

IN THE COMPLAINTS PROCEDURE BEFORE THE PRESS OMBUD

In the matter between:

THE FERREIRA FAMILY

Complainants

and

GROUNDUP

Respondent

**APPLICATION FOR LEAVE TO APPEAL AGAINST THE RULING OF THE PRESS
OMBUD DATED 5 FEBRUARY 2019**

TO: THE CHAIRPERSON OF THE SA PRESS APPEALS PANEL
The Honourable Judge Ngoepe
E-mail: Khanyim@ombudsman.org.za

AND TO: THE PRESS OMBUD
E-mail: johanr@ombudsman.org.za

KINDLY TAKE NOTICE that the Complainants hereby apply for leave to appeal against the ruling of the Press Ombud dated 5 February 2019 (“the Ruling”) in which he dismissed the Complainants’ complaint (“the Complaint”).

KINDLY TAKE NOTICE FURTHER that the application for leave to appeal is based on the ground that there are reasonable prospects that the Appeals Panel may come to a decision different to that of the Press Ombud for the following reasons:

1. The Complainants' first ground of complaint is that the Respondent did not comply with paragraph 1.8 of the Code of Ethics and Conduct for South African Print and Online Media ("the Code of Ethics"). Paragraph 1.8 requires the media **to seek** the views of the subject of critical reportage **in advance of the publication**. In other words, it must take reasonable steps to contact the subject, inform the subject of the contents of the proposed critical reportage and seek the subject's views in advance of the publication. It furthermore requires the media **to afford** the subject **reasonable time to respond**. In other words, after the media had contacted the subject and informed the subject of the proposed critical reportage, it must afford the subject a reasonable time to respond. Lastly, if the media **are unable to obtain such comment** (after seeking the views of the subject and giving the subject reasonable time to respond), this shall be reported. The Press Ombud erred in limiting the Complainants' first complaint to the question whether the Respondent afforded them reasonable time to respond,¹ whereas paragraph 1.8 also places a positive duty on the media to seek the views of the subject of critical reportage in advance of the publication.
2. The Complainants' second complaint is that the article that was published by the Respondent is factually incorrect **and** that the Respondent failed to comply with paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. The Press Ombud did not consider or give adequate consideration to the second leg of the Complainants' second complaint.

¹ First paragraph under the heading "Complaint" on p 1 of Ruling.

3. The following documents were submitted to the Press Ombud:
 - 3.1 the Complaint of the Complainants;
 - 3.2 the response of the Respondent (“the Response”); and
 - 3.3 the Complainants’ reply (“the Reply”).

4. In analysing the first complaint of the Complainants, the Press Ombud ostensibly came to the conclusion that he cannot decide the matter, or at least some of the issues that arose, on the papers before him. If the Press Ombud believed that there was a factual dispute that could not be resolved on the papers, he should have convened an informal hearing or an Adjudication Panel. Instead:
 - 4.1 The Press Ombud sent an e-mail to the Respondent in which he sought clarity on one specific issue, namely whether the reporter (Mr Chirume) spoke to Mr De Fin directly after the demonstration on Saturday the 10th of November 2018.
 - 4.2 The Respondent replied to the enquiry (“the Response to the Press Ombud’s Query”).
 - 4.3 The Press Ombud considered the Response to the Press Ombud’s Query without affording the Complainants the opportunity to respond thereto.
 - 4.4 After considering the Response to the Press Ombud’s Query, the Press Ombud concluded that he is not in a position to decide who is right and who is wrong on this issue.

5. Despite the aforesaid, the Press Ombud came to the conclusion that the Respondent's efforts to contact the Complainants were sufficient and it gave the Complainants sufficient opportunity to respond.
6. The Press Ombud's finding that the Respondent complied with paragraph 1.8 of the Code of Ethics is erroneous and not in accordance with the facts before him. On the papers before him, the Press Ombud should have found:
 - 6.1 That it was common cause that the article constitutes "critical reportage" as contemplated in paragraph 1.8 of the Code of Ethics. On a plain reading of the article it explicitly conveys to the reader thereof that the Complainants:
 - 6.1.1 do not comply with fair labour practices;
 - 6.1.2 obtained land, water rights and other benefits from the Government at a discount under the guise of a black empowerment scheme (in other words that they are guilty of fronting or fraud);
 - 6.1.3 are not transparent;
 - 6.1.4 mismanage the black empowerment scheme; and
 - 6.1.5 fail to assist employees who suffer injuries on duty.

The article is clearly calculated, or at the very least has the tendency to undermine the status, good name and reputation of the Complainants and violates their right to dignity.

6.2 That the Respondent did not seek the views of the Complainants on the proposed critical reportage on the day of the demonstration, namely **Saturday the 10th of November 2018**. It is conspicuous that the Respondent did not contend that it did so in the article. The last paragraph of the article reads as follows:

”GroundUp contacted the Endulini **on Monday** and was told to call Defin (*sic*) on Tuesday morning. On **Tuesday**, GroundUp was again told that Defin (*sic*) was not available and would return our call. Defin (*sic*) had not responded to calls or emailed questions by the time of publication.”
(emphasis added)

6.3 That the Respondent’s belated contention that the reporter, Mr Chirume, sought the views of the Complainants on the proposed critical reportage on Saturday the 10th of November 2018, which was raised for the first time in the Response, is inconsistent and contradictory. First, the Respondent did not make this allegation in the article. Secondly, in the Response the Respondent alleges that Mr De Fin quickly left after taking the list of demands and that the reporter managed to find him “later in the day”.² The Respondent does not state what the reporter discussed with Mr De Fin in its Response. Thirdly, in the Response to the Press Ombud’s Query the reporter alleges that Mr De Fin went back inside the perimeter fence after receiving the petition and emerged again when the bus got stuck. This was immediately after the procession and not “later in the day”. In the Response to the Press Ombud’s Query, it is alleged that the reporter asked “to see the Ferreiras” to get their comments.

² Paragraph 14.4 of Response.

- 6.4 That even if the belated versions of the Respondent in either the Response or the Response to the Press Ombud's Query is accepted, the reporter did not inform Mr De Fin of the content of the proposed critical reportage or sought his (much less that of the Complainants') view thereon. At best for the Respondent the reporter told Mr De Fin that he wanted to get the comments of "the Ferreiras" (the Complainants).
- 6.5 That the reporter, Mr Chirume, spoke to Bonny De Fin, an employee of Endulini, at approximately 14h30 on **Monday the 12th of November 2018** and asked to speak to Mr Charl De Fin. Bonny De Fin told him that Charl De Fin was not available. It was only at the end of the call that Mr Chirume identified himself as a member of the press. Bonny De Fin then took his number and told him that she will request one of the executive directors to call him when they return.
- 6.6 That the executive directors were absent from Sunday the 11th of November 2018 until Thursday the 15th of November 2018.
- 6.7 That by Monday the 12th of November 2018, the Respondent had accordingly still not sought the views of the Complainants to the proposed article (which was on the Respondent's own version already edited at the time) as required by paragraph 1.8 of the Code of Ethics.
- 6.8 That on **Tuesday the 13th of November 2018** the reporter spoke to a different person, namely to the receptionist, Tahn-Lee Van Rij, and asked to speak to Mr Charl De Fin. Tahn-Lee Van Rij informed Mr Chirume that Mr Charl De Fin

was in the field at the time and was therefore not available. Mr Chirume called her again after that and she then asked him to send an e-mail conveying his request.

- 6.9 The reporter, Mr Chirume, then sent an e-mail to Tahn-Lee Van Rij on Tuesday the 13th of November 2018 at 10:14 in which he asked certain specific questions.
- 6.10 That this e-mail only came to the attention of Tahn-Lee Van Rij, the receptionist of Endulini, at 11:38 on Tuesday the 13th of November 2018 (less than 1½ hours before the deadline of 13:00 that the Respondent gave to the Complainants and approximately 2 hours before the article was published). At best for the Respondent this was the first time that the Complainants was informed of the contents of the proposed critical reportage (although this e-mail only came to the attention of the Complainants after the publication).
- 6.11 That many of the statements in the aforesaid e-mail were formulated on the basis of an assumption on the reporter's part of the veracity thereof. In addition, many of the allegations are of the "have you stopped beating your wife" variety. No attempt was made to verify the allegations.
- 6.12 That the article furthermore contained a number of statements that were not even dealt with in the aforesaid e-mail.
- 6.13 That it was unreasonable of the Respondent to expect the Complainants to respond to this e-mail on such short notice.

7. The Press Ombud erred in commending the Respondent for its efforts to contact the Complainants and in so doing ignored the Complainants' rights.
8. The Press Ombud failed to have regard to the inherent contradictions and improbabilities of the Respondent's versions relating to the steps that it took to seek the views of the Complainants in advance of the publication of the article.
9. The Press Ombud held the Complainants' contention that the deadlines imposed by the Respondent was self-imposed is "rather puzzling". He furthermore held that deadlines are imposed by the editor and that the Complainants can surely not suggest that there should not have been any deadline. In doing so the Press Ombud failed to have regard, or adequate regard to the context, the Complainants' right to dignity and the fact that paragraph 1.8 of the Code of Ethics makes it compulsory for the media to seek the views of the subject of critical reportage in advance of the publication subject only to three exceptions. The only exception that could conceivably be applicable in this instance is that it would be impractical to do so "in the circumstances of the publication". That means that any deadline imposed must be assessed by reference to the context in which it was published and the contents of the publication.
10. The Press Ombud erred in failing to consider or properly consider the real nature of the allegations contained in the article in establishing whether it was impracticable to obtain the comments of the Complainants (i.e. whether the third exception contained in paragraph 1.8 of the Code of Ethics applied). The Press Ombud should have found:
 - 10.1 That the demonstration itself was a secondary issue in the article.

- 10.2 That the article deals mainly with accusations that were conveyed to the Respondent by certain sources. It is the publication of these accusations (and not the fact of the demonstration) that undermines the status, good name and reputation of the Complainants.
- 10.3 That these allegations were based on events that occurred a long time ago, *inter alia* in the years 2000, 2006, 2007, 2010 and 2016. On this basis alone the Respondent should have viewed the allegations with great circumspection and have taken reasonable steps to verify its correctness before it was published.³
- 10.4 That there was accordingly no pressing need to publish the article on that Tuesday.⁴
11. The Press Ombud states that he also took into account that the Respondent “has already amended the article with comments from Endulini.” In doing so, the Press Ombud conflated the provisions of paragraph 1.8 and paragraph 1.9 of the Code of Ethics. Paragraph 1.8 does not allow the media not to seek the views of a subject of critical reportage in advance, but to simply amend the article at a later stage if and when such comments are received.
12. The Press Ombud erred in not taking into account that the “comments from Endulini” referred to above is in fact the Complaint and not comments to the article as such. Had the Complainants been given a reasonable time to respond to the proposed critical reportage, it would have invited the Respondent to visit the farms and establish

³ Compare *Hardaker v Phillips* 2005 (4) SA 515 (SCA).

⁴ Compare *Lieberthal v Primedia Broadcasting* 2003 (5) SA 39 (W) at 49F.

first hand what the true facts are. This would have allowed the Respondent to interview the relevant persons, scrutinise the relevant documents and inspect the farms. This would also have provided the Complainants with the opportunity to understand and respond to the specific questions and allegations that the Respondent raised properly and to rebut them to the extent necessary.

13. Even if it is accepted that a contravention of paragraph 1.8 of the Code of Ethics can be cured *ex post facto*, the Press Ombud erred in failing to have regard to the fact that the amended article did not alter the crux thereof and does not constitute balanced reporting. The Respondent did not publish anything about the Complainants' empowerment efforts or the context of the procession. The allegations contained in the article remain untrue and still undermines the status, good name and reputation of the Complainants.
14. The Press Ombud should have found that the Respondent had failed to comply with paragraph 1.8 of the Code of Ethics.
15. In dealing with the second complaint of the Complainants, the Press Ombud essentially analysis the statements that the Complainants complain are incorrect and then conclude:
 - 15.1 that some are irrelevant;
 - 15.2 that some are true or substantially true; or
 - 15.3 that the Respondent was justified in printing some of the allegations as they were made by its sources.

16. In reducing the analysis to the aforesaid, the Press Ombud failed to take into account that the second ground of complaint of the Complainants is not only that the article is factually incorrect, but also that the Respondent contravened paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. These paragraphs provide as follows:

“1.1 The media **shall take care** to report news **truthfully, accurately and fairly**.

1.2 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**.

1.3 **Only what may reasonably be true**, having regard to the sources of the news, may be presented as fact, and such facts shall be published **fairly with reasonable regard to context and importance**. Where a report is not based on facts or is founded on opinion, allegation, rumour or supposition, it shall be presented in such manner as to indicate this clearly.

1.4 News should be obtained legally, honestly and **fairly**, unless public interest dictates otherwise.

...

1.7 **Where there is reason to doubt the accuracy of a report or a source and it is practicable to verify the accuracy thereof, it shall be**

verified. Where it has not been practical to verify the accuracy of a report, this shall be stated in such report.

...

- 1.9 Where a news item is published on the basis of limited information, this shall be stated as such and the reports should be supplemented once new information becomes available.

...

- 3.3 **The media shall exercise care and consideration in matters involving dignity and reputation.** The dignity or reputation of an individual should be overridden only if it is in the public interest and in the following circumstances:

3.3.1 The facts reported **are true or substantially true;** or

3.3.2 The reportage amounts to **fair comment based on facts** that are adequately referred to and that **are true or substantially true;** or

3.3.3 The reportage amounts to a fair and accurate report of court proceedings, Parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum; or

3.3.4 It was reasonable for the information to be communicated because it was prepared in accordance with acceptable principles of journalistic conduct and in the public interest;

3.3.5 The article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party.”
(emphasis added)

17. The Press Ombud should have found that there was a positive duty on the Respondent to properly investigate and verify the allegations that it published, especially as these allegations clearly injures the Complainant’s dignity, good name and reputation. As the publication of these allegations could potentially cause (and did in fact cause) the Complainant’s extraordinary harm and could be (and in fact is) false, the Respondent had to approach the publication thereto with great caution and restraint. It is not only freedom of expression (including freedom of the press) that is at stake, but also the dignity and privacy of the Complainants. Any publication must therefore be reasonable. This demands a high degree of circumspection from editors and editorial staff.⁵ It is the Respondent’s failure to comply with its duties as set out in paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics that resulted in the publication of false and disparaging allegations about the Complainants.

18. In assessing the statement in the article that “about 100 farmworkers and their supporters marched to the Endulini Fruit Farm”, the Press Ombud failed to take into account:

⁵ See also *Carbonel v Robinson & Co (Pty) Ltd* 1965 (1) SA 134 (D&CLD) p 151D – F; *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (WLD) at 576; *Muller v SA Associated Newspapers* 1972 (2) SA 589 (CPD) at 594A; *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212 – 1213; *Khumalo v Holomisa* 2002 (5) SA 401 [39] [41] – [43]; *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) par [46]; *Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network Ltd* 2011 (3) SA208 (GSJ) paras [79], [84], [92] – [95] and [97] – [100].

18.1 that on the Respondent's own version there were not 100 persons who participated in the demonstration; and

18.2 that the Complainants tendered to make the video recordings of the procession available to the Press Ombud.

19. The Press Ombud states:

“Secondly, I am puzzled by Schoeman's [ostensibly referring to the Complainants' attorney] statement that 'none' of the protestors were Endulini employees. Really?”

In doing so, the Press Ombud ostensibly assumes that some of the protestors were Endulini employees. This finding is not supported by the papers before the Press Ombud and is accordingly erroneous. The Respondent itself does not deny that the persons who participated in the demonstration were not employees of Endulini; that the majority of them are unknown to Endulini; and that they seem to have some affiliation to the EFF as a majority of them were dressed in red. A political rally for political gain is a far cry from a protest action by employees of an employer and beneficiaries of employee trusts to assert their rights as conveyed in the article.

20. In assessing the erroneous reference in the article to a “profit sharing scheme” of Endulini, the Press Ombud ostensibly found it to be excusable on the basis that it could be attributed “to a source”. In doing so, he ignored the provisions of paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. The Respondent could not publish a false and defamatory statement simply because it could be attributed to a source. The Respondent had to exercise care to report truthfully, accurately and fairly; not

intentionally or negligently depart from the facts; and only publish what may reasonably be true; and verify the accuracy of the statements that it published. As the allegations injure the dignity and reputation of the Complainants, the Respondent could only publish the statements if:

20.1 they were true or substantially true; or

20.2 it amounted to fair comment based on facts that are true or substantially true.

Not one of these conditions applied *in casu*.

21. The Press Ombud erred in holding that the aforesaid paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics could be circumvented by simply correcting an incorrect statement in a subsequent re-publication of the article. In any event, the untrue statement remained part of the re-publication.
22. The Press Ombud erred in holding that the Respondent was entitled to publish the incorrect statement that Endulini received land from the Government at a discount simply because a source said so. In doing so, he ignored the provisions of paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. The Press Ombud further erred in holding that the aforesaid paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics could be circumvented by simply correcting the incorrect statement in a subsequent re-publication of the article.
23. The Press Ombud erred in holding that the Respondent was entitled to publish the incorrect statement that the beneficiaries of the employee trusts received no distributions or that they do not know what is going on simply because a source said

- so. In doing so, he ignored the provisions of paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics.
24. The Press Ombud erred in holding that the Respondent was entitled to publish the incorrect statement attributed to Grootboom, namely that he was one of the original shareholders in the company simply because he said so. In doing so, he ignored the provisions of paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. The Press Ombud further erred in holding that paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics could be circumvented by simply correcting this incorrect statement in a subsequent re-publication of the article.
 25. The Press Ombud erred in holding that the Respondent could publish the incorrect statements attributed to Mr Pentse simply because he said so. In doing so, he ignored the provisions of paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics. The Press Ombud further erred in holding that the aforesaid paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics could be circumvented by simply correcting this incorrect statement in a subsequent re-publication of the article.
 26. The Press Ombud found that the journalist misspelt De Fin's surname and incorrectly referred to him as Endulini's general manager. He also found that these mistakes were not trivial. The Press Ombud erred in holding that the aforesaid mistakes could be cured by simply correcting the same in a subsequent re-publication of the article.
 27. The Press Ombud erred in ostensibly finding that the Respondent had gone to great effort to report the facts accurately or that its efforts to do so were hampered solely by the Complainants' failure to provide comment. On the papers before the Press Ombud it was not in dispute that many of the allegations that were published were incorrect.

There was no evidence before the Press Ombud of any steps that the Respondent took to investigate or verify any of these incorrect statements except for its inadequate and failed attempts to contact the Complainants.

28. Furthermore, these incorrect statements substantially inured the good name, reputation and dignity of the Complainants. The Press Ombud should have found that there was a positive duty on the Respondent to properly investigate the allegations and verify their correctness before it was published. In doing so, the Press Ombud completely ignored the fact that the Bill of Rights protects human dignity and that the Code of Ethics attempts to balance the competing rights of the subjects of critical reportage and the press.
29. The Press Ombud erred in not holding that the Respondent breached paragraphs 1.1 to 1.4, 1.7, 1.9 and 3.3 of the Code of Ethics.

DATED at PORT ELIZABETH on this 11th day of FEBRUARY 2019.