

Imtiaz Fazel vs. Mail & Guardian

Fri, Apr 23, 2021

Particulars

Complaint number: 8467

Complainant: Mr Imtiaz Fazel in his capacity as acting Director-General, Department of Public Works and Infrastructure (DPWI)

Complaint lodged by: The Office of the State Attorney – Pretoria

Headlines of articles and dates:

- *De Lille unfazed by acting-DG's baggage* (8 October 2020); and
- *Toxic power struggle hits public works – With infighting and allegations of corruption and poor planning, the department's top management looks like a scene from Survivor* (23 October 2020)

Author of articles: Sabelo Skiti

Respondents: Sipho Kings, acting editor-in-chief, in conjunction with Skiti

: Athandiwe Saba

1. Complaint

Mr Imtiaz Fazel complains that:

- he was not given a right of reply prior to publication (with regards to the first article);
- this has led to the false, misleading and “deliberately out of context” allegations (details below); and
- the articles unnecessarily tarnished his reputation, as well as that of the Department of Public Works and Infrastructure (DPWI).

He asks for an apology and a retraction, or a correction in a rerun of the story.

2. Relevant sections of the Press Code

These sections are:

- 1.1: “*The media shall take care to report news truthfully, accurately and fairly;*”
- 1.2: “*The media shall present news in context and in a balanced manner...*”;
- 1.8: “*The media shall seek, if practicable, the views of the subject of critical reportage in advance of publication... ; if unable to obtain comment, this shall be stated*”;
- 3.3: “*The media shall exercise care and consideration in matters involving dignity and reputation.*”

3. The texts

3.1 The gist of the *first article* was that the impasse between the Public Works Minister, Patricia de Lille, and her Director-General (DG), Adv Sam Vukela, had deepened after revelations that the man she appointed to act as an accounting officer (Fazel) had been accused of doctoring an internal forensic report.

3.2 Fazel allegedly failed to report that an employee had received allowances that the latter had not been entitled to over a period of eight years, to the value of R480 000.

3.3 Skiti quoted a “public works insider” in this regard as follows: “The report said that she should be sanctioned for knowingly accepting the allowances even though she knew she was not entitled to [them]. Imtiaz, for some reason, decided to protect her and delete those findings.”

3.4 The reporter also stated that Fazel had been on the verge of suspension (the previous November) and intimated that De Lille’s detractors were using her hiring of Fazel as evidence of a witch hunt against Vukela.

3.5 The *second article*, dubbed “News analysis”, largely repeated the above-mentioned allegations – this time, though, reporting Fazel’s views on the matter.

4. The arguments

4.1 No right of reply

4.1.1 Fazel complains that the newspaper did not give him a right of reply prior to publication.

4.1.2 Kings says Skiti attempted numerous avenues to contact Fazel, and in fact contacted the Minister’s office – which had in the past referred questions to the department.

4.1.3 He says that, as soon as Fazel told Skiti that he had not received questions sent to him by his own department, the reporter published a follow-up article that contained his response. An offer was also made to update the first article with comments online, he says.

4.1.4 When Fazel refused these remedies and continued to ask for a retraction, the editor says he did not grant his request “as not enough information was presented to show that the material facts of the article were wrong”.

4.1.5 In conclusion, Kings submits that Fazel’s views were captured in the second article.

4.1.6 Fazel maintains that the journalist did not give him a right of reply.

4.1.7 He submits the journalist appears to contend that by contacting the Minister’s office he had already and as a matter of fact contacted him – while there is a vital difference between the executive authority (the Minister) and the department (the administration). “The two are separate legal entities and who must maintain separate lines of communications,” he says.

4.1.8 The journalist’s failure to procure his side of the story before going to print has now forced him to find all sorts of justification for his flawed articles, Fazel concludes.

Analysis

4.1.9 It is important to recap exactly what the first article said about Fazel.

4.1.10 Skiti wrote that:

- he was accused of doctoring an internal forensic report;
- he was on the verge of suspension (some eleven months prior to the publication of the article);
- his version was materially different to the investigator’s report; and
- an “insider” said he decided to protect the employee and to delete the relevant findings in this regard.

4.1.11 At this stage, I am not interested in the merits of these accusations/allegations/statements of fact. What is now important, is that these were potentially detrimental to Fazel – even if all the allegations were false. Perceptions can become realities in the eyes of a reader.

4.1.12 These made Fazel a “subject of critical reportage” (see Section 1.8 of the Press Code), which means that:

- the M&G should have obtained Fazel’s side of the story; and
- if that was not possible, the story should have stated so.

4.1.13 In his response to Fazel's complaint, Kings states: "When it comes to comment from Mr Fazel for the first article, the reporter attempted numerous avenues to reach him. Questions were also sent to the minister's office, which had in the past referred questions to the department."

4.1.14 I have therefore asked the editor:

- for proof that the journalist "attempted numerous avenues" to contact Mr Fazel in person; and
- to provide me with the questions the reporter sent to the Minister's office.

4.1.15 The response by the M&G came from Athandiwe Saba. This is what she wrote:

"I have attached the email correspondence to the department of public works.

"The reporter unfortunately does not have the call records.

"However, the reporter did get in contact with the department's former spokesperson - who was already working at the Department of Agriculture - and the chief of staff about how to contact Mr Fazel.

"No one could assist. Questions were sent to the department which included those that would refer to Mr Fazel.

"The former departmental spokesperson would be able to corroborate that he was contacted to assist with the contact details for Mr Fazel. Contact details can be provided upon request."

4.1.16 Saba also provided me with relevant correspondence between Skiti and the Minister's office.

4.1.17 These are my considerations:

- It is not in dispute that the M&G did not contact Fazel directly for comment prior to publication – he could not have done so, as he admits that he was not able to obtain his contact details;
- It is not enough to only correspond with the Minister's office, hoping it would pass it on to Fazel – the allegations were of a serious nature and the newspaper was dutybound to have contacted him directly;
- In his correspondence with the Minister's office, Skiti never said that he was looking for Fazel's side of the story. Therefore, I do not think he was justified to believe that that office would necessarily send his correspondence on to Fazel for his comment;
- I accept that Skiti did try to obtain Fazel's contact details – but again, that was not sufficient. The question why it was so difficult for the journalist to contact the acting DG in person remains unanswered;
- The second story did contain Fazel's views, which was good – but this does not negate the fact that the M&G should have reported his views in the first article; and
- Skiti did not state in the first article that he attempted to contact Fazel, but was unable to do so (as required by Section 1.8 of the Press Code).

4. **Misleading statements**

4.2.1 *Doctoring an internal forensic report; report materially altered*

4.2.1.1 Fazel complains that the following statements in the *first article* were false, misleading, and out of context:

- "[He was] accused of doctoring an internal forensic report..."; and
- "Fazel's version [of the report] was materially different to the investigators' report in that recommendations of action against the employee, Manthekeleng Monana, were deleted."

4.2.1.2 He argues that, as the head of Governance, Risk, and Compliance, he had every right to amend a report on an investigation that was not done by him.

4.2.1.3 He defends his amendment in this regard by citing a finding of the Constitutional Court, on 7 December 2017, who found that Section 38(2)(b)(i) of the Public Servants Act was unconstitutional. This section allowed employers to recover overpayments directly from employees' wages or salaries. He submits that he acted on this basis.

4.2.1.4 Fazel explains further that, as the custodian of the anti-corruption function in the department, it was his role to investigate. He points out that he did not do the actual investigation himself – his duty was to review and analyse the evidence that had been collected “in order to ensure quality control and compliance with the Constitutional and legislative prescripts, as well as to ensure that findings and recommendations are supported by appropriate evidence”.

4.2.1.5 He adds, “All my inputs or essentially my editorial work on those draft reports is an essential part of the investigative process so that reports that are published are logically and legally sound. I emphasise that the development of a report undergoes review and change during its various stages including the fieldwork and supervisory review until such time it is finalised.”

4.2.1.6 He also submits that the DG approved the relevant recommendation without raising any issue with him.

4.2.1.7 He concludes the allegation that he had doctored the report is unsustainable. “... in this particular instance I sought to correct a serious error of judgment when an investigator failed to interpret the Public Service Act in a manner that conforms to the Constitution and a recent Constitutional judgment.”

4.2.1.8 He adds that Skiti persevered with his misleading reporting in his *second article*, even though he had demonstrated that he had followed the correct and proper procedures.

4.2.1.9 In conclusion, he says the word “doctored” has a “menacing and immoral character”, as it implies deception.

4.2.1.10 Kings disagrees that Fazel had a right to amend (for whatever reason) a report on an investigation that was not done by him. “This is where we differ. It is not whether he or the investigator (who refused to make the changes) were correct in their interpretation of the circular or the Constitutional Court matter - it is about the process that he undertook to effect the changes,” he says.

4.2.1.11 The editor submits that Skiti spoke to no less than three professionals (an accountant who has worked at various levels in investigations and audits for over a decade, an attorney who has processed investigations at one of the biggest SOEs, and an individual in law enforcement who has handled investigations) about this situation.

4.2.1.12 He says they all reached the same conclusion, for the same reason – someone who was not directly involved in the actual investigations, interviews and evidence collection may not materially alter a report “without a legal instrument such as an external legal opinion”.

4.2.1.13 The professionals concurred, Kings continues, that Fazel was obliged to inform the DG, as the final decision maker, of the situation before he makes his final decision. “The way Mr Fazel did it — whether correct or not — did not live up to that,” he submits.

4.2.1.14 The editor concludes, “Whether there is or isn’t merit to the cloud [allegedly hanging over Fazel’s head] does not change the fact that there is [such] a cloud. And it is De Lille’s failure to act on that cloud that is the takeaway in both articles. When politicians fail to do their jobs, for whatever reason, the public ought to know. The M&G stands by its publication.”

4.2.1.15 Fazel replies that the newspaper, in its answer to his complaint, changes its defamatory remark of “doctored” to not acting reasonably in that he did not follow proper procedures. He says this is a summersault – it seems to no more having an issue with the merits of the case, but rather with the process followed.

4.2.1.16 He again denies that he has doctored the report – all he did, he submits, is that he corrected errors in the document. In doing so, he adds, he not only followed the correct procedure (read: checking the relevant circular and Constitutional Court judgment), but he had the right, in terms of his position, to make such corrections.

4.2.1.17 He also remarks that the newspaper fails to explain what procedures he allegedly failed to observe in amending the report.

4.2.1.18 Fazel also wants to know how the journalist would know the internal processes of the department – a question that the newspaper has evaded in its response to his complaint, he says.

4.2.1.19 He adds:

- As the head of the anti-corruption programme in the department, and at all material times, he was involved in all stages of investigations – which includes the review of all evidence and source documents gathered during the investigation, as well as the final review stage of the investigation process;
- In this regard he was the only signatory to the final investigation report before it was disseminated to the DG for approval;
- Because the investigation report did not constitute a legally binding document, he also requested legal inputs where necessary to satisfy himself with the final report and to assume ownership and accountability for it; and
- A refusal to correct a blatant error would, in terms of labour laws, have amounted to insubordination.

4.2.1.20 He concludes, “The journalist insists the investigation was not done by me (and I am accordingly not allowed to correct the report) and yet in the process and on the same token the journalist contradicts himself by referring to me as the accountable person, who owns the final report.”

4.2.1.21 With regard to Skiti’s sources, Fazel says the “unknown experts” may not have been briefed with a proper and appropriate context – given the journalist’s “understandable” lack of insight into the department’s internal due processes, as well as his own reported misunderstanding that findings were augmented, when in fact they remained intact.

4.2.1.22 He invites both the editor and the journalist to reveal the identities of the “experts”, so that they can be questioned and their opinions be verified.

Analysis

4.2.1.23 With regards to “doctoring” the report, both Fazel and Kings seem to miss a vital point – *Skiti did not report this as fact, but as an accusation*. It is a fact that the accusation was made, and it was published as such. The journalist was squarely within his rights to report that fact (read: that it was an accusation which, by definition, means that it has not been proven yet).

4.2.1.24 I must add, though, that this raises some questions.

4.2.1.25 Firstly, who made this accusation? When reading the first article in its totality, it is clear that this accusation came from the suspended DG, Adv Sam Vukela. There is nothing in the story to suggest that the accusation came from more than one source.

4.2.1.26 This, in turn, leads to the question if Skiti should not have been more careful – I assume he knew of the feud (apologies if this is too strong a word) between Fazel and Vukela and, as I point out lower down (see Sub-section 4.2.2.2), the former accused the latter of having had ulterior motives for recommending his suspension.

4.2.1.27 While the journalist did nothing wrong by reporting the accusation of doctoring a report, it does bring me back to my argument above, that Skiti was obliged to obtain Fazel’s views.

4.2.1.28 Regarding the statement that Fazel’s version “was materially different to the investigators’ report in that recommendations of action against the employee ... were deleted”: It is important to note that Skiti has qualified the “materially different” by stating “in that recommendations of action against the employee ... were deleted”. No other recommendations were mentioned or implied.

4.2.1.29 This also seems to me to be correct.

4.2.1.30 I am not going to pronounce on the question if Fazel correctly followed procedures or not. That issue is not for this office to decide. I merely documented the arguments to provide some context to the matter.

4.2.2 On the verge of suspension

4.2.2.1 Fazel complains the statement in the *first article* that he “was on the verge of suspension just last November” was false, misleading, and out of context.

4.2.2.2 He argues that, because he acted properly and within the law, he could not *legally* have been on the verge of suspension. He says the currently suspended DG had an ulterior motive for wanting to have him ousted from the department.

4.2.2.3 (He elaborates on this issue to such an extent that I am not willing to entertain his explanations, as these are quite damaging to the currently suspended DG – who does not have an opportunity to defend himself.)

4.2.2.4 Kings says it is a matter of fact that Fazel was on the verge of suspension. The main point of the article, he submits, is that De Lille had failed to make a decision with regards to Vukela's disciplinary action against Fazel.

4.2.2.5 He adds that Fazel's impending suspension was also confirmed by De Lille.

4.2.2.6 Fazel replies that the DG's endeavour to have him suspended was not in itself, nor did it equate to, suspension. He argues that Skiti failed to differentiate between the request to suspend and the decision and power of the Minister to suspend or not to suspend. The Minister did not exercise her powers to suspend him, he notes.

4.2.2.7 He also asks why De Lille would appoint him when she was on the verge of suspending him.

4.2.2.8 He denies that the Minister has confirmed his impending suspension. In fact, he says, Skiti himself wrote, "It is not clear whether [De Lille] ever responded." If this was true, he argues, the journalist would have reported that in his article.

Analysis

4.2.2.9 The question is how reasonable was it for the Mail & Guardian to have stated, as fact, that Fazel had been "on the verge of suspension".

4.2.2.10 According to Merriam-Webster, the phrase "on the verge of" means that something is about to happen or is very likely to happen.

4.2.2.11 So then: Was Fazel "about to be", or "very likely", to be suspended?

4.2.2.12 Let me compare this to someone who appears in court for, say, theft. It cannot be said that, just because that person was accused of theft, she or he was "on the verge" of being found guilty. Such a determination can only reasonably be made if the evidence against the accused is over-whelming and it could reasonably be expected that the accused was guilty.

4.2.2.13 If that was the case, it can reasonably be said that the accused was on the verge of being found guilty – but not before that.

4.2.2.14 The same goes for Fazel in this case. I do not believe it was reasonable to have stated that he was on the verge of suspension as:

- I am not aware of any investigation into him that pointed to the likelihood that De Lille was about to, or very likely, to suspend him; and
- the Minister in fact afterwards appointed him as Acting DG – this was not likely if she previously seriously considered to suspend him. Of this, I have no evidence either.

4.2.2.15 In other words, the mere fact that the former DG recommended to the Minister that Fazel be suspended, did not mean that it was about to happen, or very likely to happen. At least not at that stage.

4.2.2.16 The fact that De Lille reportedly said Vukela was empowered by the Public Service Act to discipline Fazel does not change my argument. Either Vukela knew he had this power, but did not use it, or he did not know he had that power. In both instances it cannot be said that Fazel was about, or very likely, to be suspended.

4.2.2.17 Moreover, I have no evidence that De Lille has "confirmed" Fazel's impending suspension. Like Fazel, I believe that Skiti would have reported that information if he had evidence to that effect.

4.2.2.18 Based on the above, I do believe that this particular statement was an exaggeration.

4.3 Reputation damaged

4.3.1 Fazel submits: “An allegation that a senior member of the public service charged with good governance and rooting out corruption and maladministration is doctoring investigative reports is harmful. My professional life is in danger. My progression in my career is at stake. My name has been denigrated, tarnished and reduced in currency in the eyes of not only my superiors, my colleagues but also in the eyes of the country... The publication of these false statements has caused me considerable personal and professional harm and will likely continue to do so without the appropriate intervention.”

4.3.2 Kings says Fazel, like other civil servants, was clearly caught in the middle of a fight for control in the department – and yet, the latter puts blame on the M&G for his “name and standing in society, especially in the public service, being severely eroded of all its currency”.

4.3.3 He says this is an indication of “the human toll of broken civil services, that have become a battleground for corruption rather than over service delivery”.

Analysis

4.3.4 I agree with Fazel’s submission, as recorded in Sub-section 4.3.1 above.

4.3.5 Given the seriousness of the allegations made against Fazel, I have little doubt that the reportage has damaged Fazel’s dignity and reputation – and possibly unnecessarily so.

5. Finding

5. 1 No right of reply

The M&G was **in breach of** Section 1.8 of the Press Code that says, “The media shall seek, if practicable, the views of the subject of critical reportage in advance of publication... ; if unable to obtain comment, this shall be stated”.

5.2 Misleading statements

5.2.1 Doctoring an internal forensic report; report materially altered

This part of the complaint is **dismissed**.

5.2.2 On the verge of suspension

The statement that Fazel was “on the verge of suspension” was **in breach of** Section 1.2 of the Press Code that says, “The media shall present news in context and in a balanced manner, without any intentional or negligent departure from the facts whether by ... exaggeration...”

5.3 Reputation damaged

The first article was **in breach of** Section 3.3 of the Press Code that reads, “The media shall exercise care and consideration in matters involving dignity and reputation.”

6. Seriousness of breaches

Under the headline *Hierarchy of sanctions*, Section 8 of the Complaints Procedures distinguishes between minor breaches (Tier 1 – minor errors which do not change the thrust of the story), serious breaches (Tier 2), and serious misconduct (Tier 3).

The breaches of the Press Code as indicated above are all **Tier 2** offences.

7. Sanction

7.1 The Mail & Guardian is directed **to apologise** to Fazel for:

- not obtaining and reporting his views with regard to the first article;
- stating, as fact, that he was “on the verge of suspension”; and

- exercising care and consideration involving his dignity and reputation.

7.2 The newspaper is directed **to publish** the apology on all the platforms where the first article was published, with a headline containing the words “apology” or “apologises”, and “Fazel”.

7.3 The text should:

- be published at the earliest opportunity after the time for an application for leave to appeal has lapsed or, in the event of such an application, after that ruling;
- refer to the complaint that was lodged with this office;
- end with the sentence, “Visit www.presscouncil.org.za for the full finding”;
- be published with the logo of the Press Council (attached); and
- be prepared by the publication and be approved by me.

8. Appeal

The 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

Acting Press Ombud