



## CONSTITUTIONAL COURT OF SOUTH AFRICA

*Reddell and Others v Mineral Sands Resources (Pty) Limited and Others*

CCT 67/21

**Date of judgment: 14 November 2022**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Monday, 14 November 2022 at 10h00, the Constitutional Court handed down judgement in two applications for leave to appeal against the judgement and order of the High Court of South Africa, Western Cape Division (High Court). The main proceedings in the High Court concern the alleged defamation of two mining companies and their office bearers, by a group of environmental activists and lawyers. The mining companies are Mineral Sands Resources (Pty) Limited and Mineral Commodities Limited, joined in these proceedings by two of their office bearers, Mr Zamble Qunya and Mr Mark Victor Caruso. In the interests of brevity, these parties are collectively referred to as “the Mining Companies”. The environmental activists are Ms Christine Reddell, Ms Tracey Davies, Ms Davine Cloete, Mr Mzamo Dlamini, Mr Cormac Cullinan and Mr John Gerard Ingram Clarke. In the interests of brevity again, these parties are collectively referred to as “the Activists”.

Both matters before this Court arose from three consolidated actions in the High Court, in terms of which the Mining Companies issued summons against the Activists for defamation. The claims were based on the Activists’ critique of the Mining Companies’ operations and activities in the Tormin and Xolobeni Minerals Sands Projects, on various mediums and platforms. The Mining Companies sought several awards from the High Court against the Activists, for general damages, in the sum of R14 million.

In the High Court, the Activists raised two special pleas. The first is the Strategic Litigation Against Public Participation (SLAPP) suit special plea and the second is the corporate defamation special plea. The Mining Companies raised exceptions to both special pleas on the ground that they do not disclose a proper defence in law. This matter, being case CCT 67/21, was an appeal against the High Court’s upholding of the Mining Companies’ exception raised against the Activists’ corporate defamation special plea, where it held that the corporate defamation special plea failed to disclose a proper defence to a claim for defamation. Case CCT 66/21 concerned an appeal against the High Court’s dismissal of the Mining Companies’ exception raised against the Activists’ SLAPP suit special plea, where it was held that such a defence was competent. These

appeals arose from the same proceedings in the High Court, and concerned much the same factual background, and so were consolidated for the purposes of hearing in this Court. However, because they raise separate legal issues and debates and they have been dealt with in separate judgments, this Media Summary relates only to the corporate defamation special plea under CCT 67/21.

Before the Constitutional Court, the Activists submitted that the High Court erred in holding that a for-profit company may claim general damages in a defamation claim, where the for-profit company does not allege or prove that: (a) the statements complained of are false; (b) the false statements were made wilfully; and (c) that the for-profit company suffered patrimonial loss as a result thereof. They submitted that if the common law allows for-profit companies to succeed in a defamation claim for general damages without meeting these requirements, it is unconstitutional. This position was abandoned at the hearing and the Activists only persisted with their alternative claim on the constitutionality of awarding general damages to trading corporations in defamation cases. In this alternative and only claim pursued by the Activists once the main claim was abandoned, the Activists submitted that the current common-law position as set out in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) (*SA Taxi*) was incorrectly decided and that, in accordance with sections 8(3) and 39(2) of the Constitution, the common law falls to be developed to resolve this violation of the right to freedom of expression.

This is so, submitted the Activists, because allowing defamation claims for general damages imposes significant restrictions on the right to freedom of expression contained in the Constitution. This is constitutionally permissible in the case of plaintiffs who are natural persons and who bear the constitutional right to human dignity. They submitted that for-profit companies are not the bearers of the constitutional right to human dignity and, moreover, the interest of for-profit companies in their reputation is a purely financial interest. The Activists argued that for-profit companies have no intrinsic value in need of protection.

The Mining Companies, on the other hand, argued that the approach proposed by the Activists would push the pendulum way too far against businesses operating as juristic persons and will make our country business-unfriendly for both locals and potential investors from other countries. In essence, the Mining Companies argued that narrowly defined human dignity is not the only basis on which freedom of expression can be limited. Reputation or *fama* similarly justifies the limitation of the right to freedom of expression. The Activists appear to accept that for-profit companies have a reputation worthy of protection. The Mining Companies therefore submit that in light of the fact that a for-profit company has reputation worthy of protection, it may claim general damages under a defamation claim.

They went on to argue that the interest a for-profit company has in its reputation cannot always be vindicated by an action for special damages. The impact a company's reputation has on its bottom line may be intangible. It cannot always be measured in rands and cents. To permit companies to sue to vindicate their reputations only where they can prove financial loss will, in some instances, rob them of a remedy altogether. The Mining Companies further raised the public interest in protecting the viability of companies for the benefit of employees, consumers and shareholders but also for the wider economic good. The Mining Companies therefore questioned the reliance on the narrowly defined human dignity by the Activists. They questioned where this distinction would leave for example, a charity-orientated non-profit company, which has no financial interest, but similarly no dignity. They similarly raised this point regarding small for-profit companies where the proprietor's reputation and self-worth may be bound up in the reputation of his company, for example, an attorneys' practice.

The first judgment (majority), penned by Majiedt J (Madlanga J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J and Tshiqi J concurring) found that the Court's constitutional jurisdiction was plainly engaged as the matter concerns the balance to be struck between the right to freedom of expression in section 16 of the Constitution and a trading corporation's right to its reputation. In addition, the application

raises important issues as to the development of the common law in accordance with sections 8(3) and 39(2) of the Constitution. Furthermore, the questions posed in this application raise arguable points of law of general public importance, particularly considering the two divergent judgments in *SA Taxi* as to the appropriateness of awarding general damages to trading corporations in defamation cases. Additionally, the ancillary question of the applicability of the right to human dignity to trading corporations bears consideration. On the question of granting leave to appeal directly to the Constitutional Court, the first judgment found that in light of the Supreme Court of Appeal having already decided the central question in issue in the case of *SA Taxi* and that the Supreme Court of Appeal would be bound by its own decision, the interests of justice require the Constitutional Court to finally determine the matter.

On the merits, the first judgment sets out the current state of our law of defamation. In so doing, the first judgment confirmed the historical right of a trading corporation to sue for defamation under the *actio injuriarum*. Thereafter, the first judgment explored the source of a trading corporation's right to reputation. In this vein, and following on from the Constitutional Court's jurisprudence in *Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) and *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC); 2013 (2) SACR 443 (CC), the first judgment held that a trading corporation's reputational rights are sourced in the common law and not section 10 of the Constitution, which is headed "human dignity". In this regard, the first judgment found the majority decision in *SA Taxi* to have been incorrect in finding that a corporate entity has a constitutional right to dignity. In sum, the first judgment found the majority judgment in *SA Taxi* to be wrong in its reasoning that undergirds the finding that a trading corporation has a claim for general damages in defamation, based on the constitutional right to dignity. In considering whether a trading corporation ought to be awarded general damages for defamation, the first judgment recognised that although a trading corporation has no feelings, dignity or sense of self-worth which can be harmed, it has an objective external interest, in its right to reputation and a good name.

In reaching its conclusion that the award of general damages for the defamation of a trading corporation limits the right to freedom of expression in section 16 of the Constitution, the first judgment had to consider whether such an award passes constitutional muster by way of a section 36 analysis. The first judgment emphasised the importance of the role of freedom of expression in a constitutional democracy such as South Africa. Thereafter, the first judgment pointed out that the importance of the purpose of the limitation is low in light of the fact that a trading corporation's reputation rights are not sourced in the Constitution and are, at best, only enjoyed objectively. Regarding the nature and extent of the limitation, the first judgment concluded that awards of general damages for defamation, particularly in substantial amounts, tend to have a chilling effect on free speech. General damages, in contrast to alternative remedies like patrimonial damages, undoubtedly constitute a severe limitation on the right to freedom of expression. In considering the rational connection between the purpose and the limitation, the first judgment held that our law has consistently justified general damages with respect to the dignity of a plaintiff as a means to assuage their sense of self-worth. There is only a very nebulous connection between a general damages defamation suit and protecting a trading corporation's bottom line. Importantly, the first judgment concluded that there are, in any event, less restrictive means available to achieve the vindication of a trading corporation's reputation where the speech is of the nature that it is considered important for public participation, as opposed to the unjustified drastic restriction of the right to freedom of expression that an unqualified award for general damages entails. These less restrictive means include: seeking an interdict, a declarator, a retraction, or an apology.

In light of this conclusion, the first judgment found that the awarding of general damages must have regard to whether the defamation forms part of public discourse on issues of public interest. This is a pertinent factor that must bear consideration. Where the defamatory statements are made in the course of such public discourse on issues of legitimate public interest, general damages may not be considered. Where the defamation does not form part of the abovementioned public discourse, the extent of general damages would axiomatically be determined on a fact-based approach from case to case. Imposing this qualification for the awarding of general damages would afford courts a discretion to weigh up the many different factual circumstances in which defamatory speech arises. Gratuitous defamation of a private corporation upon a matter of no public interest should generally justify compensation for non-patrimonial harm. Conversely, where there are issues of public interest the award is not warranted because of the potential of suppressing important public debate in matters of public interest. Self-evidently, a court exercising a discretion in these instances would do so judicially, with a weighing up of all relevant facts and factors.

In sum, the first judgment concluded that the limitation is unjustified and, absent the qualification proposed, does not bear constitutional scrutiny in terms of section 36. In imposing this qualification, we would be giving recognition to the value of free speech on matters of public discourse of genuine public interest, without doing so via a blanket exclusion of general damages to trading corporations. It is a less restrictive means of vindicating a juristic person's reputation. In the result, the majority granted leave to appeal directly to the Constitutional Court. It upheld the appeal to the extent that it is declared that, save for where the speech forms part of public discourse on issues of public interest, and at the discretion of the court, trading corporations can claim general damages for defamation. As to costs, the majority held that, since both parties have attained some measure of success, there should be no order as to costs, as both are private parties engaged in this litigation.

The second judgment (minority), penned by Unterhalter AJ (Kollapen J concurring) agreed with the first judgment that a trading corporation has a right to protect its reputation and can institute the *actio iniurarum* to protect this right. Furthermore, it also agreed that a trading corporation may claim general damages under the *actio iniurarum*. However, the second judgment disagreed with the first judgment that where a trading corporation has been unlawfully defamed and claims general damages, the court has a discretion to determine whether to award general damages. And that where the defamatory speech forms part of public discourse on issues of legitimate debate, a court would incline against an award of general damages. The second judgment cautioned that there is a seductive attraction that attaches to the resolution of hard questions of law by recourse to discretionary judgments. This is an attraction to be resisted.

The second judgment specifically disagreed with the first judgment in the following respect. First, that a trading corporation has no constitutional right to dignity. Second, that the award of general damages to a trading corporation has a severe limitation on the right to freedom of expression. Third, that the factors in section 36 of the Constitution do not justify the infringement to freedom of expression, without a qualification of the entitlement of a trading corporation to general damages, because a trading corporation's right to reputation is not sourced in the Constitution.

On the first issue, the second judgment explained how the heading of section 10 of the Constitution – referencing human dignity – can be seen to create a textual obstacle and lead to an interpretation of “human dignity” as only referencing natural persons and excluding juristic persons. Such an approach would lead to an interpretation of section 10 that is contrary to the general application of section 8(4) of the Constitution. However, even if a trading corporation is not entitled to the protection of its reputation under section 10, a trading corporation still enjoys a common law right to protect its reputation. For this reason, it was unnecessary for the second judgment to make a dispositive interpretation on this score.

With respect to the second issue, the second judgment found that the common law has recognised general damages as a competent remedy for the unlawful defamation of a trading corporation. It found no basis to support the first judgment's reasoning that an award of general damages to a trading corporation poses a danger to free speech that an award of damages for patrimonial loss does not. According to the second judgment, if, at common law, reputational harm may be compensated by an award of general damages, there was no reason why this should pose some special, unjustifiable risk to freedom of expression at the instance of trading corporations that other remedies sought by trading corporations do not. The second judgment observed that it is actually damages awarded to trading corporations for patrimonial loss that may be sizeable because of the commercial scale of the enterprise, the loss of profits that may result, and the ability to quantify such loss. On the other hand, awards of general damages to trading corporations are generally modest, reflecting the different compensatory basis.

As to the third issue, the second judgment disagreed with the first judgment that a section 36 analysis did not entail an enquiry into the constitutionality of the less restrictive means. In this respect, the second judgment found that the first judgment had failed to show that the supposed less restrictive alternative remedies to general damages were indeed less restrictive means to achieve the same purpose as an award of general damages. Furthermore, it was also not evident why the award of non-patrimonial damages at the instance of a trading corporation posed a distinct and special danger to freedom of speech. According to the second judgment, there was no reason to suppose that general damages claimed by natural persons were any less inimical to freedom of speech than such a claim made by a trading corporation. It all depended upon the contingent features of a particular plaintiff and not whether the plaintiff was a trading corporation.

The second judgment further disagreed with the first judgment's findings that if general damages pose no greater deterrent to defamatory speech than any other remedies, then such damages serve no purpose and cannot be justified in terms of section 36. It found that such a finding failed to distinguish between purpose and effect. The second judgment explained that awarding general damages to a trading corporation has a legitimate purpose, namely the compensation of non-pecuniary loss by reason of reputational harm. This is a matter to be weighed in terms of section 36 as to the importance of the purpose of compensation by way of general damages. The effect of an award of general damages upon free speech, on the other hand, is a different matter.

The second judgment further observed the first judgment's query that there is no empirical evidence to prove the second judgment's position that the threat of litigation itself may deter defamatory speech. According to the second judgment, this engagement is a distraction. The issue is not what evidence best confirms what deters free speech. The issue is what is it about an award of general damages to a defamed trading corporation that poses a distinctive danger to freedom of speech that other remedies do not. According to the second judgment, the first judgment failed to demonstrate this danger and thus also failed to justify why general damages sought by a trading corporation warrant constitutional condemnation when other remedies are constitutionally permissible.

The second judgment held that these issues served as an indication that the source of constitutional difficulty in this case was not to be found at the level of remedy, but rather the substantive consideration of what defamatory speech the Constitution may require a trading corporation to suffer in the interests of public debate. It was also at this level that the applicants failed to address the Court.

First, the holding of the first judgment considers there to be a constitutional principle that would incline against the award of general damages to a trading corporation where the defendant engages upon public discourse for a legitimate purpose, but not to an unincorporated business. This amounts to presumptive exclusion and would incline to deny a claim for general damages brought by a small incorporated family business, but not to an unincorporated firm of highly paid management consultants. It gives rise to arbitrariness that is contrary to the right to equal protection in terms of section 9(1) of the Constitution.

Second, it led to the first judgment's untenable position that it is arbitrary to distinguish between different types of entities in awarding general damages, but it is justifiable to treat natural persons differently from all corporate entities. Under this principle of presumptive exclusion, natural persons who run businesses are treated differently from natural persons who do not run businesses. This approach would also exclude natural persons who undertake charitable work, but include a trust or not-for-profit company that does the same work.

The second judgment cautioned that freedom of speech must be understood within the context of the real world that is dominated by social media platforms. These platforms are the greatest means by which freedom of speech may be exercised, but are also the greatest engine for falsity. According to the second judgment, false speech (and sometimes also hateful speech) that harms another's reputation counts for little in the recognition that is due to freedom of expression and it is sometimes not protected speech to which a person may claim an unqualified right to freedom of expression. Therefore, it is not the case that the publication of defamatory speech is invariably a legitimate exercise of freedom of speech. It then follows that the right of a trading corporation to protect its reputation matters, and the common law's protection of that right must be carefully weighed.

Ultimately, the second judgment found that the correct position is not determined by casting freedom of expression as a higher order right, without more. Its status as a constitutional right does not avoid the many complexities as to when the right is engaged and how strongly it counts. For these reasons, the second judgment found that no case had been made out to show that the claim of an unlawfully defamed trading corporation to an award of general damages was constitutionally excluded, whether presumptively or otherwise. In the result, it would have dismissed the appeal with costs, including the costs of two counsel.