CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/01

FRED KHUMALO	First Applicant
SKHUMBUZO MIYA	Second Applicant
FIDEL MBHELE	Third Applicant
TIMES MEDIA LIMITED	Fourth Applicant
NEW AFRICA PUBLICATIONS LIMITED	Fifth Applicant
versus	
BANTUBONKE HARRINGTON HOLOMISA	Respondent

Heard on : 7 May 2002

Decided on : 14 June 2002

JUDGMENT

O'REGAN J:

[1] This is an application for leave to appeal against the dismissal of an exception by the Transvaal High Court. The respondent, a well-known South African politician and the leader of a political party, is suing the applicants whom we may assume are responsible for the publication of a newspaper, the Sunday World, for defamation arising out of the publication of an article with their newspaper. In the article it was stated, amongst other things, that the respondent was

involved in a gang of bank robbers and that he was under police investigation for this involvement.

[2] The applicants excepted to the respondent's particulars of claim. Put simply, they averred that given that the contents of the statement were matters in the public interest, the failure by the respondent to allege in his particulars of claim that the statement was false rendered the claim excipiable in that it failed to disclose a cause of action. They based their exception on two separate grounds: the direct application of section 16 of the Constitution which protects the right to freedom of expression and alternatively on the common law, asserting that it should be developed to promote the spirit, purport and objects of the Bill of Rights as contemplated by section 39(2) of the Constitution.[1]

[3] The exception also stipulated that the obligation imposed upon a plaintiff to establish the falsity of a defamatory statement did not apply to all plaintiffs in all defamation actions but only in certain actions. The exception in this regard was based on two alternative formulations as the following excerpt indicates:

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[1] Section 39(2) of the Constitution provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

> "7. It is inconsistent with s 16 of the Constitution to permit a plaintiff to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to the fitness of a public official for public office, alternatively to the fitness of a politician for public office, in circumstances where that plaintiff does not allege and prove the falsity of the statement in question.
> Alternatively to paragrapgh7 above
> 8. It is inconsistent with s 16 of the Constitution to permit a politician, alternatively a public official, to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively to his fitness for public office, in circumstances where he does not allege and prove the falsity of the statement in question."

The exception averred therefore that the particulars were excipiable either because the defamatory statement in question relates to matters of public interest or importance or concerns the fitness of a politician for public office; or because the plaintiff is a politician or public official and the defamatory statement relates to matters of public importance or interest.

[4] The exception crisply raised the question whether the common law of defamation as developed by our courts is inconsistent with the Constitution. In particular, it raised the question whether, to the extent that the law of defamation does not require a plaintiff in a defamation action to plead that the defamatory statement is false in any circumstances, the law limits unjustifiably the right to freedom of expression as enshrined in section 16 of the Constitution. The applicants are therefore asserting that the elements of the law of defamation in South Africa should, in certain circumstances, include a requirement that the defamatory statement be false. The applicants are therefore asserting that the right of freedom of expression in section 16 is

directly applicable in this case despite the fact that the litigation does not involve the state nor any organ of state. This is a matter which will be considered later in this judgment.

[5] Van der Westhuizen J in the High Court, having considered the matter fully, dismissed the exception,[2] holding himself bound by the decision of the Supreme Court of Appeal in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA); 1999 (1) BCLR 1 (SCA). Prior to instituting an application for leave to appeal directly to this Court against the dismissal of the exception, the applicants then sought and were granted a certificate from the High Court. The respondent opposed their application for leave to appeal.

Application for leave to appeal to this Court: Is the dismissal of an exception appealable?

[2] His decision is reported as *Holomisa v Khumalo and Others* 2002 (3) SA 38 (T).

[6] It was common cause between the parties that the decision by the High Court was not one which could be appealed to the Supreme Court of Appeal. Appeals to that Court are governed, amongst other provisions, by section 168(3) of the Constitution and sections 20(1) and 21(1) of the Supreme Court Act 59 of 1959. The Supreme Court of Appeal has held that these provisions mean that appeals will lie against decisions which have the following three attributes: they must be final in effect and not susceptible of alteration by the court of first instance; they must be definitive in some respect of the rights of the parties; and they must have the effect of disposing of a substantial portion of the relief claimed.[3] Applying these criteria, the High Court held that where an exception which avers that a pleading does not disclose a cause of action or defence is upheld, an appeal will lie because the success of such an exception will result in the failure of the relevant cause of action or defence. However, where an exception is not upheld, an appeal will not lie because it does not meet the criteria enumerated above.[4] In a recent case, the Supreme Court of Appeal has pertinently declined to reconsider the question of the appealability of decisions dismissing exceptions.[5]

[7] The question as to what decisions may be appealed to this Court is governed by section 167(6) of the Constitution and the rules of this Court. Section 167(6) provides that:

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3 See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J - 533A; *Trakman NO v Livshitz and Others* 1995 (1) SA 282 (A) at 289B - 290C; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7J - 8D; and *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 301B-D.

4 See *Steytler NO v Fitzgerald* 1911 AD 295; *Blaauwbosch Diamonds, Ltd. v Union Government (Minister of Finance)* 1915 AD 599 at 602; *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 832J - 833D; *Kett v Afro Adventures (Pty) Ltd and Another* 1997 (1) SA 62 (A) at 65G-H; and *Minister of Safety and Security and Another v Hamilton* 2001 (3) SA 50 (SCA) at 52B - 53E.

5 *Hamilton* ibid at 53E.

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
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> (a) to bring a matter directly to the Constitutional Court; or
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> (b) to appeal directly to the Constitutional Court from any other court."[6]

Appeals are governed by rules 18, 19 and 20 of the rules of this Court. The relevant rule for the purposes of this case is rule 18 which provides that:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal directly to the Constitutional Court where *a decision on a constitutional matter*, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court other than the Supreme Court of Appeal . . ." (my emphasis).

The question whether an appeal may lie to this Court against the dismissal of an exception by a High Court then depends on whether such dismissal constitutes a "decision on a constitutional matter" as contemplated by rule 18 and, if it does, whether it is "in the interests of justice" — the standard set by section 167(6) of the Constitution — for this Court to hear the appeal.

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[6] Section 16 of the Constitutional Court Complementary Act 13 of 1995 provides that the rules shall regulate access to the Court.

[8] Although it could be argued that the word "decision" in rule 18 should be given a meaning equivalent to the meaning given to the words "judgment or order" in section 20(1) of the Supreme Court Act by the Supreme Court of Appeal, this would not be appropriate. The Constitution intends that the interests of justice (coupled with leave of this Court) be the determinative criterion for deciding when appeals should be entertained by this Court. This Court has already developed guiding principles to interpret the phrase.[7] Were the Court to adopt a restricted meaning of "decision" in rule 18 in the light of a range of policy considerations relevant to determining when a matter should be the subject of an appeal, it would be adopting a test different to that proclaimed by the Constitution. All the considerations which have led the Supreme Court of Appeal to adopt a limited interpretation of the words "judgment or order" as contemplated by section 20 of the Supreme Court Act can be accommodated in the "interests of justice" criterion. Thus, it will often not be in the interests of justice for this Court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties.

[9] The question to be considered then is whether the order made by Van der Westhuizen J on 8 December 2000 dismissing the exception raised by the applicants constitutes a "decision on a constitutional matter". The exception was squarely based on the applicants' constitutional right to freedom of expression, and it raised the question of whether the common law of defamation is an unjustifiable limitation of those rights. In considering and then dismissing the applicants'

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[7] See, for example, *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10; and *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) at paras 15-19.

contentions, the judge was clearly concerned with a constitutional matter and his order constitutes a decision on such a matter as contemplated by rule 18.

[10] The next question is whether it is in the interests of justice for leave to be granted to the applicants to appeal against the order dismissing the exception before the trial had started. In answering this question, it is necessary to take into account, amongst other things, the following considerations: the nature of the exception and, in particular, the effect that upholding the exception may have upon the trial proceedings in the High Court; the extent to which the exception raises the question of the development of the common law in which case a decision by the Supreme Court of Appeal on the matter may be desirable before the case is heard by this Court;[8] whether the matter is appealable to the Supreme Court of Appeal; the stage of the proceedings in the High Court; the importance of a determination of the constitutional issues raised by the exception; and the applicants' prospects of success upon appeal.[9]

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8 See *De Freitas and Another v Society of Advocates of Natal (Natal Law Society intervening)* 1998 (11) BCLR 1345 (CC) at para 23; and *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 35.

9 See *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 44; *MEC for Development Planning and Local Government* above n 7 at para 32.

[11] Were the exception to be upheld by this Court on appeal, the effect would be to require the respondent to amend his particulars of claim to include an allegation that the defamatory statement in question was false. The respondent would then bear the onus of establishing that the defamatory statement was false and would have to prove it in the trial. Were the appeal to be dismissed, however, the respondent would not have to aver or prove that the defamatory statement was false and it would be for the applicants to prove its truth or the reasonableness of their having published it. The outcome of the appeal on the exception, therefore, will be determinative of the manner in which the trial is conducted in the High Court.

[12] In support of their application for leave to appeal, the applicants have lodged an affidavit by their attorney asserting that if the appeal on the exception were not to be heard now, it may well result in their deciding to settle the respondent's claim rather than defending the defamation action. In particular, they state that the defence of reasonableness now available to the media under the common law of defamation is still undeveloped and as such poses an inhibition upon defendants in defamation actions from pursuing a defence. This consideration carries no weight in determining what constitutes the interests of justice in any case. Defendants can hardly be heard to say that they would like to see further developments in the common law to protect their rights because they are unwilling to rely on existing rules which may provide protection, but which they are unwilling to pursue.

[13] Although it is clear that the exception in issue does raise the question of the development of the common law, upon which it would ordinarily be desirable to have a decision of the

Supreme Court of Appeal prior to it being heard by this Court, this is a matter which cannot go to the Supreme Court of Appeal at this stage of the proceedings, as is clear from para 6 above. Be that as it may, the fact that the Supreme Court of Appeal would not entertain an appeal in this matter cannot operate as a bar to this Court hearing the appeal: it is merely a factor relevant to determining the overall interests of justice. Moreover, the Supreme Court of Appeal has recently reviewed the law of defamation in *Bogoshi*'s case.[10] In that case, the Court developed the common law in a manner which it held to be consistent with the provisions of the interim Constitution. Although there are textual differences between the interim Constitution and the 1996 Constitution, they are not material to this case. It is therefore doubtful that the Supreme Court of Appeal would have reconsidered its judgment in *Bogoshi* in this case. In these circumstances, therefore, the fact that this matter has not been considered by the Supreme Court of Appeal is not an impediment to our hearing the matter.

[14] A further consideration relevant to the interests of justice is the question of the public interest in a determination of the constitutional issue. The applicants have argued that there is a significant public interest in the determination of the issue on the grounds that the daily business of the media, both print and electronic, are affected by the current law of defamation. They are faced regularly with difficult decisions as to what material to publish and what not. Those decisions are materially affected by the law of defamation. Accordingly, they argued, there was a great public interest in obtaining a judgment on the issue raised in the exception.

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10 *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA); 1999 (1) BCLR 1 (SCA). Page references in this judgment are to the South African Law Reports.

[15] Lastly, an often determinative consideration for the purposes of determining the interests of justice, is the question whether the applicants for leave to appeal have reasonable prospects of success in the appeal. In this regard, rule 18 requires the judge in the court below to provide a certificate stating, amongst other things, whether he or she thinks "that there is a reasonable prospect that the [Constitutional] Court will reverse or materially alter the judgment if permission to bring the appeal is given". Van der Westhuizen J issued a certificate signifying that there was a reasonable prospect that this Court might reverse or alter his order.

[16] The extent to which the Constitution requires a development of the law of defamation is a question which has been frequently asked. The issue was raised but not answered in an early decision of this Court *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) and has been considered in a considerable number of High Court judgments since.[11] It is also a matter which has received the attention of the Supreme Court of Appeal in *National Media Ltd v Bogoshi*[12] and has also troubled courts in many other jurisdictions. In all these circumstances, therefore, it seems that it would be in the interests of justice for this Court to consider the appeal. The application for leave to appeal is therefore granted (though to avoid confusion I shall continue to refer to the appellants as applicants).

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[11] See, for example, *Mandela v Falati* 1995 (1) SA 251 (W); 1994 (4) BCLR 1 (W); *Government of the Republic of South Africa v "Sunday Times" Newspapers* 1995 (2) SA 221 (T); 1995 (2) BCLR 182 (T); *Gardener v Whitaker* 1995 (2) SA 672 (E); 1994 (5) BCLR 19 (E); *Bogoshi v National Media Ltd* 1996 (3) SA 78 (W); *McNally v M & G Media (Pty) Ltd and Others* 1997 (4) SA 267 (W); 1997 (6) BCLR 818 (W); *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W); and *Hall v Welz and Others* 1996 (4) SA 1070 (C).

The common law of defamation in South Africa

[17] The law of defamation in South Africa is based on the actio injuriarum, a flexible remedy arising from Roman Law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another.[13] One of those personality rights, is the right to reputation or fama, and it is this aspect of personality rights that was protected by the law of defamation.

[18] At common law, the elements of the delict of defamation are –

(a) the wrongful and

(b) intentional

(c) publication of

(d) a defamatory statement

(e) concerning the plaintiff.

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12 Above n 10.

13 See the full and illuminating discussion in *Holomisa v Argus Newspapers Ltd* above n 11 at 599-601. See also J Burchell *The Law of Defamation in South Africa* (Juta, Kenwyn 1985); J Neethling, JM Potgieter and PJ Visser *Law of Delict* 2 ed (Butterworths, Durban 1994); and J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (Juta, Kenwyn 1998) at 133ff.

It is not an element of the delict in common law that the statement be false.[14] Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention.[15] Although not a closed list,[16] the most commonly raised defences to rebut unlawfulness are that

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14 See the recent restatement of this in *Bogoshi* above n 10 at 1218 E-F where Hefer JA held: "I should add that the falsity of a defamatory statement is not an element of the delict, but that its truth may be an important factor in deciding the legality of its publication. I find it difficult to see why (as was held in *Holomisa*) a plaintiff should, as part of his claim, allege and prove something that the defendant may rely upon in justification."

15 See *Borgin v De Villiers* 1980 (3) SA 556 (A).

16 In *Bogoshi* above n 10, Hefer JA observed as follows: ". . . it is hardly necessary to add that the defences

the publication was true and in the public benefit;[17] that the publication constituted fair comment[18] and that the publication was made on a privileged occasion.[19] Most recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*.[20] In that case, Hefer JA, after a careful analysis of the development of

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available to a defendant in a defamation action do not constitute a *numerus clausus.* In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community. In accordance with this criterion Rumpff CJ indicated in *O'Malley*'s case [*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A)] at 402*fin*–403A that it is the task of the Court to determine in each case whether public and legal policy requires the particular publication to be regarded as lawful." (at 1204 D-E). It should be emphasised that the court's perception of the legal convictions of the community as a test for determining wrongfulness in delict might well have to be reconsidered in the context of our new constitutional order. See *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 56.

17 See *M'Pherson v Daniels* (1829) 10 B&C 263; *Sutter v Brown* 1926 AD 155; *Johnson v Rand Daily Mail* 1928 AD 190; *Caxton Ltd and Others v Reeva Forman and Another (Pty) Ltd* 1990 (3) SA 547 (A); and *Kemp and Another v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E).

18 See *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A); and *Johnson v Beckett and Another* 1992 (1) SA 762 (A).

19 Privilege can either be an absolute privilege or a qualified privilege. See *May v Udwin* 1981 (1) SA 1 (A).

20 Above n 10.

a similar defence in Australia, England and the Netherlands, held that:

> ". . . the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.
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> In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318 C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper." (at 1212G - 1213A).

[19] This fourth defence for rebutting unlawfulness, therefore, allows media defendants to establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances.

[20] In *Bogoshi*, too, the question of the rebuttal of intention was considered. One of the aspects of animus injuriandi (the intention to cause injury) is subjective intent which, amongst other things, requires the person who made the defamatory statement to have been "conscious of the wrongful character of his act".[21] In 1982, the Appellate Division held that the mass media

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[21] See *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840 E-G.

could not avoid liability for the publication of a defamatory statement by relying on a defence that the publication was not intentionally injurious.[22] The effect of this decision was to impose strict liability upon the media for the unlawful publication of defamatory material. In *Bogoshi*, the Supreme Court of Appeal overruled this decision.[23] Hefer JA held that the Court in *Pakendorf*'s case had failed to recognise the importance of freedom of expression and, in particular, the important role the mass media perform in a democratic society. He concluded that:

> "If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*." (at 1210).

Hefer JA then considered whether media defendants should be permitted to rebut the presumption of intentional harm by establishing a lack of knowledge of wrongfulness, even where that lack of knowledge was as a result of the negligence of the defendant. He concluded that they should not, reasoning as follows:

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22 See *Pakendorf and Others v De Flamingh* 1982 (3) SA 146 (A). See also the earlier discussion in *SAUK v O'Malley* above n 16.

23 Above n 10 at 1211B-C.

> "If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths. In practical terms (because intoxication, insanity, provocation and jest could hardly arise in the present context) the defence of the lack of *animus injuriandi* is concerned with ignorance or mistake on the part of the defendant regarding one or other element of the delict. . . . The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication. In such a case a defence of absence of *animus injuriandi* can plainly not be available to the defendant.
> Defendants' counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi,* and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case." (at 1214C-F).

Hefer JA therefore concluded that media defendants could not escape liability merely by establishing an absence of knowledge of unlawfulness. They would in addition have to establish that they were not negligent.

Freedom of expression

[21] Having sketched the principles of the common law of defamation, it is now necessary to consider section 16 of the Constitution. It is this provision upon which the applicants rely to assert that the existing common law rules are inconsistent with the Constitution. Section 16 provides that:

> "(1) Everyone has the right to freedom of expression, which includes –
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by this Court,[24] and other South African courts.[25] Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

[22] The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to

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24 See, for example, *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC)*;* 1999 (6) BCLR 615 (CC) at para 7; *S v Mamabolo (E TV and Others Intervening)* 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC) at para 37; and *Islamic Unity Convention* above n 7 at paras 25-30.

25 See, for example, *Bogoshi* above n 10 at 1207I - 1208F; *Holomisa v Argus Newspapers Ltd* above n 11 at

be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia:

608G - 609B; and the judgment in the court below, *Holomisa v Khumalo* above n 2 at 61E-G.

> ". . . the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media."[26]

The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

[23] Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.[27] As Joffe J said in *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A:

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26 *Theophanous v Herald & Weekly Times Ltd and Another* (1994) 124 ALR 1 at 61.

27 Section 1 of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state found on the following values:
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> . . . .
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

See also s 36 of the Constitution.

> "It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . . It must advance the communication between the governed and those who govern."

[24] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.

[25] However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.[28]

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[28] See the discussion in *Mamabolo* above n 24 at paras 40-1.

The constitutional value of human dignity

[26] It has long been recognised in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name. As Corbett CJ said:

> "I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (ie truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory."[29]

Under our new constitutional order, the recognition and protection of human dignity is a foundational constitutional value.[30] As this Court held in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35:

> "The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of

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29 See *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 25 B-E.

30 Section 1 of the Constitution.

levels."[31]

[31] See also *President of the RSA and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 17-32 and paras 120-9.

[27] In the context of the actio injuriarum, our common law has separated the causes of action for claims for injuries to reputation (fama) and dignitas. Dignitas concerns the individual's own sense of self worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order.[32] The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion.[33] This right serves to

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32 See *National Coalition* ibid at para 30: "The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy."

33 See *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC); and *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC).

foster human dignity. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution. No argument was addressed to this Court on the relevance of the right to privacy to this case and I shall not consider it further.

[28] The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.

"Horizontal application" of section 16

[29] The applicants' exception relies directly on section 16 of the Constitution, despite the fact that none of the parties to the defamation action is the state, or any organ of state. Section 8 of the Constitution provides that:

> "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
>
> > (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to

> that right; and
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

[30] The applicants argued that because, in terms of section 8(1), the Bill of Rights applies to all law and binds the judiciary, section 16 must be interpreted to have direct application to the common law of defamation. The applicants observed that in this regard the provisions of the 1996 Constitution were distinguishable from the provisions of the interim Constitution in which the provisions of the Bill of Rights were not directly binding on the judiciary.[34] Accordingly, they argued that the conclusion of the majority of this Court in *Du Plessis and Others v De Klerk and Another*,[35] that the right to freedom of expression in that Constitution could have no direct application in a defamation action to which the state was not a party, was no longer applicable. In that case, the Court held that although the interim Constitution did not directly apply to the common law, the principles of common law would nevertheless have to be applied and developed by courts "with due regard to the spirit, purport and objects" of the Bill of Rights in that Constitution.

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34 See section 7(1) of the interim Constitution.

35 *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 43-7.

[31] The applicants' argument cannot succeed. It is clear from sections 8(1) and (2) of the Constitution that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8(1) binds the legislature, executive, judiciary and all organs of state without qualification to the terms of the Bill of Rights. Section 8(2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights "to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".[36] Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right. Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of section 8(3)(b).

[32] Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.

[33] In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of

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[36] See the similar line of reasoning in *Du Plessis v De Klerk* ibid at para 42-9.

defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution.

[34] The next question is whether, to the extent that the common law does not require as an element of the delict of defamation in any circumstances that a defamatory statement be false, and leaves the question of truth to be raised only as an aspect of a defence, it is inconsistent with the Bill of Rights as directly applicable.

Is the common law inconsistent with the Constitution?

[35] The applicants argued that to the extent that the common law of defamation does not require a plaintiff to allege and prove the falsity of a defamatory statement, it is inconsistent with the Constitution. There can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements. As Cory J observed in the Canadian case, *Hill v Church of Scientology of Toronto*:

> "False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free

and democratic society."[37]

Similarly, no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation.

[36] To the extent, therefore, that the common law of defamation permits a plaintiff to recover damages for a defamatory statement without establishing the falsity of the defamatory statement, it does not directly protect a powerful constitutional freedom of expression interest, for there is no powerful interest in falsehood. Nor does it provide necessary protection for the constitutional value of human dignity. For, in the main, a person's interest in their reputation can only further constitutional values if that reputation is a true reflection of their character.[38]

[37] However, the common law delict of defamation does not disregard truth entirely. It remains relevant to the establishment of one of the defences going to unlawfulness, that is, truth in the public benefit. The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit. The burden of

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37 *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106. See also the decision of the German Bundesverfassungsgericht in 54 BVerfGE 208 (1980) (the *Böll* case).

38 However, it has long been recognised that past mistakes should not be raked up after a long period of time has elapsed. See *Graham v Ker* (1892) 9 SC 185.

proving truth thus falls on the defendant.

[38] In considering the constitutionality of this rule, it must be realised that it is often difficult, and sometimes impossible, to determine the truth or falsity of a particular statement. As Stevens J noted in a dissenting judgment in the United States Supreme Court in *Philadelphia Newspapers, Inc v Hepps* (1985) 475 US 767 at 785-6:

> "The danger of deliberate defamation by reference to unprovable facts is not merely a speculative or hypothetical concern. Lack of knowledge about third parties, the loss of critical records, an uncertain recollection about events that occurred long ago, perhaps during a period of special stress, the absence of eyewitnesses – a host of factors – may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends or his business associates."

In not requiring a plaintiff to establish falsity, but in leaving the allegation and proof of falsity to a defendant to a defamation charge, the common law chooses to let the risk lie on defendants. After all, it is by definition the defendant who published the statement and thereby caused the harm to the plaintiff.

[39] The difficulty of proving the truth or otherwise of defamatory statements, and the common-law rule which lets the risk of the failure to establish truth lie on defendants, in the absence of a defence of reasonable publication, does cause "a chilling effect" on the publication of information. A publisher will think twice before publishing a defamatory statement where it may be difficult or impossible to prove the truth of that statement and where no other defence to defamation would be available. As Lord Keith said in *Derbyshire County Council v Times*

Newspapers[39] –

> "What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts that would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."

But this chilling effect is reduced considerably by the defence of reasonable publication established in *Bogoshi*'s case. For it permits a publisher who is uncertain of proving the truth of a defamatory statement, nevertheless to publish where he or she can establish that it is reasonable.

[40] In seeking to assert that the common law rule was inconsistent with the Constitution, the applicants relied upon the United States Supreme Court decision *New York Times Co. v Sullivan* (1964) 376 US 254 at 279-80 in which Brennan J held:

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even

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39 *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011 (HL) at 1018. See also Mason CJ's observation in the Australian High Court case of *Theophanous* above n 26 at 19-20.

> courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (footnote omitted).

In that case, the United States Supreme Court thus established a principle that for public figures to succeed in defamation actions they need to establish not only that a false defamatory statement has been published concerning them, but that it was published with "actual malice". This decision represents the high-water mark of foreign jurisprudence protecting the freedom of speech and many jurisdictions have declined to follow it.[40] It should be noted that the applicants do not assert the "actual malice" standard in this case. They only rely on the case to the extent that it imposes an obligation on the plaintiff to

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40 For Canadian cases rejecting the approach, see *Hill* above n 37; *R v Keegstra* (1990) 3 CRR (2d) 193; *Committee for Commonwealth of Canada v Canada* (1991) 4 CRR (2d) 60; and *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* (1991) 6 CRR (2d) 298. In the United Kingdom, the "actual malice" standard has also been rejected. See *Derbyshire County Council* above n 39; *Reynolds v Times Newspapers Ltd and Others* [1999] 4 All ER 609 (HL); and *Berezovsky v Michaels and Others; Glouchkov v Michaels and Others* [2000] 2 All ER 986 (HL). The rule was also criticised in the United Kingdom Report of the Committee on Defamation (the Faulks Committee Report) (1975) and the Irish Law Reform Commission's Report on the Civil Law of Defamation (the Keane Final Report) (1991). Similarly, in Australia the rule was rejected in *Theophanous* above n 26 and by the Australian Law Reform Commission's Report No. 11 "Unfair Publication: Defamation and Privacy" (the Kirby Committee Report) (1979). (See the discussion in *Hill* above n 37 at para 136.) In Germany, too, the Bundesverfassungsgericht has adopted a test different to that established in *Sullivan*. Their test seeks to establish an appropriate balance between the rights of human dignity and freedom of expression. See 7 BVerfGE 198 (1958) (the *Lüth* case); 30 BVerfGE 173 (1971) (the *Mephisto* case) and the discussion thereof in BS Markesinis *The German Law of Torts: A Comparative Introduction* 3 ed (Clarendon, Oxford 1994) at 352ff and DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke, London 1997) at 423ff.

establish that the defamatory article was false.

[41] In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the Constitution, sight must not be lost of other constitutional values and in particular, the value of human dignity. To succeed, the applicants need to show that the balance struck by the common law, in excluding from the elements of the delict a requirement that the defamatory statement published be false, an appropriate balance has been struck between the freedom of expression, on the one hand, and the value of human dignity on the other.

[42] Although the applicants are right when they contend that individuals can assert no strong constitutional interest in protecting their reputations against the publication of truthful but damaging statements, the applicants can also not show that publishers have a strong constitutional speech interest in the publication of false material. At the heart of the constitutional dispute lies the difficulty of establishing the truth or falsehood of defamatory statements. Burdening either plaintiffs or defendants with the onus of proving a statement to be true or false, in circumstances where proof one way or the other is impossible, therefore results in a zero-sum game. Either plaintiffs will benefit from the difficulties of proof, as happened previously under common law rules; or defendants will win, as the applicants propose.[41] Such a

41 For a discussion of the effect of burdens of proof in civil law as they relate to the right to equality, see *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 37-8 (per Ackermann, O'Regan and Sachs JJ) and paras 55-6 (per Didcott J).

zero-sum result, in whomsoever's favour, fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and human dignity.

[43] Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi*'s case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result. However, the defence of reasonableness developed in that case does avoid a zero-sum result and strikes a balance between the constitutional interests of plaintiffs and defendants. It permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if a publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable. In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defence of reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.

[44] It is true, as the applicants assert, that the effect of excluding the falsity of a defamatory

statement as an element of the delict of defamation will mean that from time to time a plaintiff may succeed in a defamation claim even when a defamatory statement was in fact false. In this regard, however, we cannot disregard the fact that it is the defendant who publishes the defamatory statement and who therefore causes any damage. So it will only be where defendants establish neither that the statement was true and its publication in the public interest, nor that the publication was reasonable in all the circumstances, that they will be held delictually liable. This outcome does not unduly burden defendants. Contrarily, to hold as the applicants argued, that plaintiffs may never succeed unless they can establish that a defamatory statement was false would clearly put plaintiffs at risk. It would destabilise the careful balance struck between plaintiffs' and defendants' interests achieved by the Supreme Court of Appeal's development of a defence of reasonable publication.

[45] In the circumstances, the applicants have not shown that the common law as currently developed is inconsistent with the provisions of the Constitution and their appeal must fail.

[46] This case did not involve the state or an organ of state. It was a dispute between private parties. The applicants have failed in the appeal and, in the circumstances, it is fair that the respondent should be awarded costs.

Order

[47] The following order is made:

1. The application for leave to appeal is granted.

2. The appeal is dismissed and the applicants are ordered to pay the costs including the costs of the application for leave to appeal.

Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, Sachs J and Skweyiya AJ concur in the judgment of O'Regan J.

For the applicants: GJ Marcus SC and M Chaskalson instructed by Webber Wentzel Bowens, Johannesburg.

For the respondent: F Bezuidenhout instructed by Dyason Incorporated, Pretoria.