liable for rand fixing.

111. Instead of pursuing a claim for damages, Ms Ramos seeks the declarator, interdict, removal order and apology described in more detail earlier. There is nothing unusual in a defamation complainant electing to pursue relief other than damages, or in addition to damages. The SCA recently endorsed similar relief to that sought by Ms Ramos here in *EFF v Manuel*,[30] although in that case the court overturned the award for unliquidated damages granted by the High Court on application (as opposed to by way of an action). The SCA held in this regard that:

> "Motion proceedings are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise."[31]

However, the SCA upheld the declarator, interdict, and removal order granted by the High Court.

The declaratory relief

112. Ms Ramos seeks an order declaring that:

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[28] *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) at para 17

[29] *Tswelopele*, n28 above, para 19

[30] Above, n28

[31] *EFF v Manuel*, above n20, para 105

> "(T)he statements made about the Applicant in the article published by the Respondents on 9 December 2020 … are defamatory of her, false and unlawful."

113. I have found that the statements identified by Ms Ramos are indeed defamatory, false and unlawful. However, the respondents nonetheless take issue with Ms Ramos's entitlement to a declarator to this effect. As far as I can gather from their submissions in this regard, the respondents contend that since Ms Ramos's career advancement has not been affected since the rand fixing news broke five years ago, she cannot claim that her reputation actually has been tarnished. As I understand it, the argument is that Ms Ramos's claim to reputational harm is not real and so the court should not grant declaratory relief.

114. The respondents' submissions seem to me to miss the point. Ms Ramos's claim is based on defamation. I have found that her claim is good in law: by publishing the statements, the respondents committed a delict. A declarator confirming the false and defamatory nature of the statements concerned does not constitute abstract relief for which a declaratory order is unsuited.[32] On the contrary, the declarator Ms Ramos seeks encapsulates the legal finding I have made, and it leads into the interdictory relief that follows.

115. I find that there is no merit in the respondents' objections to the granting of the declaratory relief sought. Ms Ramos is entitled to an order in the terms she seeks in this regard.

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[32] See for example, *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Another* 1995 (4) SA 1 (A) at 14F-G; *Maccsand (Pty) Ltd & Another v City of Cape Town & Others* 2011 (6) SA 633 (SCA) para 39; and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at paras 16-17

The interdictory relief

116. Ms Ramos avers that she has a clear right to her reputation and good name, and that the respondents have breached that right. The breach continues on an ongoing basis as the article containing the defamatory material remains accessible on line and through social media. Having failed to discharge their onus to show that the defamatory statements were not unlawful, Ms Ramos says that the respondents cannot justify the publication and continued publication of the defamatory material. She avers that she has suffered and continues to suffer ongoing harm to her reputation, and that she has no alternative effective remedy. An award of damages would be backward looking, and thus would not be effective against the continued harm to her reputation. Similarly, she says that an apology and retraction would also not be effective on their own.

117. Accordingly, she seeks an interdict prohibiting the respondents:

> "3. …from publishing or republishing:
>
> 3.1 the article; and
>
> 3.2 any statement that says or implies that the Applicant, while employed as the CEO of Absa Bank participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand".

118. The respondents contend that Ms Ramos has not satisfied the requirements for the granting of an interdict. Their case is that she has not shown that she has suffered any harm. They say that calls for Ms Ramos to be held accountable for rand fixing have been in the public domain since 2016, and she has nonetheless advanced in her career.

119. As with the respondents' objection to the declaratory relief, this argument also appears to miss the point. Ms Ramos has established a claim of defamation against the respondents. The court has found that her reputation is likely to be harmed by

the defamatory statements. It was not necessary for her to show actual harm to her career in order to satisfy her onus in the defamation claim where she seeks interdictory relief. Ms Ramos is not claiming damages on the basis that she is likely to be fired as chair of the AGA board and likely to be unemployable as a result of the respondents' defamatory statements. Thus, this court is not concerned with proof of actual damages. It is inarguable that statements to the effect that criminal charges of corruption or treason are justified against Ms Ramos, and that she is avoiding prosecution because of undue political influence are likely to harm her reputation. That is sufficient evidence of harm to suffice for purposes of an interdict to prevent the harm from continuing.

120. In any event, whatever criticism previously may have been in the public domain over the years about Ms Ramos, the respondents do not point to any that made the specific defamatory statements that are the subject matter of this application. The respondents' argument that Ms Ramos has not suffered harm from other people making critical comments, and therefore that she is unlikely to suffer harm from the respondents' statements is thus ill-founded.

121. The respondents also contend that Ms Ramos has an alternative, and more appropriate remedy. This is to take up Mr Mahlangu's offer to afford her the space in the respondents' publications to respond in the public space to the statements made in the article. This is not an effective remedy against the defamation committed against Ms Ramos. In the face of the defamation, she cannot be expected to defend her reputation, *ex post facto*, in the media.

122. I find no merit in these objections raised by the respondents. Ms Ramos has established a right to her dignity, good name and reputation. Her rights have been infringed by the false, defamatory and unlawful statements published by the

respondents. The respondents do not dispute that the article containing the statement remains accessible on the respondents' websites and through their social media portals. The harm to Ms Ramos's reputation is ongoing. I am also satisfied that she has no alternative effective remedy other than to be granted an interdict prohibiting the continuation or repetition of the defamatory statements.

123. This brings me to the final objection by the respondents. They say in the first place that the terms of the interdict sought in prayer 3 of the notice of motion are too broad. It would prevent the respondents from reporting on or making statements about Ms Ramos's appointment as chair of the AGA board; her donation to the President's campaign; and the SARB bailout issue.

124. This objection is based on a misunderstanding of the ambit of prayer 3. It does not prohibit the respondents from making statements about the general topics they identify. It prohibits them from making specific statements, namely: "*(those) that (say) or (imply) that the Applicant, while employed as the CEO of Absa Bank participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand.*" They are also prohibited from publishing or republishing the article in full.

125. While only certain statements in the article are impugned and have been found to be defamatory and unlawful, the article would not make any sense if it were published in redacted form. It is therefore not irrational (as the respondents contend) for the court to make an order prohibiting the publication of the article. It makes practical sense to do so. However, the order does not prohibit the respondents from making the non-impugned and non-defamatory statements in another form, provided they do not carry the same sting as that carried by the defamatory statements, and thus breach prayer 3.2.

126. The second objection by the respondents to the prayer 3 relief is that in future Ms Ramos may indeed be found to have participated in fixing the rand while Chief Executive of Absa, or in having committed treason or corruption in relation to fixing the rand. I was referred in this regard to the following dictum in *Heroldt v Wills:*[33]

> "Although judges learn to be adept at reading tea leaves, they are seldom good at gazing meaningfully into crystal balls. For this reason I shall not go so far as 'interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media'. I have no way of knowing for certain that there will be no circumstances in the future that may justify publication about the applicant."

It was submitted by the respondents that as the Competition Commission inquiry is ongoing, this court should not attempt the impossible, that is to predict the future. This court does not, and cannot know whether statements of the type sought to be prohibited may be justified by events in years to come. Consequently, say the respondents, to grant an interdict in the terms sought would unduly undermine the respondents' rights and obligations under s 16 of the Constitution.

127. The respondents accept that if there is merit in this submission, I have the power to grant an interdict in terms that would effect a balance between the two sets of rights involved. Media reports attached to the answering affidavit by the respondents indicate that the Competition Commission seeks fines against the banks involved based on 10% of their turnover. I have no other information before me that the Competition authorities are pursuing relief against Ms Ramos, or that the prosecuting authorities intend to charge her.

128. While at this stage, on the evidence before me, it does not appear that Ms Ramos is in any real danger of being found guilty of corruption or treason, I will err on the

[33] Above, n21, para 40

side of caution and resist the temptation to gaze into the crystal ball. In my view, the respondents' concerns may be dealt with by the simple expedient of adding the word "*falsely*" before the phrase "*says or implies that the Applicant ….*". I do not believe that this small adjustment warrants an adverse order of costs, as the respondents submitted.

The removal order

129. The respondents object to the removal order on the basis, in the first place, that the harm has already occurred. As it is common cause that the article remains available on line and through social media portals, clearly there is no merit in this objection.

130. The second objection is that the removal of the article will be academic because nothing would bar other media platforms from keeping or publishing similar statements in their publications or on their platforms. In the first place, as I noted earlier, the respondents present no evidence of other publications making the kind of defamatory statements that they have made in the article under consideration.

131. In the second place, where particular parties have made defamatory statements it is the practice to cite them as defendants and respondents and to seek appropriate relief against them. Quite obviously, relief cannot be sought against the media in general in a case like the present. However, once an order is granted against the respondents in this case, it would be legally foolhardy for any other media players to engage in the same or similar unlawful conduct. This is always the effect of an order of this nature. Of course, Ms Ramos would have to seek relief against anyone who committed a similar defamation. However, that does not mean that an order to remove the defamatory material should not be made against the respondents.

The apology

132. The Constitutional Court confirmed in *Le Roux* that an apology is an appropriate remedy in respect of an actionable injury to a person's dignity.[34] In that case, the complainant sought both delictual damages and an apology. The same held true in *EFF v Manuel*. There, the High Court ordered both forms of relief. The SCA denied the complainant damages, and consequently denied him the apology. It's reasoning was as follows:

> "Neither of these two judgments (*Le Roux* and *McBride*) suggested that an order for publication of a retraction and apology on its own and not in conjunction with an award of damages would be an adequate remedy. The High Court's order for publication of a retraction and apology in this case was made in conjunction with its order for damages. We have held that the latter should not have been made without hearing evidence. The applicants had suggested in their challenge to the quantum of damages, that an apology would be sufficient redress, but that suggestion can only be considered in conjunction with the consideration of whether an award of damages should be made and the quantum of that award. An apology has always weighed heavily in determining the quantum of damages in defamation cases as occurred in *Le Roux v Dey*. In our view, whether an order for an apology should be made is inextricably bound up with the question of damages. As the latter award falls to be set aside and referred to oral evidence, so too must the order to publish a retraction and apology be set aside and referred to the High Court for determination after the hearing of oral evidence on damages.[35] (emphasis added)

133. As the SCA noted, none of the judgments to date have considered the question of an apology de-linked from a claim for damages. Although the underlined portion of this dictum suggests that there is an inextricable link between the question of damages and that of an apology, this must be read in context. It is clear from the

[34] *Le Roux*, above n7, paras 202- 203, read with para 150

[35] *EFF v Manuel*, above n20, para 130

dictum as a whole that the statement is directed at the manner in which the case was pleaded. As I read the underlined statement, it is that in this case, the link is inextricable. In other words, where both forms of relief are claimed the link is established. This is because the measure of damages will be affected by the additional award of an apology. For this reason, where the two are pleaded together (as they were in *EFF v Manuel*), they must be determined together. For this reason, the apology could not, in that case, survive without the survival of the claim for damages.

134. In my view, there is nothing in the relevant dicta of our higher courts that prevents a court ordering an apology along with the kind of relief that Ms Ramos is entitled to in this case. She has elected not to pursue a damages claim. The effect of an apology on the computation of damages in the future is not a relevant factor here. The respondents are members of the media. It is by no means unusual for the media to publish corrections and apologies without a court directing them to do so. I see no reason why, in circumstances where the respondents elect not to offer an apology, this court should not order them to do so.

CONCLUSION

135. I have given lengthy reasons for my finding in favour of Ms Ramos. Inherent in our law of delict, amplified by our Constitution, is the need to effect a balancing exercise between the rights of the individual defamed and the public interest in safeguarding the right to freedom of expression and the press. The latter right requires that courts avoid overly protecting public figures from criticism directed at them in the media, even if the criticism is defamatory.

136. On the other hand, the media has an obligation to act lawfully as the instrument through which the right to freedom of the press is exercised. Where the media

makes defamatory statements about public figures it is nonetheless required to justify its conduct in terms of the law. There is a good reason for this. Irresponsible reporting of false facts can be extremely damaging to democracy. The public has a right to be informed, and it has the right to read information and opinions that may be critical of public figures. But the media has an obligation to exercise due care in making sure that the facts and opinions it publishes fall within the bounds of the law. In this case, the respondents failed to do so.

137. I find that Ms Ramos is entitled to the relief she seeks in her notice of motion, subject to the adjustment to prayer 3.2 discussed earlier. There is no reason why costs should not follow the result. The applicant seeks the costs of two counsel. Both parties had teams of more than one counsel, and in my view, the costs of two counsel for the applicant is justified.

138. I make the following order:

1. It is declared that the statements made about the Applicant in the article published by the Respondents on 9 December 2020 and attached to the founding affidavit as "FA1" and "FA2" ("the article") are defamatory of her, false and unlawful.

2. The Respondents are interdicted from publishing or republishing:

2.1. the article; and

2.2. any statement that falsely says or implies that the Applicant, while employed as the CEO of Absa Bank, participated in fixing the rand or committed corruption or treason in relation to the fixing of the rand.

3. Within 24 hours of the date of this order, the Respondents are directed to permanently remove the article from:

3.1. the First Respondent's website, www.iol.co.za, and any other online platform on which the article was published;

3.2. all Twitter accounts controlled by the Respondents, including the Twitter account for The Star (@The Star news); and

3.3. all Facebook accounts controlled by the Respondents, including the Facebook page for The Star.

4. Within 24 hours of the date of this order, the Respondents are directed to publish the following retraction and apology in the manner directed in paragraph 5:

> "On 9 December 2020, Independent Media published an article on the Independent Online website, and in the Star, which contained various false and defamatory statements concerning Ms Maria Ramos. These include that she is guilty of "fixing the rand", that she engaged in conduct that amounts to, and justifies criminal charges for, "treason or corruption", and that she received improper quid pro quos. independent Media unconditionally retracts these false and defamatory statements and apologises unreservedly for any harm caused to Ms Ramos."

5. The Respondents must publish the apology referred to in paragraph 5 in the following manner:

5.1. in the next print edition of The Star after the date of this order in reasonably sized print and in a reasonably prominent location on page three;

5.2. on the homepage of the First Respondent's website, www.iol.co.za, for five business day, in reasonably sized print and in a reasonably prominent location;

5.3. in a tweet from The Star's Twitter account (@The Star news), tweeted during ordinary business hours, which tweet must be pinned for at least five business days;

5.4. in a post on The Star's official Facebook page, posted during ordinary business hours, which post must remain on the page for at least five business days.

6. The Respondents are ordered to pay the Applicant's costs, including the costs of two counsel, such costs to include costs of senior counsel

ELECTRONICALLY SUBMITTED

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 May 2021.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

Date of hearing:	26 MARCH 2021
Date reserved:	26 MARCH 2021
Date judgment delivered:	28 May 2021
For the applicant:	S Budlender SC
	J Mitchell
	S Mabunda
Instructed by:	WEBBER WENTZEL
For the respondents:	V Ngalwana SC
	F Karachi
	N Jiba
Instructed by:	ABRAHAMS KEIWITZ INC