

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

Case number: 21/0144

In the matter between

MARIA DA CONCEIÇÃO DAS NEVES CALHA RAMOS Applicant

and

INDEPENDENT MEDIA (PTY) LIMITED First Respondent

SIFISO MAHLANGU Second Respondent

INDEPENDENT NEWSPAPERS (PTY) LTD Third Respondent

INDEPENDENT ONLINE SA (PTY) LTD Fourth Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

- 1 The Star Newspaper proclaims itself to be “South Africa’s most influential daily newspaper”.¹
- 2 On 9 December 2020, the Star carried an article by Mr Mahlangu, its editor. The article also appeared on the IOL website. The article accused the applicant, Ms Ramos, of “fixing the rand” – that is manipulating the Rand’s exchange rate.² It said she should be charged with treason—a crime so serious it was once met with death.³
- 3 The statements made regarding Ms Ramos are self-evidently defamatory. They are also false. Not a single fact in the papers supports the statements in the article that Ms Ramos engaged in “fixing the rand” or that “In any other country, Ramos would have been charged with treason or corruption.”
- 4 This is what actually happened:
 - 4.1 Six years ago, in 2015, two Absa employees went rogue and colluded with multiple other banks to manipulate the exchange rate.⁴

¹ Founding affidavit; annexure “FA6”, p 1-47. Independent Media does not deny this: answering affidavit; pp 9-62 to 9-70, paras 142 to 145.

² Founding affidavit; annexure “FA2”, p 1-37 reproduced in as an annexure to these heads of argument.

³ See *S v Makwanyane* 1995 (3) SA 391 at para 44 (quoting the then section 277 of the Criminal Procedure Act 51 of 1977, which, at the time, permitted a court to impose the death penalty for, amongst other things, “treason committed when the Republic is in a state of war”). See also, generally, *S v Mayekiso* 1988 (4) SA 738 (W).

⁴ Founding affidavit; pp 1-14 to 1-16, para 29. Independent Media does not deny these facts: answering affidavit; pp 9-70 to 9-72, paras 146 to 154.

- 4.2 At the time, and far up the corporate hierarchy, Ms Ramos was Absa's CEO. She did not know about the rogue traders' conduct.⁵
- 4.3 Once Absa's senior leadership (including Ms Ramos) found out, Absa made full disclosure to the Competition Commission. Absa's disclosure prompted the Competition Commission's investigation, with which Absa fully cooperated.⁶
- 4.4 In other words, far from covering up the unlawful conduct, Absa's leadership (including Ms Ramos) was the whistle-blower in respect of the scheme. Its actions led to the Competition Commission taking against the banks concerned.
- 5 The case of the respondents (Independent Media) is not that it was justifiable to accuse Ms Ramos of manipulating the Rand/dollar exchange rate or that it was justifiable to accuse her of treason.
- 5.1 Instead, Independent Media's case mostly turns on an attempt at re-interpreting the article which, we submit, is plainly an after-thought.
- 5.2 Independent Media now argues that the article did not actually state that Ms Ramos personally manipulated the Rand/dollar exchange rate.⁷ Instead, so the revisionist interpretation goes, the article is about

⁵ Founding affidavit; p 1-15, paras 29.4 to 29.5. Independent Media does not deny these facts: answering affidavit; pp 9-70 to 9-72, paras 146 to 154. See also replying affidavit; pp 10-19 to 10-21, para 20.

⁶ Founding affidavit; pp 1-14 to 1-16, para 29. Independent Media does not deny these facts: answering affidavit; pp 9-70 to 9-72, paras 146 to 154. See also replying affidavit; p 10-21, para 20.8.

⁷ Answering affidavit; p 9-8, para 8; p 9-29, para 62; p 9-29, para 63; p 9-63, para 144.2; p 9-63, para 144.3; p 9-64, para 144.4; p 9-64, para 144.5; p 9-65, para 144.6; p 9-68, para 144.13; p 9-69 para 144.14; p 9-70, para 147; p 9-72, para 154; p 9-74, para 161; p 9-75, para 168; p 9-80, para 182; p 9-81, para 183.

corporate wrongdoing and MS Ramos' oversight responsibility as Absa CEO.

6 A mere reading of the article makes clear that Independent Media's belated interpretation is wrong.

6.1 The article is about Ms Ramos personally and her personal conduct.

6.2 The revisionist version of the article that Independent Media tries to defend now does not rhyme with the words Mr Mahlangu actually used in the article.

7 Independent Media devotes most of the answering affidavit to building and then defending this straw-man interpretation of the article. This leaves Independent Media with no defence if the interpretation is wrong. That is, if this Court finds that the article means what it says, then Ms Ramos must succeed.

8 But even if Independent Media was somehow right about its interpretation of the article, the statements about Ms Ramos, even in her capacity as Absa CEO, are still false and still defamatory. Independent Media still does not satisfy its "full onus" to prove a defence.⁸

9 The result is therefore the same no matter which interpretation prevails. Independent Media published false, defamatory statements about Ms Ramos.

9.1 It either pleads no defences at all (on the ordinary-meaning, personal-responsibility interpretation); or

⁸ *Le Roux v Dey* 2011 (3) SA 274 (CC) at para 85.

9.2 It fails to meet its burden to prove the defences it does plead (on the revisionist, corporate-oversight interpretation).

10 Either way, we submit, Ms Ramos's application should succeed.

THE STATEMENTS ARE DEFAMATORY

The ordinary meaning of the statements

11 The full text of the article is included as an annexure to these heads of argument.

12 In interpreting the article, the court must give it its "ordinary meaning":

*"... In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement..."*⁹

13 As a matter of "ordinary meaning", the article accuses Ms Ramos of being personally involved in manipulating the Rand/dollar exchange rate. A "reasonable person" reading the article would understand Mr Mahlangu to mean that there are grounds to conclude that Ms Ramos was engaged in "fixing the rand" or similar criminal or unethical conduct, and that she has, in her personal capacity, engaged in criminal or unethical conduct that justifies criminal or disciplinary action.

⁹ *Le Roux* (note 8) at para 87.

- 14 The article also alleges that Ms Ramos engaged in conduct that justifies a charge of treason.
- 15 Both statements—that Ms Ramos was personally involved in “fixing the rand” and that she should be “charged with treason or corruption”—are defamatory as a matter of their primary meaning.¹⁰ The “reasonable reader of ordinary intelligence”¹¹ would understand Mr Mahlangu’s statements to mean that Ms Ramos personally manipulated the Rand/dollar exchange rate and that she personally engaged in conduct that amounts to treason—one of the most serious crimes in the book.
- 16 These statements are plainly defamatory. They “injure the good esteem” in which Ms Ramos is held by the reasonable reader.¹²

Independent Media’s revisionist interpretation of the statements

- 17 The mainstay of Independent Media’s opposition is an interpretation argument. It argues that the article is not about what Ms Ramos did, and what she should be held responsible for, personally. Rather, so the argument goes, the article is about Ms Ramos’ responsibility for the misdeeds in her official capacity as Absa CEO.¹³

¹⁰ *Le Roux* (note 8) at para 89.

¹¹ *Le Roux* (note 8) at para 89.

¹² *Le Roux* (note 8) at para 91.

¹³ Answering affidavit; p 9-8, para 8; p 9-29, para 62; p 9-29, para 63; p 9-63, para 144.2; p 9-63, para 144.3; p 9-64, para 144.4; p 9-64, para 144.5; p 9-65, para 144.6; p 9-68, para 144.13; p 9-69 para 144.14; p 9-70, para 147; p 9-72, para 154; p 9-74, para 161; p 9-75, para 168; p 9-80, para 182; p 9-81, para 183.

18 Having built that strawman interpretation, Independent Media devotes most of the answering affidavit to defending a version of the article that is about the oversight responsibilities of CEOs.

19 But Independent Media's interpretation does not fit with what the article actually says.

19.1 Because the test for defamatory meaning is objective, the test is what the article actually says to the reasonable reader. It is not about how Independent Media, long-after-the-fact, reads the article.¹⁴

19.2 The article is plainly not about corporate criminal liability or holding executives vicariously liable for corporate wrongdoing. Instead, the article is about Ms Ramos and what she allegedly did in her personal capacity.

20 For starters, nowhere in the article does Mr Mahlangu say that Ms Ramos should be held liable or punished because she was the CEO of Absa. The phrase "[Ms] Ramos has still not accounted for fixing the rand" is, on any sensible interpretation, an allegation that Ms Ramos was personally involved in manipulating the Rand/dollar exchange rate.

20.1 Independent Media claims that the article means that "as Chief Executive of Absa Bank [Ms Ramos] was responsible for that conduct of her company and must be held accountable for it" and that she has

¹⁴ *Le Roux* (note 8) at para 89.

“yet to be held accountable for the rand fixing scandal of Absa Bank of which [I] was Chief Executive at the time.”¹⁵

20.2 The problem with this interpretation is that nothing in the article links “fixing the rand” to Absa and Ms Ramos’ role as CEO of Absa. For Independent Media’s new interpretation to work, there would need to be a connection between the two—that is, between “fixing the rand” and Absa—so that the ordinary reader would know that Mr Mahlangu was talking about corporate wrongdoing.

20.3 The article never links “fixing the rand” to Absa or Ms Ramos’ role as CEO of Absa. Instead, it links “fixing the rand” to Ms Ramos and Ms Ramos only.

20.4 The article mentions “Absa” just four times.

20.4.1 The first time the article mentions “Absa” is in this sentence: “While she was the group chief executive for Absa, Ramos was also a donor to President Cyril Ramaphosa’s CR17 campaign.” That sentence—and the article’s first use of “Absa”—does not link “Absa” to “rand fixing” in any way.

20.4.2 The second, third, and fourth times that “Absa” is mentioned is in the seventh and eighth paragraphs, where the article meanders through history: the formation of Absa, and decades-old transactions between the government and Absa,

¹⁵ Answering affidavit; p 9-63, para 144.2; p 9-64, para 144.4.

and the Public Protector's investigation. Nothing there links "Absa" to "rand fixing" either.

- 20.5 Without the crucial link between the conduct (fixing the Rand) and the corporate wrongdoer (Absa), the article does not support Independent Media's interpretation that the article is about corporate wrongdoing and CEO oversight. Without this link to Absa, the ordinary meaning of the article is that Ms Ramos is personally responsible for "fixing the rand", that she should personally apologise for her own role in "rand fixing", and that she should be charged for treason for her own wrongdoing.
- 21 Independent Media's CEO-oversight interpretation of the article is also irreconcilable with statements in the article that have nothing to do with Absa. These important contextual indicators make no sense if the article was about corporate wrongdoing and CEO responsibility.
- 21.1 In the article, Mr Mahlangu develops a false narrative that Ms Ramos was "honoured with a PIC board seat", suggesting a quid pro quo following a donation to President Ramaphosa's campaign.
- 21.2 The implication is false but, more importantly, the statements have nothing to do with Absa.¹⁶
- 21.3 If the article were about Ms Ramos' oversight responsibility and vicarious liability for the conduct of Absa employees while she was

¹⁶ Replying affidavit; p 10-12, para 12.

CEO, it makes no sense to include statements about what she did in her personal capacity.

22 There is another reason why the article does not support Independent Media's CEO-responsibility interpretation: the allegation of treason. Independent Media avoids this allegation altogether in their answering affidavit.¹⁷

22.1 Treason is a serious crime. Its ordinary definition largely aligns with its legal definition: attempting to overthrow the government or otherwise betray one's allegiance to their country.¹⁸ It is defamatory to accuse someone of treason (or to state that they should be charged with treason, which implies that they engaged in conduct that justifies the charge).

22.2 No ordinary reader of the article would understand the sentence "In any other country [Ms] Ramos would have been charged with treason or corruption" to mean that Ms Ramos should be charged with "treason or corruption" based on Absa's wrongdoing.

22.3 As a matter of ordinary meaning and its legal definition, treason is committed by individuals, not corporations. The dictionary definition is "[v]iolation by a subject of his allegiance to his sovereign or to the state."¹⁹ A corporation lacks the necessary element of "allegiance to his sovereign or to the state". For that reason, more than a century ago,

¹⁷ See, for example, answering affidavit; pp 9-73 to 9-75, paras 159 to 165 (the ad seriatim section purportedly responding to paragraph 40 of the founding affidavit).

¹⁸ See the collection of authorities in *Mayekiso* (note 3). See also Black's Law Dictionary (10th ed.) ("treason").

¹⁹ Oxford English Dictionary (online) ("treason").

the House of Lords explained that a company “can be neither loyal nor disloyal” and “cannot compass treason”.²⁰

23 Independent Media calls in aid two examples of corporate wrongdoing and CEO responsibility: “[i]n the United States ... the Chief Executive and other senior executives of Enron were prosecuted and imprisoned for their company’s breach of Securities laws” and the “[f]urther exampl[e]” of “Chief Financial Officer of Chinese Tech Giant Huawei.”²¹

23.1 Mr Mahlangu did not mention these examples in the article. The article did not, for example, list famous corporate collapses and bemoan the lack of C-suite accountability. On this basis alone, Independent Media’s attempt to rewrite the article with analogies not mentioned in the article must fail.

23.2 But in any event, both examples actually show that the article is about Ms Ramos’ personal liability, not her oversight responsibility.²²

23.2.1 Take Enron. The main culprits in the Enron collapse were three of its executives: Andrew Fastow, Kenneth Lay, and Jeffrey Skilling. All three were charged for crimes that they personally committed.²³ They were not “prosecuted and imprisoned for [Enron’s] breach of Securities laws”.²⁴

²⁰ *Continental Tyre and Rubber Co (Great Britain) Ltd v Daimler Co Ltd* [1915] 112 LTR 324 at 333.

²¹ Answering affidavit; p 9-68, para 144.13.

²² Replying affidavit; pp 10-14 to 10-15, para 13.7.

²³ Replying affidavit; pp 10-14 to 10-15, paras 13.7.2 to 13.7.3.

²⁴ Answering affidavit; p 9-69, para 144.13.

23.2.2 The Huawei example similarly involves personal criminal liability.²⁵ The United States charged both Huawei and its former CFO, Meng Wanzhou. Ms Wanzhou is not charged vicariously for crimes that Huawei, the company, committed. She is charged for things that she herself did.

23.2.3 In short, neither Enron nor Huawei is an example of corporate executives being held vicariously liable for the crimes of their companies or their employees. Quite the opposite: they are examples of executives personally committing crimes. Jeffrey Skilling is not in jail because Enron committed fraud; Jeffrey Skilling is in jail because he committed fraud.

23.3 If, as Independent Media seeks, we should interpret the article with the Enron and Huawei examples in mind, then Independent Media's interpretation fails. It fails because Enron's executives were not charged and convicted for Enron's conduct, but for their own conduct. In other words, on Mr Mahlangu's own comparison, the implication is that Ms Ramos should be "charged with treason or corruption" in her personal capacity (like Enron's executives), not by virtue of her position as CEO of Absa.

24 An analysis of the article shows that the article simply does not say what Independent Media wants it to say.²⁶ The article is not about corporate criminal liability and holding a company's executives responsible for the misconduct of

²⁵ Replying affidavit; p 10-15, para 13.7.4.

²⁶ Replying affidavit; pp 10-36 to 10-41, para 70.

their subordinates or the company itself. On any reasonable interpretation, the article is about Ms Ramos personally: it accuses Ms Ramos of misconduct and calls for Ms Ramos to be punished.

25 The revisionist interpretation urged by Independent Media must therefore be rejected.

26 But we reiterate that, even if Independent Media is somehow right about its interpretation of the article, and the article is somehow understood about Ms Ramos in her official capacity as CEO, the article is still defamatory of her.

26.1 Accusing someone of misconduct—including treason—in their capacity as CEO defames them.

26.2 Even if the article is read in this way, the reasonable reader would understand the statements about Ms Ramos in the article to mean that she either acquiesced to, or even authorised, Absa employees manipulating the Rand/dollar exchange rate, or that her failures in leadership created a climate where that conduct was allowed to, and could, take place.²⁷

26.3 The reasonable reader would conclude from the article that Ms Ramos should be held “account[able]” for what she did, or what she failed to do, in her capacity as CEO.

26.4 Those statements are defamatory.

²⁷ Replying affidavit; pp 10-19 to 10-21, para 20.

INDEPENDENT MEDIA HAS NOT ESTABLISHED A DEFENCE

27 The previous section shows that there has been, in the article, publication of defamatory statements about Ms Ramos. Everyone agrees that the article was published and that it refers to Ms Ramos.

28 Those boxes ticked, publication is presumed to be wrongful and intentional.²⁸ It is up to Independent Media, which bears the “full onus”, to establish a defence that justifies publication.²⁹

29 As we demonstrate in what follows, Independent Media has not met this onus. This is irrespective of whether the ordinary personal-liability interpretation is accepted (as it should be) or whether Independent Media’s revisionist oversight-liability interpretation is adopted.

No defence pleaded on the personal-liability interpretation of the article

30 Independent Media seems to accept that Ms Ramos was not personally involved in manipulating the Rand/dollar exchange rate.³⁰ Its case is that the article does not carry that meaning; instead, its case is that the article is about Ms Ramos’ oversight responsibility as CEO.

31 If Independent Media is wrong on the interpretation question, then, on its own version, it has no justification for publication. It offers no defences at all to rebut

²⁸ *Le Roux* (note 8) at para 85.

²⁹ *Le Roux* (note 8) at para 85. Independent Media agrees: answering affidavit; p 9-28, para 60.

³⁰ Answering affidavit; p 9-8, para 8; p 9-29, para 62; p 9-29, para 63; p 9-63, para 144.2; p 9-63, para 144.3; p 9-64, para 144.4; p 9-64, para 144.5; p 9-65, para 144.6; p 9-68, para 144.13; p 9-69 para 144.14; p 9-70, para 147; p 9-72, para 154; p 9-74, para 161; p 9-75, para 168; p 9-80, para 182; p 9-81, para 183.

the wrongfulness of the personal-liability interpretation of the article. It follows that if the personal-liability interpretation of the article is correct, then this application must succeed.

No defence established on the oversight-liability interpretation of the article

32 Even if Independent Media is right that the article is about Ms Ramos' liability as CEO for corporate wrongdoing, the statements are still defamatory and Independent Media has still not discharged its "full onus" to justify publication.

The attempt at the protected comment defence

33 Independent Media's first defence is that the article expresses an opinion that is protected comment.³¹

34 The defence involves four elements.³²

34.1 The defamatory statement must be a comment and not a statement of fact.

34.2 The defamatory statement must be fair, by which is meant only that it must be an honestly-held opinion, not that it is balanced or temperate.

34.3 The facts on which the defamatory statement are based must be true and must be clearly stated or clearly indicated, or matters of public knowledge.

34.4 The comment must relate to a matter of public interest.

³¹ See, for example, answering affidavit; p 9-29, para 62.

³² *Economic Freedom Fighters and Others v Manuel* [2021] 1 All SA 623 (SCA) at para 38.

35 The first difficulty for Independent Media is that the article does not merely express opinions; it states facts. For example, the article states or implies as a fact Ms Ramos was involved in fixing the rand. Once this is so, Independent Media' defence of protected comment does not get out of the starting blocks.

36 But even if one were to overlook this and to regard the defamatory statements as comments, the second difficulty is that protected comment goes hand-in-hand with truth. Independent Media then still has the onus to prove that the underlying facts are true. It must also prove that they are clearly stated or clearly indicated, or matters of public knowledge.

37 Independent Media has not remotely met these requirements.

38 Indeed, despite it not being her burden, Ms Ramos explains the true facts.³³ Independent Media does not seriously dispute her version.³⁴

38.1 In 2015, after Absa discovered that two of its then-traders were involved in manipulating the Rand/dollar exchange rate with other banks, Absa approach the Competition Commission as a whistleblower under the corporate leniency programme. Absa cooperated fully with the Commission. The Commission then initiated a complaint against twenty-three local and foreign banks.

³³ Founding affidavit; pp 1-14 to 1-16, para 29. See also replying affidavit; pp 10-19 to 10-21, para 20.

³⁴ Answering affidavit; pp 9-70 to 9-72, paras 146 to 154.

- 38.2 Although Absa was one of the banks implicated in the Competition Commission's complaint, the Commission did not seek a fine or any other sanction against Absa because Absa was the whistleblower.
- 38.3 In other words, far from covering up the unlawful conduct, Absa's leadership (including Ms Ramos as CEO) was the whistle-blower in respect of the scheme. Its actions led to the Competition Commission taking against the banks concerned.
- 38.4 There is no dispute that Ms Ramos was unaware of the conduct of the two, rogue Absa traders. It is also not disputed that as soon as she found out, she not only ensured that the whistle was blown on the scheme but also ensured that Absa conducted a thorough internal investigation and took appropriate disciplinary steps against the two traders.
- 39 On this basis too, there is simply no way in which the protected comment defence can succeed. The comments (if they are comments at all) are not based on true facts – still less true facts that are clearly stated or clearly indicated, or matters of public knowledge.
- 40 The protected comment defence must therefore fail.

The attempt at the truth and public interest defence

41 Independent Media' second defence is that the statements are true and were published in the public interest.³⁵

42 To come home on this defence, Independent Media must prove that the “sting of the charge” is true.³⁶ The truth of “peripheral facts” unrelated to the defamatory sting of an article is irrelevant.³⁷

43 This means that Independent Media must prove the truth of the allegation that Ms Ramos was personally involved in manipulating the Rand/dollar exchange rate, or (at least) that there is a basis to hold her vicariously liable by virtue of her position as CEO. Independent Media must also prove that there is a basis to charge Ms Ramos with treason.

44 This defence trips for the same reason as protected comment: Independent Media has not proven the truth of any of those statements.

44.1 Independent Media does not even defend an interpretation of the article that alleges that Ms Ramos was personally involved in manipulating the Rand/dollar exchange rate, let alone proving the truth of that allegation.

³⁵ See, for example, answering affidavit; p 9-30, para 69.

³⁶ *Media 24 Limited v Du Plessis* 2017 JDR 0587 (SCA) at para 22.

³⁷ *Media 24* (note 36) at para 22.

- 44.2 There is no factual basis for the allegation that Ms Ramos should be held vicariously liable based on her position as CEO, as discussed in paragraph 36.
- 44.3 Independent Media does not allege a single fact to support the statement in the article that Ms Ramos should be charged with treason.
- 45 Instead of engaging with the facts, Independent Media tries to muddy otherwise clear waters with references to the Heath Unit Report and the Davis Panel Report.³⁸
- 45.1 The relevance of these decades-old reports is not clear. They cover what happened in the mid-eighties to the mid-nineties. Ms Ramos joined Absa in 2009. The reports also have nothing to do with the manipulation of the Rand/dollar exchange rate.
- 45.2 The reports also have nothing to do with Ms Ramos. This application targets defamatory statements in the article about Ms Ramos. Even if there is, on an unduly expansive approach to relevance, some link between Absa and the old reports, they are not relevant to the article's specific statements about Ms Ramos and her conduct. At best for Independent Media, these are the types of "peripheral facts" that, even if true, are not enough for the defence of truth.³⁹

³⁸ Answering affidavit; pp 9-31 to 9-58, paras 70 to 125.

³⁹ *Media 24* (note 36) at para 22.

45.3 Also irrelevant is that Public Protector's report.⁴⁰ It is not related to Ms Ramos and does not support Independent Media's defamatory statements about her. Independent Media also failed to mention—in the article and in the answering affidavit—that this Court set aside the report.⁴¹ In the Constitutional Court's words, the report was the product of a "flawed" investigation and the Public Protector's conduct "[e]ll short of the high standards required of her office."⁴²

46 The truth and public interest defence must therefore fail.

The attempt at the reasonable publication defence

47 Independent Media' third defence, though obliquely raised, is that publication of the defamatory statements about Ms Ramos, though untrue, was nonetheless justified.⁴³

48 Since the decision of the SCA in *Bogoshi*, the media have been entitled to establish that the publication of a defamatory 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.⁴⁴

49 However, this defence is not open to Independent Media on the pleaded facts.

⁴⁰ Answering affidavit p 9-67, para 144.11. See also replying affidavit; pp 10-34 to 10-35, paras 63.3.3 to 63.3.7.

⁴¹ Replying affidavit; annexures "RA7" to "RA9", pp 10-92 to 10-279.

⁴² Replying affidavit; annexure "RA8", p 10-165.

⁴³ Answering affidavit; p 9-30, para 69.

⁴⁴ *Economic Freedom Fighters* (note 32 above) citing *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA).

- 49.1 It has not pleaded any facts to show it that it believed in the truth of the false statements, still less that it did so reasonably.
- 49.2 In *Bogoshi*, the SCA explained that what will figure “*prominently*” in assessing whether the reasonableness defence has been established “*is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information*”.⁴⁵ A further important factor is “*the opportunity given to the person concerned to respond*” prior to publication of the defamatory matter.⁴⁶
- 49.3 In the present case, there is no explanation at all from Independent Media as to:
- 49.3.1 the nature of the information relied on;
 - 49.3.2 the reliability of the source (whatever source it might have been);
 - 49.3.3 any steps taken to verify the information; or
 - 49.3.4 any opportunity given to Ms Ramos to respond prior to publication of the defamatory statements. Indeed, Ms Ramos got no such opportunity.⁴⁷

50 The reasonable publication defence must therefore fail.

⁴⁵ *Bogoshi* (note 44 above) at 1212H-J

⁴⁶ *Bogoshi* (note 44 above) at 1213B-C

⁴⁷ Replying affidavit; p 10-18, para 19.

Conclusion on the absence of any defence

51 In summary then:

51.1 If the ordinary-meaning, personal-responsibility interpretation is accepted (as it should be), Independent Media has pleaded no defences at all.

51.2 If the revisionist, corporate-oversight interpretation is accepted, Independent Media has pleaded defences but failed to meet the requirements to prove any of those defences.

52 In either event then, the publication of the article was unlawful.

AN APPROPRIATE REMEDY

53 Because her rights have been breached, Ms Ramos is entitled to an effective remedy.

54 This flows from the Constitution, as the SCA has emphasised in a different context:

*"[T]hough the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in Fose v Minister of Safety and Security) 'without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced'."*⁴⁸

⁴⁸ *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) at para 17.

55 Moreover, “*effective relief must be speedy, and it must address the consequences of the breach of [the] rights*”.⁴⁹

56 Ms Ramos has elected not to pursue damages. Instead, the remedies that she seeks are designed to address the consequences of the breach of her rights.

57 An effective remedy starts with declaratory relief.

57.1 Independent Media complains that it is too broad to declare the entire article defamatory of Ms Ramos.

57.2 That is not correct. As the SCA has recently explained:

*“Insofar as it was suggested that those parts of the statement that were unobjectionable could be clinically excised from the defamatory portions, our response is as follows: It is not for this court to recast the statement so that it might be unobjectionable and coherent. We decline the invitation to do so.”*⁵⁰

57.3 In any event, at minimum, Ms Ramos is entitled to a declaration that:

57.3.1 The statement made in the article that Ms Ramos was involved in manipulating the Rand/dollar exchange rate is false and defamatory.

57.3.2 The statement made in the article that Ms Ramos should be charged with treason or corruption, or that she engaged in conduct that would justify a charge of treason or corruption, is false and defamatory.

⁴⁹ Id at para 19.

⁵⁰ *Economic Freedom Fighters* (note 32 above) at para 90

58 Second, Independent Media should be interdicted from publishing the false and defamatory statements just set out. Ms Ramos meets the requirements for an interdict.

58.1 Ms Ramos has a clear right to a reputation and a good name. Independent Media has breached that right. Independent Media has not discharged their onus to justify publication of the defamatory statements about Ms Ramos.

58.2 Ms Ramos has suffered, and continues to, suffer harm to her reputation. Independent Media does not deny that the statements it made about her were widely disseminated and are still available online.

58.3 Ms Ramos has no alternative remedy. A retraction and apology may compensate her for the past infringement of her rights, but they do not prevent ongoing harm that the continued publication of the defamatory statements causes.

59 Third, Ms Ramos is entitled to an order directing Independent Media to permanently remove the article from the IOL website, and from Independent Media' Twitter and Facebook accounts. This relief follows from the declaration that the ongoing publication of the defamatory statements is unlawful, and from the interdictory relief.

60 Fourth, Ms Ramos asks that Independent Media be ordered to publish a public retraction of, and apology for, the defamatory statements concerned.

60.1 The vindication of Ms Ramos' dignity and reputation requires no less.

60.2 As the Constitutional Court explained in *Le Roux v Dey*:

“... Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.

The applicants’ depiction of Dr Dey in the image is an actionable injury to his dignity. He is entitled to an apology from them.”⁵¹

60.3 Independent Media has itself previously recognised the appropriateness of a front page apology. Just two years ago, the Star’s sister newspaper apologised for spelling its boss’s name incorrectly.⁵² A false accusation of treason surely deserves the same real estate as a typo.

⁵¹ *Le Roux* (note 8) at paras 202 – 203 (emphasis added). See also *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at para 74.

⁵² The front page of the late final edition of the Cape Argus on 19 February 2019 reads, just above the day’s headline, “IN YESTERDAY’S LATE FINAL WE SPELLED DR IQBAL SURVÉ’S NAME INCORRECTLY. WE REGRET THE ERROR” (capitals, for emphasis, in the original). Available at: <https://www.pressreader.com/south-africa/cape-argus-pm-edition/20190219>.

THE REMAINING TECHNICAL ARGUMENTS: URGENCY AND JOINDER

61 The question of urgency does not need to be debated further. The matter has been set down on special allocation by the agreement of all parties.

62 However, insofar as it may need to be addressed, the following should be pointed out.

62.1 The publication of the article caused, and continues to cause, irreparable harm—including threats to Ms Ramos' safety.⁵³ Ms Ramos will not obtain substantial redress in the ordinary course.

62.2 Ms Ramos acted with haste after the article was published.⁵⁴ She took reasonable steps to engage with Independent Media to try and avoid the need for urgent litigation.⁵⁵ For close on a month, Independent Media did not even bother to reply to her letter.

62.3 There has been no prejudice to Independent Media. The notice of motion afforded them twelve days to file an answering affidavit. After the parties agreed to a special allocation, Ms Ramos offered Independent Media an opportunity to supplement their answering affidavit if needs be. They did not take up her offer.

⁵³ Founding affidavit; p 1-25, paras 52 to 53.

⁵⁴ Independent Media allege that “calls for Ms Ramos to be held accountable have been made as far back as 2016.” The examples that Independent Media give were either not in the mainstream media, or did not accuse Ms Ramos of being personally involved in manipulating the Rand/dollar exchange rate. See replying affidavit; p 10-26, para 38.2.

⁵⁵ Founding affidavit; pp 1-16 to 1-17, paras 32 to 36. See *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) at para 37 (“[I]t was only prudent and salutary that the applicants first sought to engage the city before they rushed off to court”). See also *Transnet Limited v Rubenstein* 2006 (1) SA 591 (SCA) at para 33 (Cloete JA, concurring) (“Rubenstein cannot legitimately be criticised for attempting to settle the matter before resorting to litigation.”).

63 Independent Media also raises a technical point about joinder.⁵⁶

63.1 Ms Ramos initially (and properly) cited Mr Mahlangu and Independent Media (Pty) Limited which, according to its website, is responsible for The Star and IOL.⁵⁷

63.2 Independent Media, however, complained about Ms Ramos not having joined the subsidiaries in the, to use Independent Media's own description, "stable". Whatever the merits or demerits of this point, Ms Ramos' joinder application in respect of the third and fourth respondents cures the problem.

CONCLUSION

64 We submit that Ms Ramos is entitled to an order in terms of the notice of motion.

The costs order should include the costs of two counsel.

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Chambers, Sandton

10 March 2021

⁵⁶ Answering affidavit; p 9-6, para 6.

⁵⁷ Founding affidavit; annexure "FA1A", p 1-33.

ANNEXURE: THE ARTICLE

Ramos was never charged for for [sic] fixing the rand but keeps getting rewarded with top jobs

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, 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 our [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.