IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 36

Originating Summons No 118 of 2020

Between

The Online Citizen Pte Ltd

… *Appellant*

And

Attorney-General

… *Respondent*

JUDGMENT

[Statutory Interpretation] — [Construction of statute] — [Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019)]

TABLE OF CONTENTS

The Online Citizen Pte Ltd
v
Attorney-General

[2020] SGHC 36

High Court — Originating Summons No 118 of 2020
Belinda Ang Saw Ean J
6 February 2020; 14 February 2020

19 February 2020 Judgment reserved.

Belinda Ang Saw Ean J:

1 Originating Summons No 118 of 2020 ("OS 118") is filed by the appellant, The Online Citizen Pte Ltd ("TOC"), to set aside a Part 3 Correction Direction ("Part 3 CD"), which was issued by the Competent Authority on the instruction of the Minister of Home Affairs ("the Minister") on 22 January 2020 pursuant to s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) ("POFMA"). This Correction Direction is hereafter referred to as "the January 2020 CD".

2 The focus of OS 118 is on s 17(5)(*b*) of the POFMA. The crux of the matter is whether the POFMA is engaged because TOC published an article reporting that Lawyers For Liberty ("LFL") had made a press statement ("Press Statement"). The question is whether a Part 3 CD can be set aside

notwithstanding that TOC takes no position on either the veracity or falsity of LFL's Press Statement.

3 A related provision is s 11(4) of the POFMA, which addresses TOC's subjective belief that it does not know whether LFL's Press Statement contains false statements of fact. While TOC is indifferent towards the truth or falsehood of LFL's Press Statement, it nonetheless continues to share an extract of LFL's Press Statement on its news website in Singapore with its viewers. Against this backdrop, the question for determination is whether s 11(4) of the POFMA applies to TOC who publishes an extract of the Press Statement on its news website in Singapore without verifying the truth of the content but merely states that it has contacted the Ministry of Home Affairs for comments.

4 In addition to the two statutory provisions outlined above, this Judgment will address an ancillary matter regarding the legal burden of proof in a s 17(5) setting aside application. This concerns a significant feature of s 17(5)(*b*) which, as a matter of statutory construction, requires TOC to prove the truth of a statement rather than the respondent its untruth.

Events leading up to the filing of OS 118

5 On 16 January 2020, LFL, a Malaysian non-governmental organisation, published the Press Statement in writing titled "Disclosure of the brutal & unlawful hanging methods in Changi prison – brutal kicks inflicted to snap prisoners' necks".[1] The Press Statement claims that officers from the Singapore Prison Service in Changi prison utilised an unlawful hanging method to execute

[1] Affidavit of Xu Yuan Chen @ Terry Xu at pp 10–13.

prisoners on death row.[2] It also discloses the specifics of this hanging method based on information purportedly given by an anonymous officer who had served at Changi prison's execution chamber.[3]

6 On the same day, TOC published an article titled "M'sian human rights group alleges 'brutal, unlawful' state execution process in Changi Prison" ("the Article"), which repeats most of the allegations made by LFL in its Press Statement.[4] In particular, the Article directly refers to LFL's Press Statement through quotations of various lengths.[5] The relevant portion of TOC's Article that quotes LFL's Press Statement (the quoted section being italicised) is reproduced here for ease of reading and reference:[6]

> Citing an unnamed former Singapore Prison Services (SPS) officer's account, LFL advisor N Surendran said that the former officer and other *prison officers were 'instructed to carry out the following brutal procedure whenever the rope breaks during a hanging, which happens from time to time':*
>
> *a) The prison officer is instructed to pull the rope around the neck of the prisoner towards him.*
>
> *b) Meanwhile, another prison officer will apply pressure by pulling the body in the opposite direction.*
>
> *c) The first officer must then kick the back of the neck of the prisoner with great force in order to break it.*
>
> *d) The officers are told to kick the back of the neck because that would be consistent with death by hanging.*
>
> *e) The officers are told not to kick more than 2 times, so that there will be no tell-tale marks in case there is an autopsy.*

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2 Affidavit of Xu Yuan Chen @ Terry Xu at pp 10–13.

3 Affidavit of Xu Yuan Chen @ Terry Xu at p 11.

4 Affidavit of Xu Yuan Chen @ Terry Xu at pp 15–17.

5 Affidavit of Xu Yuan Chen @ Terry Xu at pp 15–17.

6 Affidavit of Xu Yuan Chen @ Terry Xu at p 15.

> *f) Strict orders are also given not to divulge the above to other prison staff not involved in executions.*
>
> [emphasis added]

7 Also that same day, TOC's chief editor sent an e-mail to the Ministry of Home Affairs' Feedback channel to solicit comments on the claims made in LFL's Press Statement.[7]

8 On 22 January 2020, the Competent Authority, on the instruction of the Minister, issued the January 2020 CD addressed to TOC's chief editor pursuant to s 11 of the POFMA.[8] The January 2020 CD identifies the "subject statement" under s 17(5) of the POFMA as being the italicised portions of the extract reproduced in [6] above starting with the words "prison officers" ("the Subject Statement").[9] TOC accepts that the Subject Statement is the extract identified in the January 2020 CD.

9 Subsequently, TOC made an application to the Minister under s 19 of the POFMA to cancel the January 2020 CD on the grounds set forth below:[10]

> The report does not affirm the authenticity of the claims made by the non-government entity mentioned in the report.
>
> A query has been sent to MHA for its response in regards to the claim to be included in the report.
>
> MHA has not responded to the publication in regards to the query, even till the point where the Corrective Direction is issued by the Minister.

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7 Affidavit of Xu Yuan Chen @ Terry Xu at p 19.

8 Affidavit of Xu Yuan Chen @ Terry Xu at pp 21–24.

9 Affidavit of Xu Yuan Chen @ Terry Xu at pp 21–22.

10 Affidavit of Xu Yuan Chen @ Terry Xu at pp 26–29.

10 On 24 January 2020, the Minister rejected TOC's cancellation application made under s 19 of the POFMA.[11] By OS 118, TOC applies to set aside the January 2020 CD.

Preliminary points

11 As stated earlier, TOC relies on s 17(5)(*b*) of the POFMA as its sole ground to set aside the January 2020 CD. To be clear, TOC makes no challenge in respect of the matters sets out in subsections (*a*) and (*c*) of s 17(5) of the POFMA. Section 17(5) of the POFMA reads as follows:

> (5) The High Court may only set aside a Part 3 Direction on any of the following grounds on an appeal:
>
> (*a*) the person did not communicate in Singapore the subject statement;
>
> (*b*) the subject statement is not a statement of fact, or is a true statement of fact;
>
> (*c*) it is not technically possible to comply with the Direction.

12 The first limb of s 17(5)(*b*) of the POFMA allows the court to set aside a Part 3 CD on the basis that the "subject statement" is not a "statement of fact". Section 2(2)(*a*) of the POFMA provides that "a statement of fact is a statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact".

13 The second limb of s 17(5)(*b*) of the POFMA empowers the court to set aside a Part 3 CD on the ground that the "subject statement" is a "true statement of fact". Section 2(2)(*b*) of the POFMA states that "a statement is false if it is

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[11] Affidavit of Xu Yuan Chen @ Terry Xu at p 31.

false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears."

14 This leads me to s 11(4) of the POFMA, which deals with the communication of a false statement of fact on the internet regardless of the subjective motivations behind the communication. Section 11(4) of the POFMA reads as follows:

> (4) A person who communicated a false statement of fact in Singapore may be issued a Correction Direction even if the person does not know or has no reason to believe that the statement is false.

15 The statutory language of s 11(4) is plain. So long as the statement of fact is false, any person who circulates a false statement of fact in Singapore by posting or reposting it on the internet may be issued a Part 3 CD regardless of that person's awareness (or lack thereof), subjective knowledge or belief as to the truth or falsity of the statement of fact. Section 11(4) of the POFMA is intended to prevent and stop the spread of falsehoods and misleading information when information is posted online without prior verification and thought, be it deliberate or otherwise. The Part 3 CD is a countermeasure to debunk stories (in this case a story of the brutal execution of prisoners in Changi prison) where the Minister considers the facts therein to be false and also regards the continued circulation of the misinformation as being inimical to the public interest.

16 With the above analysis of s 11(4) in mind, the heart of the matter in OS 118 is whether TOC's application to set aside the January 2020 CD satisfies either of the two legal elements set out in s 17(5)(*b*). As alluded to earlier, a significant feature of s 17(5)(*b*) derived from the language of the subsection requires TOC to prove the truth of a statement rather than the respondent to

prove its falsehood. I will elaborate on this view below. Suffice to say for now that proof of a necessary legal element for the purposes of s 17(5)(*b*) resides within the framework of s 17 of the POFMA alone and recourse to the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") is, in my view, a red herring.

The onus of proof to set aside a Part 3 CD

17 I now turn to the question of where the onus of proof lies in an appeal made to set aside a Part 3 CD. I must again point out that although both parties argued the question at length in written submissions, this question actually distracts from the material issues in OS 118 given TOC's position. To elaborate, even assuming *ad arguendo* that the onus lies on the respondent to prove the falsehood of a factual statement, the outcome in this decision would be the same for the simple reason that TOC has repeatedly affirmed that it takes no position regarding the truth of the Subject Statement and therefore does not argue that the Subject Statement is "true" in the context of s 17(5)(*b*) of the POFMA. TOC's other contention that the Subject Statement is not a statement of fact because it is a hearsay statement is equally meaningless. Nevertheless, I will address the debate on the onus of proof since parties have submitted on this matter. More importantly, my views on the onus of proof are quite different from those espoused in *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 ("*SDP*"), which held that the onus of proof in a setting aside application under s 17(5) of the POFMA falls on the respondent. Needless to say, TOC relies on the decision of *SDP* whereas the respondent argues that the court's ruling on this point is wrong.

18 The High Court in *SDP* gave three main reasons (at [37]–[39]) for why the onus of proof falls on the respondent in an appeal to set aside a Part 3 CD on the limited grounds prescribed under s 17(5) of the POFMA:

(a) First, given that it is the Minister who seeks to curtail an individual's right under Art 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the "Constitution"), s 103 of the EA operates to require the respondent to prove that the statement is false.

(b) Secondly, the court has the discretion to scrutinise an administrative decision because an appeal under s 17 of the POFMA is "by way of rehearing" pursuant to r 5 of the Supreme Court of Judicature (Protection From Online Falsehoods and Manipulation) Rules 2019 (S 665/2019) ("POFMA Rules"). If the burden rests with the statement-maker, the Minister's earlier decision to issue a Part 3 CD would effectively fetter the court's discretion in a situation where neither party provides any evidence of truth or falsity.

(c) Thirdly, Parliament could not have intended for the statement-maker to bear the burden of proof due to the information asymmetry that exists between the Minister and the statement-maker.

19 The respondent disagrees with the Judge's reasoning in *SDP* for the following reasons:

(a) First, any person who comes to the court seeking judgment as to a legal right bears the burden of proof under s 103 of the EA. Since TOC brings the challenge to set aside the Part 3 CD under s 17(5)(*b*) of the POFMA, the burden of proof must be on TOC. Art 14 of the Constitution is not engaged because the Part 3 CD simply requires TOC to display a Correction Notice.

(b) Secondly, the fact that a s 17 challenge takes place by way of rehearing pursuant to r 5 of the POFMA Rules only means that the court may receive any evidence and exercise its discretion without being influenced by the prior decision. However, r 5 of the POFMA Rules speaks nothing about the burden of proof. An outcome in favour of the Minister in a situation where neither party provides any evidence is nothing exceptional and merely mirrors the outcome in a judicial review case.

(c) Thirdly, Parliament could not have intended for the burden of proof to fall on the Minister because it would compel the Minister to disprove a panoply of bare assertions and to disclose sensitive information on the basis of spurious claims.

20 With respect, I hold a different view from the Judge in *SDP* on the legal burden of proof in an appeal to set aside a Part 3 CD for reasons that are based primarily on the construction of the relevant statutory provisions and, in particular, the statutory language forming the legal elements that must be satisfied before a Part 3 CD may be set aside. As a matter of statutory construction, the grounds for setting aside a Part 3 CD require the statement-maker to establish its case, and for instance, prove the truth of a statement rather than to require the respondent to prove the untruth of a statement.

21 It is helpful to begin by outlining the procedural framework of s 17 that culminates in a challenge to set aside a Part 3 CD under s 17(5) of the POFMA. The procedure begins when the Minister instructs the Competent Authority to issue a Part 3 CD pursuant to s 10(1) of the POFMA. Section 10(1) of the POFMA states:

> **10.**—(1) Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
>
> (*a*) a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
>
> (*b*) the Minister is of the opinion that it is in the public interest to issue the Direction.

22 If the statement-maker accepts the issuance of the Part 3 CD, then all that remains is for the statement-maker to comply with the Part 3 CD, and that would be the end of the matter. However, if the statement-maker is not satisfied with the issuance of the Part 3 CD, then the statement-maker must first apply to the Minister to cancel or vary the Part 3 CD under ss 19(2) and 17(2). Section 17(2) states:

> (2) No appeal may be made to the High Court by any person unless the person has first applied to the Minister mentioned in section 19 to vary or cancel the Part 3 Direction under that section, and the Minister refused the application whether in whole or in part.

23 Only after the Minister has refused the application to cancel or vary the Part 3 CD can the statement-maker then apply to the High Court to set aside the Part 3 CD under s 17(5) of the POFMA. Notably, s 17(4) compels the court to either confirm or set aside but not to vary the Part 3 CD.

24 Seen in this light, an application to set aside a Part 3 CD is not so much an appeal against the Minister's decision to instruct the Competent Authority to issue the Part 3 CD under s 10(1) of the POFMA, but is more accurately an appeal against a Minister's decision under s 19 of the POFMA rejecting an application to vary or cancel the Part 3 CD. Reference to an appeal in s 17 of the POFMA is to be understood in this context.

25 With this procedural framework in mind, I turn to s 17(1) of the POFMA, which states that "[a] person to whom a Part 3 Direction is issued may appeal to the High Court against the Direction." The identification of this "person" who has been issued a Part 3 CD takes on significance in light of s 17(5) of the POFMA because s 17(5) scopes the grounds that the said "person" must establish to set aside a Part 3 CD. This is no different from any other statute that sets out the legal elements to be satisfied and which, in doing so, allows the court to draw on the prescribed legal elements and discern on whom the legal burden of proof lies. To illustrate, in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 ("*Loo Chay Sit*"), the Court of Appeal determined the legal burden of proof with reference to the language of the legal elements and exceptions set out in s 46 of the Land Titles Act (Cap 157, 2004 Rev Ed). In that case, the respondent who sought to rely on the presumption of indefeasibility of title bore the legal burden of establishing title, while the appellant who sought to displace the presumption of indefeasibility bore the burden of proving that the exceptions to indefeasibility applied: see *Loo Chay Sit* at [14].

26 Likewise, the court here is aided by the language of the legal elements in s 17(5) of the POFMA to identify where the legal burden of proof resides. Section 17(5) of the POFMA is reproduced below:

> (5) The High Court may only set aside a Part 3 Direction on any of the following grounds on an appeal:
>
> (*a*) the person did not communicate in Singapore the subject statement;
>
> (*b*) the subject statement is not a statement of fact, or is a true statement of fact;
>
> (*c*) it is not technically possible to comply with the Direction.

27 Tracing the language of s 17(5)(*a*), I find that the expression "the person did not communicate" takes reference from the perspective of the statement-maker, who is the "person" issued with a Part 3 CD. Similarly, s 17(5)(*c*) directs the inquiry to the person issued with a Part 3 CD as the person alone is able to explain why he or she or the entity concerned cannot comply with the Part 3 CD. Finally, the phrases "the subject statement is not a statement of fact" and "the subject statement … is a true statement of fact" in s 17(5)(*b*) of the POFMA are equally referable to the "person" issued with a Part 3 CD. In short, the grounds in s 17(5) characterise the legal elements in terms of the positive case that the statement-maker has to meet (*eg*, where the subject statement is "true" or the person "did not communicate" the statement in Singapore). The statutory language itself indicates that the onus is on the statement-maker to establish any of the grounds under s 17(5) of the POFMA to set aside the Part 3 CD.

28 The phraseology of s 17(5)(*b*) (*ie*, "the subject statement ... is a true statement of fact") stands in contrast to the language of s 10(1) of the POFMA, which states the legal elements in terms of the conditions that the respondent has to satisfy. Section 10(1) is reproduced below and reads as follows:

> **10.**—(1) Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
>
> (*a*) a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
>
> (*b*) the Minister is of the opinion that it is in the public interest to issue the Direction.

29 If Parliament had, as TOC argues, otherwise intended for the legal burden in this case to be on the respondent, the legal elements in s 17(5) of the POFMA would have been worded in a manner that adopts the language of s 10(1)(*a*) and identifies the respondent's positive case (*eg*, where the statement is "false" or the person "communicated" the statement in Singapore).

30 Furthermore, if TOC is correct that the legal burden of proof is on the respondent, then the court would be forced to read into the provision a statutory presumption in favour of TOC that is simply not there, either explicitly or implicitly. That the respondent has the legal burden to persuade the court not to set aside the Part 3 CD is a position that contradicts the clear language of s 17(5)(*b*). In my judgment, TOC's contention ignores a significant feature of s 17(5)(*b*) that requires the statement-maker (*ie*, TOC) to prove the truth of a statement rather than the respondent its untruth. Accordingly, it is for the statement-maker (*ie*, TOC) to establish its case and rely on the legal elements in s 17(5)(*b*) to set aside the January 2020 CD. This view comports with the procedure for filing evidence under the POFMA Rules, which require the statement-maker to present its evidence first. Under r 5(3) of the POFMA Rules, the statement-maker proceeds first to file its evidence in a supporting affidavit "at the same time as the originating summons." Subsequently, the Minister files an affidavit in reply under r 7(1) of the POFMA Rules. After all, it is the statement-maker who wishes to modify the *status quo* by applying to set aside the Part 3 CD.

31 Having concluded that the language of s 17(5) assists the court in determining the question of onus of proof, I find that s 103 of the EA, a provision relied upon by the Judge in *SDP,* is but a red herring. Pausing here, I note that the parties seemed to agree that s 103 of the EA applied to the present proceedings. However, s 2(1) of the EA states that "Parts I, II and III shall apply to all judicial proceedings … but not to affidavits presented to any court", and s 103 of the EA comes under Part III of the EA. Parties were invited to submit on s 2(1) of the EA and their respective submissions in writing were received by the Registry on 14 February 2020.

32 The respondent offers two possible interpretations of s 2(1) of the EA and draws a distinction between affidavits *per se* and proceedings in which affidavits are used. On the first interpretation of s 2(1) of the EA, which the respondent advances, Parts I to III of the EA do not apply to affidavits themselves only. On the second interpretation, Parts I to III of the EA do not apply in all proceedings where evidence is presented by way of affidavit. I question the correctness of the respondent's approach. To my mind, if s 2(1) of the EA disapplies Parts I to III of the EA with regard to affidavits, then it would also necessarily disapply the EA in proceedings where evidence has been led *solely* by affidavit.

33 Regardless, I do accept that ss 103 and 105 of the EA represent codifications of an underlying common law principle that "he who asserts must prove": see *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [17]. Further, Prof Jeffrey Pinsler observes in Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 1.046 that s 2(1) of the EA "does not prevent a court from applying basic evidential considerations in order to reach a just result."

34 Be that as it may, my view is that greater weight must be given to the language of s 17(5) of the POFMA itself in assigning the legal burden of proof. While it is a maxim of common law that *onus probandi incumbit actori* ("he who asserts must prove"), the language of s 17(5) should be accorded primacy for the purpose of ascertaining how the maxim operates in the statutory context. Moreover, the foregoing construction keeps faith with the legislative purpose of prevention as articulated in s 5(*a*) of the POFMA. Section 5(*a*) of the POFMA states:

> **5.** The purpose of this Act is —

> (*a*) to prevent the communication of false statements of fact in Singapore and to enable measures to be taken to counteract the effects of such communication;

35 With respect, I also cannot agree with the reasoning in *SDP* that the issuance of a Part 3 CD constrains the freedom of speech under Art 14(1) of the Constitution because the nature of the speech in question is not in the categories of speech covered by Art 14. Place, time and circumstance govern the Constitutional freedom of expression, and it is clear that Art 14 does not immunise every use of speech. In particular, "a wholly unrestricted right to free speech (assuming for the moment this exists at all) does not extend to a wholly unrestricted right to deceive or to maintain a deception by not drawing attention to the falsehood": see *Attorney-General* v *Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") at [112]. Put differently, the right to free speech pertains to the communication of "information not misinformation": see *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 at 238 ("*Reynolds*"). It is observed that while the law must be vigilant against attempts to check the expressions of tastes and opinions contrary to our own, there is no public interest in preserving a right to disseminate falsehoods. To the contrary, "purveying as facts statements which are not true is destructive of the democratic society": *Reynolds* at 238.

36 A Part 3 CD does not inhibit free speech because it does not prevent the statement-maker from maintaining the original text of its published material. Rather, a Part 3 CD is akin to the remedy provided under s 15(3) of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed), which "does not restrict the speaker's freedom of speech" but only requires a notification and/or a direction directing readers to the truth: see *Ting Choon Meng* at [111]. In similar vein, the statement-maker's only obligation in relation to a Part 3 CD issued under the POFMA is to insert a Correction Notice within its published

material, which allows viewers to compare the competing accounts of facts and make an individual assessment based on the available evidence.

37 In this regard, a Part 3 CD might be characterised as the Minister's response, consonant with Prof Thio Li-Ann's observation that a general "right to reply" facilitates the search for truth in Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 14.013:

> … [O]ne might locate the right to reply to inaccurate or offensive statements or ideas disseminated to the public by a legally regulated medium of communication as a corrective to misinformation. It promotes observance of the principle of *audi alteram partem* (hear the other side), in service of a balanced inquiry, which is a safeguard against its antithesis, a self-satisfied ignorance. …

38 Seen in this light, s 11(4) of the POFMA is one mode of tackling the unique difficulties associated with refuting false factual claims on the internet. Prof Thio remarks in Thio Li-Ann, "The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore" [2008] SJLS 25 at 44 and 54:

> … It is difficult to refute wrong views because, while newspaper readership is relatively constant, it is 'difficult to identify readers … online. How do you find them to clarify the truth?'
>
> …
>
> … The Internet heightens social fragmentation by making it 'easy for like-minded people to find each other and to insulate themselves from competing views. In the worst cases, hatred and even violence are possible consequences.' …

39 Additionally, imposing the burden of proof on the Minister in a s 17 application on the basis of the Minister's decision to issue a Part 3 CD under s 10(1) of the POFMA is, with respect, problematic. This is because Part 3 of the POFMA clearly bifurcates the Minister's responsibilities under s 10(1) from the court's powers under s 17(5) of the POFMA. Despite the similarities between

ss 10(1) and 17(5) of the POFMA, the two provisions represent two distinct regimes. For a start, s 10(1) expressly addresses the Minister, whereas s 17(5) (in particular, subsections (*a*) and (*b*)) addresses the court's powers in relation to matters in s 10(1)(*a*) but not s 10(1)(*b*) of the POFMA. Moreover, as I previously mentioned, the legal elements of s 17(5) are framed in terms of the statement-maker's case to meet, while s 10(1) is phrased in terms of the conditions the Minister has to satisfy. From a procedural perspective, the two provisions are also separated by a cancellation application under s 19 of the POFMA. As discussed above, s 17(2) of the POFMA prevents the statement-maker from applying to set aside the Part 3 CD until it has first applied to the Minister to cancel or vary the Part 3 CD. In any event, to the extent that the two provisions do overlap (which I do not accept), the presumption against surplusage is a canon of construction that operates to prefer an interpretation of the statute that avoids redundancy.

40 Perhaps more importantly, if the basis of imposing the legal burden of proof on the respondent owes itself to the Minister's decision to issue a Part 3 CD under s 10(1) of the POFMA, then by parity of reasoning, one would expect s 17(5) of the POFMA to permit an appeal on all of the legal elements under s 10(1) of the POFMA. However, this is not the case. Although s 10(1)(*b*) of the POFMA requires the Minister to be "of the opinion that it is in the public interest to issue the Direction", this "public interest" recedes into the background once the case is brought before the court under s 17(5) of the POFMA. Section 17(5) does not permit the statement-maker to challenge that the Minister erred in his or her consideration of the "public interest" limb.

41 As an alternative to s 17 of the POFMA, s 18 of the POFMA preserves the statement-maker's rights with regard to other causes of action. Section 18 clearly states that "[t]he issue of a Part 3 Direction in relation to the subject

statement does not affect any power or right of any person" to take any action under the POFMA or any other law. In the final analysis, however, s 10(1) is not a mirror image of s 17(5) of the POFMA, and accordingly, there is no reason why the burden should remain on the same party once the matter is brought before the court under s 17 of the POFMA.

42 This is not to say that the Minister need not establish evidential sufficiency where s 10(1) of the POFMA is concerned. On the contrary, it is incumbent upon the Minister to ensure there is sufficient evidence in his or her administrative determination to issue a Part 3 CD. During the second reading of the Protection from Online Falsehoods and Manipulation Bill (Bill No 10/2019), the Minister for Law noted that the Minister's Direction would have to show "on the face of it" that the statement in question is false: *Singapore Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Law). Be that as it may, nothing in the POFMA explains why such a burden (assuming that it attaches to the Minister under s 10(1)) should tether itself to the Minister in s 10(1), follow the Minister beyond the issuance of the Part 3 CD and the s 19 cancellation application and still remain with the Minister at the s 17(5) setting aside application before the court.

43 Finally, with respect, I disagree with the reasoning in *SDP* that Parliament could not have intended for the statement-maker to bear the burden of proof owing to the information asymmetry between the parties. From the outset, I question the propriety of reconstructing legislative intent on the basis of a concern (*ie*, information asymmetry) that Parliament did not articulate. It is not obvious how the court should balance the statement-maker's interests in mitigating information asymmetry on one hand with the respondent's interests in avoiding confidential disclosures on the other. Nothing in the statute or the

extrinsic materials assists in that determination, and I am not prepared to imply legislative intent where none was expressed.

44 Assuming for a moment that information asymmetry is a relevant concern in a s 17 appeal, the shifting of the evidential burden would in any event mitigate the concerns alluded to by the High Court in *SDP* at [39]. Placing the burden on the statement-maker is not oppressive because once the statement-maker adduces *prima facie* evidence of the statement's truth, the evidential burden subsequently shifts to the respondent to demonstrate otherwise. Thus, subject to its ability to satisfy the evidential burden, the statement-maker will receive an equal opportunity to review *prima facie* evidence of a statement's falsity.

45 For the foregoing reasons, in my judgment, the legal burden of proof rests on the statement-maker in an application made under s 17(5) of the POFMA to set aside a Part 3 CD. Having addressed this point, I turn now to the two main issues in dispute.

Issue 1: Whether the Subject Statement is a "statement of fact" under s 17(5)(*b*) of the POFMA

46 TOC contends that the Subject Statement is not a "statement of fact" under the first limb of s 17(5)(*b*) of the POFMA because it is neither a fact nor an opinion but rather a report based on hearsay. In TOC's view, it has never affirmed that the Subject Statement contained statements of facts or that the events described in the Subject Statement took place in fact. Given that the Ministry of Home Affairs has neither responded to TOC's queries nor engaged in a fact-finding process, TOC concludes that the Subject Statement cannot qualify as a fact. Notably, TOC denies that the Subject Statement is a statement of opinion. Rather, TOC argues that it merely reported in an even-handed way

that LFL had made certain allegations. As such, its statements fall into a separate third category of its own, and the reasonable reader would perceive that the Subject Statement is a report based on hearsay and not a fact nor an opinion.

47 I am unable to accept TOC's hearsay argument. TOC makes two critical errors.

48 First, TOC mistakenly assumes that it is entitled to introduce a different category of statement that is not a statement of opinion within the meaning of s 17(5)(*b*). This is incorrect. In the genus of "statements" there exist only two species for the purposes of s 17 of the POFMA, "facts" and "opinions". The two options are exhaustive, for Parliament clearly intended that the POFMA distinguish statements of facts that are captured by the Act from "[o]pinions, comments, [and] criticisms, [that] are not covered by the [Act]": *Singapore Parliamentary Debates, Official Report* (7 May 2019) vol 94 (K Shanmugam, Minister for Law). Inherent in TOC's characterisation of the Subject Statement as a *hearsay statement* is an implicit acceptance that the Subject Statement is a statement of fact that TOC has no personal knowledge about in the legal sense. Notwithstanding that a statement-maker has no personal knowledge about a statement and is thus unable to testify as to its veracity or otherwise, a hearsay statement can still be a statement of fact. This analysis brings TOC within the ambit of s 11(4) of the POFMA, which is the respondent's case.

49 Secondly, TOC wrongly assumes that the determination of a "statement of fact" as defined in s 2(2)(*a*) of the POFMA depends on the outcome of a verification procedure or fact-finding exercise. In doing so, TOC conflates two different inquiries. The first inquiry is the fact-or-opinion inquiry under the first limb of s 17(5)(*b*) of the POFMA. The second inquiry concerns the truth of the statement under the second limb of s 17(5)(*b*) of the POFMA. Logically, the

first inquiry precedes the second. Only after a statement is ascertained to be a fact and not an opinion does one then proceed to determine whether the statement of fact is true. As such, a verification exercise only takes place during the second inquiry to determine whether a "statement of fact" is true. In contrast, a verification exercise is not necessary for the purposes of the fact-or-opinion inquiry, which tends to focus on the semantics of the subject statement rather than the evidence in support of the statement. Indeed, a statement that is verifiable or capable of being proved is usually a statement of fact, regardless of whether the statement is true or false. As such, an unverified but verifiable report based on hearsay can be a statement of fact.

50 I now reproduce the Subject Statement here:

> prison officers were 'instructed to carry out the following brutal procedure whenever the rope breaks during a hanging, which happens from time to time':
>
> a) The prison officer is instructed to pull the rope around the neck of the prisoner towards him.
>
> b) Meanwhile, another prison officer will apply pressure by pulling the body in the opposite direction.
>
> c) The first officer must then kick the back of the neck of the prisoner with great force in order to break it.
>
> d) The officers are told to kick the back of the neck because that would be consistent with death by hanging.
>
> e) The officers are told not to kick more than 2 times, so that there will be no tell-tale marks in case there is an autopsy.
>
> f) Strict orders are also given not to divulge the above to other prison staff not involved in executions.

51 Applying the "reasonable person" test as articulated in s 2(2)(*a*) of the POFMA, I find that a reasonable person who reads the Subject Statement would regard the statement as a "statement of fact". Accordingly, TOC's basis to set

aside the January 2020 CD under the first limb of s 17(5)(*b*) of the POFMA fails.

Issue 2: Whether the Subject Statement is "true" under s 17(5)(*b*) of the POFMA

52 TOC also argues that the Subject Statement is a "true statement of fact" under the second limb of s 17(5)(*b*) because TOC's statement is that LFL made the Press Statement, which is true.[12] I refer to this latter argument as the "reporting defence". On this view, the court must take into account the context of the Article in order to objectively interpret the Subject Statement, and to this end, have regard for the use of quotations marks and quoted extracts. When the Subject Statement is read in the context of the Article, it is true because the fact that LFL made such allegations is undisputed and TOC simply reported that fact alone. TOC argues that its news business does what court reporters and investigative journalists do, that is, to report the fact that allegations have been made. Throughout the oral submissions, TOC also repeatedly stressed that it made no averment as to the truth of the Subject Statement.

53 In response, the respondent's main contention is that the Minister directed the January 2020 CD against the Subject Statement itself and not against TOC's statement that LFL had made certain allegations. Although TOC argues that its statement that LFL made a statement is true, this is inconsequential given that the Minister confined the relevant "subject statement" to the statement identified in the January 2020 CD, that is, the Subject Statement. Since TOC takes no position regarding the truth of the

12 Affidavit of Xu Yuan Chen @ Terry Xu at pp 5–6.

statement and provides no evidence to this end, TOC did not adduce any evidence to discharge its burden of proof that the statement is true.

54 Having heard the parties, I find that TOC's "reporting defence" is untenable for two reasons.

55 First, TOC's "reporting defence" is premised on a misconstruction of the "subject statement" under s 17(5)(*b*) of the POFMA. While the fact that LFL made certain allegations is true, this is not the correct locus of inquiry because s 17(5)(*b*) of the POFMA concerns itself with whether the "subject statement" is true. TOC's argument implicitly relies on a reinterpretation of the "subject statement" that includes TOC's own *reporting* of the Subject Statement. However, TOC had conceded at the start of the hearing that the "subject statement" in question is the extract as it was identified in the January 2020 CD (*ie*, the Subject Statement). Accordingly, it cannot now contest the definition of the "subject statement".

56 Secondly, s 11(4) of the POFMA forecloses the viability of the "reporting defence". As stated earlier, under s 11(4) of the POFMA, the issuance of a Part 3 CD does not require a fault element. Section 11(4) states that "[a] person who communicated a false statement of fact in Singapore may be issued a Correction Direction even if the person does not know or has no reason to believe that the statement is false." A Minister is therefore not prevented from issuing a Part 3 CD even if a person genuinely believes that he communicates a true statement of fact when the statement is in fact false. As such, the fact that TOC does not know whether the Subject Statement is true is ultimately an immaterial consideration.

57 Any recognition of a "reporting defence" would frustrate the legislative purpose of prevention as laid out in s 5(*a*) of the POFMA. When read together, ss 5(*a*) and 11(4) make clear that the POFMA not only seeks to capture those tale-makers who author falsehoods, but also implicates tale-bearers who receive false information and forward it to others without taking a position on the truth of the content. This rationale undergirds s 11(4) of the POFMA, which accords no weight to an individual's honest, innocent or ignorant dissemination of false information. Consequently, it is no defence to a Part 3 CD issued under the POFMA for TOC to assert that it merely "reported" the Subject Statement without confirming or knowing of the statement's veracity.

58 Throughout these proceedings, TOC repeatedly insisted that it takes no position regarding the truth of the Subject Statement. This denotes that TOC does not argue that the statements are "true" in the sense intended by s 17(5)(*b*) of the POFMA. Therefore, TOC has no legal basis for its application to set aside under the second limb of s 17(5)(*b*) of the POFMA, and this alone is sufficient to dispose of the issue.

59 Neither did TOC produce any evidence to prove the truth of the Subject Statement. Since TOC has failed to discharge its burden of proof, there is no need to consider the respondent's evidence. Nevertheless, the respondent provided the following evidence in an affidavit by the Deputy Director (Operations Management) of the Singapore Prison Service Mr Ong Pee Eng:[13]

> 5. The Statement is false.
>
> (a) First, the Singapore Prison Service ("SPS") does not apply, nor has it ever instructed its officers to apply, the procedure alleged in the Statement during a judicial execution.

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13 Affidavit of Ong Pee Eng at p 5.

> (b) Second, the rope used for judicial executions in Singapore has never broken before during a hanging (contrary to the assertion in the Statement that "*the rope breaks during a hanging, which happens from time to time*").
>
> (c) Third, all judicial executions are conducted in the presence of the Superintendent of the Prison and a medical doctor, among others. Section 25(1)(b) of the Coroners Act (Cap 63A) and section 313(m) of the Criminal Procedure Code (Cap 68) also require a Coroner, who is a Judicial Officer of the State Courts, to conduct an inquiry within 24 hours of the execution to satisfy himself that the execution was carried out duly and properly.

60 On its face, I have no reason to doubt Mr Ong's evidence. In any event, given that TOC has not adduced any evidence to demonstrate the truth of the Subject Statement, I find that TOC has not discharged either its legal or evidential burden of proving on the balance of probabilities that the Subject Statement is true. Consequently, TOC's basis for the setting aside application under the second limb of s 17(5)(*b*) of the POFMA must fail.

Conclusion

61 For the reasons above, TOC's application under both limbs of s 17(5)(*b*) of the POFMA fails. Accordingly, OS 118 is dismissed. If there is any claim for costs of the application under r 15(2) of the POFMA Rules, the respondent is to write to the court within one week to justify its basis for seeking costs in this case. If there is such a claim for costs, TOC will have one week thereafter to reply in writing to the respondent's application for costs.

Belinda Ang Saw Ean
Judge

Eugene Thuraisingam (Eugene Thuraisingam LLP) for the appellant;
Hui Choon Kuen, Pang Ru Xue Jamie and Teo Meng Hui Jocelyn
(Attorney-General's Chambers) for the respondent.
