

Zuko Nonxuba vs. Sunday Times

Thu, Mar 31, 2016

Ruling by the Press Ombud

30 March 2016

This ruling is based on the written submissions of Mr Zuko Nonxuba (an attorney) and those of Susan Smuts, legal editor of the Sunday Times newspaper.

Complaint

Mr Zuko Nonxuba is complaining about a story in Sunday Times of 17 January 2016, headlined *The tragic tale of a penniless SA millionaire – Paraplegic Avela Mathimba must be the only multimillionaire living off a R1400 monthly state grant.*

Nonxuba complains that the story was selective in that it failed to reflect:

- the contents of existing court reports (which confirmed that his conduct in maintaining the proceeds of a damages award in his trust account was in accordance with a valid court order);
- that delays occurred primarily because of Mr Avela Mathimba's new attorneys (not because of his own actions); and
- that no expert evidence had been produced to suggest that he had acted wrongfully.

His complaint boils down to misleading and unfair (and not to inaccurate) reporting.

The text

The story, written by Sabela Skiti and Monica Laganparsad, said Mr Avela Mathimba (26) was awarded a total of R9.6-million in two separate damages claims against the Road Accident Fund (RAF) and the Eastern Cape department of health – this money was paid to his lawyer as far back as 2013, but he reportedly had yet to receive a cent.

The article quoted Mathimba as saying that, when he “grilled” his lawyer about the money, Nonxuba rushed to court with an application to have a curator appointed to manage Mathimba's affairs. “The attorney cited the possibility of brain damage, his client's ‘tender years’ and ‘limited education’, and fears that his money would be misspent by his family,” the story said.

According to Mathimba, Nonxuba raised the issue of his mental state to prevent him from getting his money. He said he had seen a court order that clearly said the RAF would pay Nonxuba (his legal fees) directly. “When I confronted [Nonxuba] he said we could maybe get R20 000, but I later found out he claimed for R13-million,” Mathimba was quoted as saying.

The journalists also reported that a former client of Nonxuba told them she had received just over R850 000 out of a R1.8-million payout, meaning that just under R1-million of the RAF payout went to fees. Another client said he had been paid R700 000 out of a total payout of R5.6-million by the RAF and the provincial department of health. He said the payout was made in 2013 and Nonxuba promised to pay the balance within days.

Mathimba was quoted as saying, “These villages are littered with his victims and our only sin is being uneducated.”

The newspaper reportedly established that the RAF has launched a forensic investigation into several claims paid to Nonxuba’s firm (who denied that he had done anything wrong).

The story ended by stating, “RAF CEO Eugene Watson said investigations into corruption involving the fund had led to 1 595 arrests and 1 240 convictions in the past five years. During 2014-15, the fund had fraudulent cases amounting to R178-million.”

Sunday Times responds

Smuts says the article was not a court report, but rather a human interest story about a young man who was surviving on a pittance when he, at least on paper, was a millionaire.

She submits that the court cases were important aspects of the story because they arose from an accident which left Mathimba a paraplegic, and they resulted in him being awarded payouts that should to some extent compensate for his suffering.

The legal editor argues that nothing in the Code of Ethics and Conduct prevents the newspaper from using court documents to write human interest stories, nor does anything in the Code compel the publication to tell such stories only through court documents.

She adds that Nonxuba has not pointed out any alleged breach of the Code. He was given ample opportunity to respond to queries and his responses were fulsomely covered in the newspaper.

Smuts denies that the story failed to reflect the contents of the court records and the facts therein. “In fact, we submit, we did cover the main points made by both parties insofar as they were relevant to the story.”

She adds the accusation that Sunday Times failed to reflect that the delays appear to be on account of steps taken by Mathimba is without merit. “At best, that contention is Mr Nonxuba’s opinion. While the story makes it clear that Mr Mathimba has instituted court action, this has been to defend his interests, as he is entitled to do. It is not very convincing to imply that these efforts to gain control of his payout is the reason for the delay in receiving it. He was, after all, injured in 2004 and the payout was made to Mr Nonxuba in 2013. Mr Mathimba’s court action was also instituted only after a curator was appointed as a result of action by Mr Nonxuba.”

She describes as “frivolous” the accusation that the article failed to reflect the absence of evidence showing that the orders regarding the *curator bonis* were erroneous or unreasonable – saying, “The story makes it clear that these were orders of court.”

The legal editor also denies that Sunday Times did not speak to Zukile Tutsu and Phumzile Masekwana – she says the reporter conducted interviews with both. “Our reporter later confirmed the contents of the interview with Mr Masekwana. The interviews were recorded, but were conducted in Xhosa.”

Smuts presents this office with the following translation of the salient points in the interviews:

On Friday Jan 15, Zukile Tutsu said: *“He (Nonxuba) has not finished paying me according to his words. The amount of money has paid me is R 700 000 ... He said I should call him next Wednesday so that he can prepare my things (payment) ...He said he will continue to pay me ... He deposited the money in my bank in installments ... He started with R 150 000 and then paid me in three increments of R 50 000 each and then gave me R 400 000. I then added it and it came to R 700 000 ... The last payment was R 400 000 in 2014.”*

On Friday Jan 15, Phumzile Masekwana’s wife said: *“I did have a query around all this, but we did not know how it worked ... Mr Nonxuba told him to come and sign for his money and I thought he would be told about it and explained to him, so that day I went with him hoping that Nonxuba would show us how much it is ... But instead he walked around the High Court at Mthatha and eventually called my husband in a hurry. He asked him to come quickly, and I thought when they were discussing I would be called in, but instead my husband came back saying Mr Nonxuba asked him to sign without showing him the entire document. Said he would need to speak to someone ... We expected that he would get called again and things explained, but there were two deposits of R 400 000 paid in. I then asked my husband to ask for something in writing explaining what was going on, and he wrote something...”*

Nonxuba replies

Nonxuba says the reporter confirmed to him that he was in possession of the records of the relevant court proceedings. He argues, “The extremely selective manner in which the reporter has quoted the sentiments of Mr Mathimba, and the contents of his affidavits in these proceedings, without reference at all to other countervailing matter contained in these affidavits and court papers, resulted in the article having a gloss or slant which was both untrue and severely prejudicial, and grossly unfair.”

He submits that, had the reporter correctly reported the contents of the court papers, the following would have been disclosed:

- He did not “rush to court” for ulterior and unethical purposes (to have a curator appointed to investigate the need to appoint a *curator bonis* to manage these funds in Mathimba’s interests) – he went to court for the purposes expressed in court papers (an order was obtained in terms of an agreement between himself and Mathimba’s legal representative at court to protect the funds realized for his ultimate benefit);
- This court documentation included a number of medico-legal reports which substantiated Mathimba’s claims for damages, and the settlement of these claims for damages was favorable to him;

- The report of the *curator bonis* (an independent advocate, appointed by the court) clarified that he (Nonxuba) had no role to play in respect of investigations into the matter, and was not responsible for any delays in the paying out of the funds;
- The application for the appointment of this curator was supported by the Law Society of the Northern Province (he quotes from a letter by the Law Society to substantiate his argument);
- Mathimba engaged a number of sets of further attorneys, who thereafter sought to have the earlier order granted by agreement set aside on a basis which had subsequently been held by the High Court to be without any legal or factual foundation;
- The subsequent (unsuccessful) “interlocutory applications” brought by Mathimba’s more recent attorneys led to significant delays in the finalisation of the initial application; and
- His actions were determined by the effect of the court order, which was that the proceeds of the damages claim be held in trust by him pending the outcome of the application proceedings. He says the order by agreement stated, “In the interim and pending the finalisation of this application the Applicant is ordered to retain the proceeds of the damages claims in Trust.” After Mathimba terminated his mandate, the next attorney should have taken steps to secure a release or partial release of funds as considered by the High Court (if necessary).

Nonxuba summarises, “The reporter made no reference whatsoever to the aforementioned facts, to the independent oversight role played by the High Court in making the order on the basis of the papers before it, of the independent function fulfilled by the curator ad litem... Had the funds merely been paid over in the face of the medico-legal reports, and had I ‘washed my hands’ of the matter, and had [the funds] then been dissipated, this would no doubt have been considered to be reckless”.

He adds that the “unfortunate reference” in the story to fraud and investigations relating to RAF matters was calculated to give rise to an unjustified suggestion that he had been guilty of such conduct in relation to this matter.

Nonxuba concludes, “In these circumstances, the report in question contains an unjustified gloss and innuendo, is highly and unfairly selective, distorts the true position, and is grossly unfair.”

Analysis

The gist of Nonxuba’s complaint is that the story failed to reflect the contents of existing court reports which validated his actions, and that the delays in the payout of the money to Mathimba was not the former’s fault – therefore the reportage unfairly put him in a bad light.

I do not believe that the story can rightfully be described as a human interest article, as Smuts argues. True, the text does contain elements of human interest – but the many references to fraud in general (details about RAF’s litigation) and to Nonxuba in particular (the RAF has launched a forensic investigation into several claims paid to his firm) took the article some

way out of the realm of “human interest” and into the sphere of hard news. (Had the story been a human interest one only, it would have focused much more on the hardship that Mathimba had been suffering despite the money due to him.)

Smuts’s argument that the article was not court reporting is correct, of course – but still, when allegations such as those contained in the story are made, the journalists should ensure that they do not misrepresent court documents *in the sense that the reportage reflects unfairly on Nonxuba*.

She is also correct that a newspaper may use court documents to write human interest stories and that a publication is not compelled to tell such stories only through court documents.

Nonxuba’s main complaint is not so much about what was written, but rather about what was omitted. I now first need to take a good look at exactly what the story did report on his version of the events.

In general, Nonxuba reportedly denied any wrongdoing.

He was also quoted as saying that:

- Mathimba was informed about the lawsuit against the department;
- he had informed his client that his RAF claim had been successful;
- he had acted on behalf of Mathimba;
- a curator had been appointed in April 2014;
- Mathimba had since brought an application to challenge that order;
- attorneys generally finalised their bills and those of experts after payment was made (with regard to the two other cases mentioned in the story);
- he had paid both clients in increments;
- he had still been working out the bills; and
- he had spoken with one of them that week, but had not undertaken to pay him – he merely informed him that he would look at his file and get back to him regarding his query.

In addition, the journalists reported that:

- Nonxuba told the court he relied on reports by two therapists as well as on the opinions of a rehabilitation expert who treated Mathimba in Port Elizabeth;
- court documents provided by Nonxuba showed that the Mthatha court had appointed advocate Moyisi Bodlani in May 2014 to ascertain whether Mathimba needed a *curator bonis* to manage his financial affairs; and

· Bodlani cited Mathimba’s refusal to cooperate with his investigation and said he was being influenced by his family and needed a curator to look after his finances.

I now need to compare Nonxuba’s complaints with what was reported (with my comments, where necessary – which will be in line with the arguments stated above regarding “human interest” and “court reporting”):

The complaint	What the story reported / my comments
<p>“Rushing to court” for ulterior and unethical purposes – instead, he went to court for the purposes expressed in court papers.</p>	<p>This statement was a quote by Mathimba who said that, when he grilled Nonxuba about the money, the latter rushed to court with an application to have a curator appointed to manage his affairs. Mathimba was entitled to his opinion (given the delays in paying out the money), and so was the newspaper to report his view. The question is whether it was fair to let this statement hang in the air (a matter to which I shall return shortly).</p>
<p>Court documentation included a number of medico-legal reports which substantiated Mathimba’s claims for damages (the settlement of which was favorable to him).</p>	<p>The story (adequately) stated Nonxuba advised Mathimba that in terms of the reports of the medical experts who examined him, it was recommended that a curator be appointed.</p>
<p>The report of the <i>curator bonis</i> clarified that Nonxuba had no role to play in respect of investigations into the matter, and was not responsible for any delays in paying out the funds.</p>	<p>The article quoted Nonxuba to the effect that his mandate was terminated. This implied that he had no further role to play and that he was therefore not responsible, including for any possible delays.</p>
<p>The Law Society of the Northern Province supported his application for the appointment of a curator.</p>	<p>The story did not question this matter, neither was it relevant for the purposes of the article (even though it did mention this law society with regard to its investigation of Mathimba’s complaint).</p>

<p>Mathimba engaged a number of sets of further attorneys, who thereafter sought to have the earlier order (granted by agreement) set aside on a basis which had subsequently been held by the High Court to be without any legal or factual foundation.</p>	<p>The story did not question this matter, neither was it relevant for the purposes of the article.</p>
<p>The subsequent (unsuccessful) “interlocutory applications” brought by Mathimba’s more recent attorneys led to significant delays in the finalisation of the initial application.</p>	<p>After having said that Nonxuba’s mandate had been terminated, it was not necessary to explain who were responsible for (further) delays and why these occurred.</p>
<p>His actions were determined by the effect of the court order (stating that the proceeds of the damages claim should be held in trust by him pending the outcome of other proceedings). After Mathimba terminated his mandate, the next attorney should have taken steps to secure a release or partial release of funds as considered by the High Court.</p>	<p>By not balancing Mathimba’s statement about “rushing to court” with Nonxuba’s argument that his actions were determined by a court order, the story may have left the impression that he had acted in haste to cover for himself. The article stated Mathimba alleged that Nonxuba went to court only after he had challenged him on his intention to deduct fees from his payout. This may or may not have been true – but if it was, the newspaper was obliged to find reasonable proof for such a damaging allegation. (I agree with Nonxuba that no expert evidence has been produced to suggest that he had acted wrongfully.) Smuts’s argument that the story made it clear that Nonxuba’s actions were based on court orders does not fully cover his complaint – the issue is whether Nonxuba acted in haste in order to save his own skin.</p> <p>The “next attorney” was none of the newspaper’s business, which is why I cannot find for Nonxuba on this point.</p>

One matter remains – Nonxuba’s complaint that the “unfortunate” references in the story to fraud and investigations relating to RAF matters gave rise to an unjustified suggestion that he had been guilty in this matter.

The RAF’s CEO was quoted as saying that investigations into corruption involving the fund had led to 1 595 arrests and 1 240 convictions in the past five years and that the fund had fraudulent cases amounting to R178-million during a specific time.

This statement could have created a possibly unfair impression, was it not for the (reported) statement that the RAF had launched a forensic investigation into several claims paid to Nonxuba’s own firm – a statement that he did not deny (not in the story, and also not in his complaint to this office).

Finding

It was unfair to Nonxuba not to balance out Mathimba’s statement about “rushing to court” with Nonxuba’s argument that his actions were determined by a court order – which may have left the impression that he had acted in haste to cover for himself. If this was true, Sunday Times should have produced evidence to provide reasonable substantiation for such a potentially damaging allegation (which it did not do).

This is **in breach of** Section 1.1 of the Code of Ethics and Conduct which says, “The media shall take care to report news...fairly.”

The rest of the complaint is **dismissed**.

Seriousness of breaches

Under the headline *Hierarchy of sanctions*, Section 8 of our Complaints Procedures distinguishes between minor breaches (Tier 1), serious breaches (Tier 2) and serious misconduct (Tier 3).

The breach of the Code of Ethics and Conduct as indicated above is a **Tier 2** offence.

Sanction

Sunday Times is **cautioned** for the breach of the Code as described under *Finding* above and directed **to publish** this outcome on the same page on which the offending story was carried.

The text, which should be approved by me, should:

- start with the sanction; and
- end with the sentence, “Visit www.presscouncil.org.za for the full finding”.

The headline should reflect the content of the text. A heading such as *Matter of Fact*, or something similar, is not acceptable.

If the story appeared on the newspaper’s website, this text should be published there as well.

Appeal

Our Complaints Procedures lay down that within seven working days of receipt of this decision, either party may apply for leave to appeal to the Chairperson of the SA Press Appeals Panel, Judge Bernard Ngoepe, fully setting out the grounds of appeal. He can be contacted at Khanyim@ombudsman.org.za.

Johan Retief

Press Ombud