PO Box 26463, Windhoek

Complaint: *Office of the Judiciary* v *The Namibian*

Tuesday, 18 August 2020

Ruling by the Media Ombudsman

Complainant: Mrs Rolanda N Van Wyk, Executive Director for the Office of the Judiciary

Article: 'LAC condemns court secrecy plan'

Date of article: 18 February 2020

Authors of article: Tileni Mongudhi and Mathias Haufiku

Respondents: Tangeni Amupadhi, Editor & Mathias Haufiku, Journalist

Date of Ruling: 18 August 2020

1. Particulars

This ruling is based on a complaint made by Mrs Rolanda N Van Wyk (hereafter Van Wyk), Executive Director for the Office of the Judiciary, and the written responses thereto by Mr Tangeni Amupadhi (hereafter Amupadhi), Editor of the Namibian Newspaper, and Mr. Mathias Haufiku (hereafter Haufiku), the journalist who co-authored the impugned article. The Namibian published a lead story titled *"LAC condemns Court Secrecy Plan".* The story, in the main concerns the proposed draft rules of the High Court, with specific reference to Article 12 of the Namibian Constitution or better known as in-camera proceedings.

2. Complaint

Van Wyk complains that:

- ✓ the article intentionally and willfully, misstated and misrepresented the facts
- ✓ journalist Haufiku exerted unreasonable pressure on the Office of the Judiciary to provide a response
- ✓ the headline, the graphic and pictorial images used were misleading, exaggerated and distorted

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- ✓ the *Matter of Fact (MoF)* published the next day, 19 February 2020, did not disclose certain material facts and that it was not given the same prominence as the impugned lead article.

Van Wyk contends that the following clauses of the Code of the Ethic and Conduct (the Code) were breached:

- ✓ Clauses 2.1-2.3 relating to accuracy, fairness, the prohibition of misrepresentation and the obligation to give factual accounts
- ✓ Clause 2.8 requiring reasonable time to be afforded for a response.
- ✓ Clause 4.3 requiring that care and consideration be exercise in matters involving dignity and reputation
- ✓ Clause 4.3.4 in so far as the defenses of 'acceptable journalistic conduct' and 'public interest' listed therein cannot not raised to override the clause 4.3 requirement.
- ✓ Clauses 13.1 & 13.2 prohibiting the use of misleading headlines and posters/pictures.

Van Wyk, accordingly request the following remedies as appropriate form of redress:

i. A correction of facts and an unequivocal apology to the Judge President to be published on the front page.

ii. The correction must state that the Namibian erred in their reporting of the facts which necessitated the correction.

iii. A full retraction of the misleading information i.e. that the LAC made a submission to the Judge President.

iv. The corrected article should be published as a lead and cover all the questions and answers as provided by the Judiciary to Haufiku by Mr. Ockert Jansen (hereafter Jansen), Deputy Director of Public Relations in the Office of the Judiciary, on 14 February 2020.

3. The text

The article centered around the proposed 'Amendment of Rules of the High Court of Namibia' as prepared by the Judge President. It reported that in terms of the draft rules a litigant may request the managing judge for the prohibition or restriction on access to a case file by the press or public. The articles pointed out that this is a new initiative aimed at closing the gap when it comes to in-camera hearings. It quoted the Judge President (JP) as having stressed that the proposal is well-meant and within the law.

The article reported that some lawyers were skeptical about the proposed initiative. For instance, such a window might reportedly be misused to hide information in cases implicating high-profile individuals, especially politicians. The article extensively quoted the Director of the Legal Assistance Centre (LAC), Mrs. Toni Hancock. She for

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instance, reportedly warned, amongst others, that the proposed changes might affect the credibility of the judiciary and impact on the independence, impartiality, and delivering of transparent justice by courts. The article reported that the LAC made written submissions to the Judge President on 27 January 2020 to convey their concerns in this regard.

The article further reported that the JP developed the draft rules on instructions from the Chief Justice who ultimately acted as per the directions of the Judicial Service Commission (JSC). The article reported that the draft rules are intended to bring clarity to litigants in respect of in-camera court proceedings and to provide guidelines in this regard.

The article further reported that the JP sent the draft rules to various stakeholders, including the LAC on 17 December 2019. It highlighted that by 13 February 2020 no feedback or submissions were received from any of the stakeholders.

The latter part of article also reported on the Kora saga. It reports on how the judiciary in this instance was accused of secrecy and of blocking access to vital court documents. It also cited examples from the US to illustrate how *'big business and its legal lieutenants'* in that country reportedly rely on the court system to *'keep to their deadly secrets*.'

The next day, The Namibian published a Matter of Fact (MoF). The MoF tendered an apology to the LAC and its director. It apologised for wrongly stating that the LAC made a submission to the Judiciary whereas it was done to the Law Society of Namibia and not to the Judge President as reported.

4. The arguments

Van Wyk holds the view that the article is devoid of facts, that the facts were misstated and misrepresented. She specifically also complains that the judiciary was given insufficient time to respond in contravention of the 'element of reasonability of time' as prescribed by the Code.

Van Wyk also argues that the MoF as published was half-baked. She contends that the MoF did not concede and acknowledge that they were already in possession of the facts prior going to print. Also, that it and fell short of the same prominence requirement as enjoined by the Code.

Amupadhi, on the other hand, argues that the complaint of the Office of the Judiciary is misplaced and call for it to be dismissed. He pointed out that a correction and apology was indeed published the next day. He stressed that the LAC document was not addressed to the JP as initially thought but to the Law Society of Namibia. Hence their apologies. In his view it would not make any sense to deliberately publish wrong information just to correct and apologise later.

5. Analysis

5.1 The intentional and willful misrepresentation of facts

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Clause 2.1 of the Code obliges the media to report news truthfully, accurately, and fairly. This means that the media is expected to take due care in ensuring that the content they publish is true. Furthermore, clause 2.2 stipulates that the news shall be presented in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions or summarisation.

The issue to be determined is whether the impugned article was truthful, accurate and fair? Also, whether it was presented in context, in a balanced manner or in a distorted, exaggerated way tainted by misrepresentations or material omissions.

It appears that the main purpose of the article was to highlight the LAC's objections to the proposed draft High Court in-camera rules and not so much to provide the judiciary with an exclusive/sit-down interview. To this end, it extensively quoted the LAC's director. This was interposed with the responses to the questions (7) sent to the judiciary to solicit their comments on a wide range of issues. These, for the record related to the perceived secret environment within the judicial space which the draft rules might potentially create, the efficacy of the draft rules, the coincidence between initiation of the draft rules and the Kora case files, the allegations that the draft rules are aimed at protecting high profile persons involved in litigation, and a specific reply to the LAC's reported strong opposition to the enactment of the draft rules.

The main bone of contention appears to be the fact the article erroneously stated that the LAC made a submission to the Judge President on the draft rules. However, the selfsame the article went on to report that the Office of the Judiciary did not receive any response from any of the stakeholders from whom inputs were sought.

A careful analysis of the article reveals that it touched on all the responses given by Van Wyk. In fact, he is extensively quoted. That is why Haufiku finds it surprising and *"interesting that it is now made to seem like the response was entirely ignored".*

Furthermore, a cross reading of the questions sent to the judiciary and the article shows that neither the Judge President nor Van Wyk was quoted out of context. It is accordingly difficult to uphold the complaint that the article in question intentionally and willfully misrepresented the facts or that is was one-sided (bias). This part of the complaint is accordingly dismissed.

5.2 Reasonable time to respond

Clause 2.8 of the Code enjoins the media to seek the views of the subject of critical reportage in advance of publication. This injunction need not be complied with in instances where there are reasonable grounds to believe that by doing so it would be prevented from reporting, where evidence might be destroyed or sources intimidated, or because it would be impracticable to do so in the circumstances of the publication. None of these exclusions are applicable in this instance.

The issue to be determined with reference to this part of the compliant is whether the office of the Judiciary was afforded reasonable time to respond.

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The journalist confirmed that he was in contact with Jansen on 11 February 2020 to obtain comments regarding a story on the proposed High Court in-camera rules. He indicated that the initial plan was to get a response on the 12 February 2020 for publication on 14 February 2020. At the time of the information request the judiciary was engaged with the planning of the official opening of the legal year. As such Van Wyk requested for an extension of the deadline to respond. The records also show several WhatsApp messages exchanged between the journalist and Van Wyk wherein the latter appealed for more time. An extension was duly granted, albeit grudgingly. The judiciary provided their formal response on 14 February 2020. The article was eventually published on 18 February 2020.

Was the time given to the Office of the Judiciary, objectively viewed, unreasonable? Haufiku opines that it was reasonable. His response to the claim of unreasonableness is as follows: *"I am perplexed that Mrs Van Wyk in her complaint went at length to talk about the response period given, despite the fact that I agreed with Mr Jansen to extend the deadline for a response. I gave them three days to respond and they duly complied. The article was only published on 19 February 2020 (sic), instead of the initial plan to have it published on 14 February 2020."*

All things considered, it is hard to comprehend the complain of unreasonable time been given to the Office of the Judiciary. Haufiku was most certainly unreasonable to put undue pressure on the Office of the Judiciary to reply on the 12th of February 2020 at 17.00 despite the activity office was involved with then. He, however, rightfully so, self-correct in this regard. The Office of the Judiciary was given three (3) days to answer seven (7) questions. This, by all standards cannot be said to be unreasonable. The complaint for not been afforded reasonable time to respond, in my view, cannot be sustained under the circumstances. It is accordingly dismissed.

5.3 The headline and pictorial images used

Van Wyk complains about the headline and the graphic and pictorial images used for the article. In her view, the headline and the pictures used for the article were *'negligent in the collection and dissemination of information and presentation of facts [and] had the intention to mislead the public through exaggeration and distortion of facts'*.

It is worth noting that neither the Amupadhi nor Haufiku provided responses to this part of the complaint. The Code enjoins the Media Ombudsman to make a ruling in instances where the respondent failed to respond. This, undoubtedly, is one such instance. I will accordingly proceed to decide this part of the complaint despite not having received a response from the Namibian in this regard.

Clause 13.1 of the Code dealing with headlines, pictures and captions is instructive in deciding this part of the complaint. Clause 13.1 directs that *"[h]eadlines and captions to pictures or broadcasting content shall give a reasonable reflection of the contents of the report or picture in question."*

The Namibian, as noted earlier, published a lead story under the headline *"LAC condemns Court Secrecy Plan".* The article, in the aim, as clarified by Haufiku was

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"based on a document by the Legal Assistance Centre dated 27 January 2020 written to the Law Society of Namibia". The article extensively quotes the Director of the LAC condemning the proposed draft High Court in-camera rules, as observed earlier. For instance, the LAC Director is quoted as holding the view that:

"Since no one other than the parties would be involved or even aware of such applications, the public would have no way of knowing if the power of exclusion was being used widely, frequently or inappropriately. This undermines one of the cornerstones of the concept of independent, impartial, and transparent justice – that court proceedings are, except in very limited circumstances, open to public scrutiny."

She is also reportedly stated that:

"This basis for restricting access of pleadings other than in the limited cases as approved by the Constitution can therefore not be condoned."

The LAC, according to Haufiku, did not distance *'itself from the quoted document'*.

A careful reading of the article shows that headline is aligned with its content. The main news reported on relates to the LAC's position/views regarding the proposed draft High Court in-camera rules. The responses of the Office of the Judiciary are also presented.

Was the reporting of the LAC's opposition to the said draft High Court rules presented in an exaggerated fashion? Similarly, were the responses sought from the Office of the Judiciary presented in a distorted fashion and/or under-reported?

It appears that the article was not intended to expand on the nitty-gritties of the draft High Court in-camera rules. Rather, to report of the LAC's reported opposition thereto. A critical assessment of the article shows that it does that. Such an assessment also reveals that the views of the Office of the Judiciary are neither under reported nor distorted. The spokesperson of the Office of the Judiciary is extensively quoted. Van Wyk seems to insinuate that the entire response from her office ought to have been published. It is worth stressing though that newsrooms, globally, do not operate in that way. The responses of the Office of the Judiciary, on the whole, were adequately, fairly and reasonably reflected. It follows that the complaint relating to the headline, alleged exaggeration and distortion of facts is misplaced. It is accordingly dismissed.

Were the pictorial images used for the article presented out of context? The article was accompanied with the pictures of Mrs. Toni Hancock, Director of the LAC, and that of the Judge President, Justice Petrus Damaseb. No other images were used in the article. The article, as noted earlier, primarily dealt with the LAC's reported opposition thereto. It is common knowledge that the draft rules in question were crafted by the Judge President. Can it be said that the use of the picture of the Judge President was used out of context? I do not think so. The article is reporting on a matter the Justice Damaseb is seized with. So how can the use of the picture of the Judge President on the issue reported on be out of context? There is, in my view, nothing untoward in this regard. It is my considered view that the complaint pertaining to the

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use of the pictorial image of the Judge President is misplaced and stand to be dismissed. It accordingly follows, that the unequivocal apology to the Judge President as demanded by Van Wyk, similarly, be dismissed.

5.4 The Matter of Fact

Clause 2.10 of the Code provides that the media shall make amends for presenting information or comment that is later found to be inaccurate. Further, such amends are to be done promptly and with the appropriate prominence to readily attract attention to the applicable retraction, correction, or explanation whichever.

It is common cause that the Namibian published a Matter of Fact (MoF) on 19th February 2020.

Van Wyk complaints that the MoF is misleading in that it:

"[…] does not disclose the fact that when the original article was published the authors knew that the Honourable Judge President had not receive any letter from the LAC or any other party whose comments were sought by the Judiciary. The correction does not also deal with the answer provided that 'it was improper to impute improper motives to the Judiciary when what was sought to be done with the new guidelines was to provide predictability and certainty against the earlier criticisms that there were no guidelines'. […] the purported corrections also did not make clear that we made clear that no action will be taken until all comments were received and considered."

The complaint essentially alleges that the MoF failed to disclose critical information as analysed below.

5.4.1 Failure to disclose that the authors knew that the LAC did not make a submission to the Judge President

Question 5 posed to the Office of the Judiciary specifically probed on the concerns of the LAC regarding the draft rules. To this end, the JP was asked: *"What does your office make of these concerns, and how will it be addressed?* The answer given to this question was: *"The Judge President was not aware that the LAC had such concerns because they never conveyed it to him although they fall under the Law Society whose views the Judge President still awaits."*

The lead article reported that the LAC wrote a letter to the JP to convey their concerns regarding the draft rules. This was obviously inaccurate. The MoF published the next day made the necessary correction in this regard. It pointed out that the letter was in fact written and submitted to the Law Society and not to the JP as reported. Herein lies the bone of contention.

Van Wyk is of the view that the MoF was supposed to go further. She takes issue with the MoF since it "*does not disclose the fact that when the original article was published the authors knew that the Honourable Judge President had not receive any letter from the LAC or any other party whose comments were sought by the Judiciary*." She

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seems to view this fact as crucial and regards its non-disclosure as vitiating the correction and apology tendered or even as malious.

Amupadhi strongly rejects any insinuation of malice on their part. In his view, "*[i]t doesn't make sense to deliberately publish wrong information only to correct and apologize"* immediately the next day. Haufiku on his part, states that *"the error regarding who the LAC document was meant for was an honest mistake and not malicious as Mrs Van Wyk wants to make it seem. Hence it was rectified promptly, even without a complaint from the Office of the Judiciary."*

It stands to be determined whether the non-disclosure as complained of detracts from the correction and apology tendered. Was there substantial compliance with the Clause 2.10 requirement to make amends for the publications of inaccurate information? The Merriam-Webster's Dictionary of Law defines 'substantial compliance' as '*compliance with the substantial or essential requirements of something that satisfies its purpose or objective even though its formal requirements are not complied with'*. The journalists knew that at the time of publication that the LAC did not make a submission to the JP but to the Law Society instead. Can it be said that this a genuine mistake though? I am prepared to give the journalists the benefit of the doubt on this point. This conclusion is reached following several considerations i.e. that the correction and apology were of own volition and done promptly. Similarly, it is worth reiterating that there is nothing in the lead article to suggest that it was presented in a distorted, exaggerated, sensationalist, partisan or skewed manner. In the absence of anything else to the contrary, the assertions of the respondents on this point is accepted and that of the complainant rejected.

This part of the complaint with reference to the MoF is accordingly dismissed.

5.4.2 Failure to quote the Judge President

Question 4 posed to the JP read as follows: "*What is the Judge President's views that the proposed amendments are aimed at protecting high profiles persons involved in litigation going forward?"* The question was partly answered as follows: *"It is a matter of concern to impute on the Judge President improper motives for the exercise of his public power intended to serve a public good if regard is had to the backdrop which we set out above and which is a matter of public record […]."* The rest of the answer clarified that the draft rules are meant to assist litigants and the public at large, to provide clarity and predictability. Also, that they address transparency and fairness issues. All these assurances i.e. the utility of the draft rules, besides for the *'improper motives'* part, were reported on in the lead article.

Van Wyk is of the view that the JP's concern about improper motives been imputed to him was supposed to be reflected in the article. The MoF, similarly, did not disclose this concern. She accordingly takes issue with these omissions. Haufiku, however, does not agree with her sentiments. According to Haufiku, *"[…] Mrs Van Wyk is insinuating that the entire response from her office ought to have been published. However, globally, newsrooms do not operate in that way. It is also not the job of her office to decide how or which angle should be covered."*

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It is worth stressing that the Editor-in-Chief has the ultimate responsibility to decide on editorial decisions free from undue influence. Outside pressure to publish or not to publish in a particular manner amounts to unacceptable interference on editorial independence. The Media Ombudsman is the industry regulator as per the Code. However, this in no way gives the incumbent a right to interfere with editorial independence of a given media house. It is trite that regulation does not equate to control. It is thus not within the mandate of the Media Ombudsman to dictate on the content of a given article. Doing so will undermines independent journalism and freedom of expression. A determination on the decision not to quote the concerns of the Judge President, in both the lead article and the MoF falls outside the remit of the Media Ombudsman. Moreso, the rational and efficacy of the draft rules as clarified in the responses were adequately reported on. Failure to quote the personal concerns of the JP does not detract from this.

This part of the complaint with reference to the MoF is accordingly dismissed.

5.4.3 Failure to emphasis that no action will be taken until all comments were received and considered

This part of the complained centers around question 6 of the questions given to the Office of the Judiciary i.e. *"Is there a timeframe for when the Judge President may want to enforce the amendments?"* The answer given to this question was: *"As soon as all stakeholders views have been received and considered and the JSC consulted on the matter. To be implemented the guidelines will have to be approved by the President before the Judge President have them gazette."*

The response was paraphrased in the lead article as follows: *"Jansen insisted that Damaseb [the JP] would only take his final draft to the JSC after receiving comments or feedback from the said stakeholders."* Van Wyk seems to suggest that this phraseology does not adequately emphasise their response. She similarly bemoans the silence of the MoF on this point.

It is difficult to comprehend the issue canvassed by this part of the complained. What more was there to emphasis in the MoF? The lead article, in my view, sufficiently amplified Jansen's response that no action will be taken until all comments from the relevant stakeholders were received and such were submitted to and considered by the JSC. It is my considered view that this part of the complaint with reference to the MoF has no merit is accordingly dismissed.

5.4.4 Lack of prominence of the Matter of Fact

All things been considered, the correction and apology were owed to the LAC and not to the Office of the Judiciary and the Judge President, respectively. A correction and apology to the LAC was duly published as noted above. The MoF was published on page two (2) whereas the article was published on the front page and as a lead story. The issue of prominence indeed arises. However, since no compliant was lodged with the Media Ombudsman by the LAC I will refrain from deciding this part of the complaint.

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6. Finding

The complaint is dismissed in its entirety for the reasons as specified in the respective sections of the analysis above.

7. Appeal

The Complaints Procedures lay down that within seven (7) calendar days of receipt of this decision, any one of the parties may appeal to the Media Appeals Committee fully setting out the grounds of appeal in writing. The appeal must be send to jbnakuta@yahoo.com.

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