IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/21

WCHC case numbers: 7595/2017,
14658/2016 & 12543/2016

In the matter between:

CHRISTINE REDDELL	First Applicant
TRACEY DAVIES	Second Applicant
DAVINE CLOETE	Third Applicant
MZAMO DLAMINI	Fourth Applicant
CORMAC CULLINAN	Fifth Applicant
JOHN GERARD INGRAM CLARKE	Sixth Applicant
and	
MINERAL SANDS RESOURCES (PTY) LIMITED	First Respondent
MINERAL COMMODITIES LIMITED	Second Respondent
ZAMILE QUNYA	Third Respondent
MARK VICTOR CARUSO	Fourth Respondent

APPLICANTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1 Can a for-profit company succeed in claiming general damages in a defamation claim even though:

1.1 it does not allege or prove that the statements complained of are false;

1.2 it does not allege or prove that the false statements were made wilfully; and

1.3 it does not allege or prove that it suffered any patrimonial loss at all?

2 The plaintiffs[1] – the two mining companies and their executives suing for R14 million in general damages – say the answer is "yes".

3 The defendants[2] – the six environmental lawyers and community activists being sued – say that the answer is "no".

4 The defendants contend that where a for-profit company sues for defamation (and certainly for general damages), that company must allege and prove that:

4.1 the defamatory statement was false;

4.2 the false defamatory statement was made wilfully; and

4.3 the false defamatory statement caused the company patrimonial loss.

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1 The respondents before this Court under Case CCT 67/21.

2 The applicants for leave to appeal before this Court under Case CCT 67/21.

5 We submit 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.

5.1 Allowing defamation claims for general damages imposes significant restrictions on the right to freedom of expression contained in the Constitution.

5.2 This is constitutionally permissible in the case of plaintiffs who are natural persons. This is because they are of the bearers of the constitutional right to human dignity and the principles of defamation law strike an "appropriate balance"[3] between the competing constitutional rights to human dignity and freedom of expression.

5.3 But the situation is quite different when it comes to plaintiffs who are for-profit companies. They are not the bearers of the constitutional right to human dignity contained. Moreover, the interest of for-profit companies in their reputation is not personal and is purely financial.

5.4 In those circumstances, the Constitution demands that if a for-profit company is entitled to sue for general damages for defamation at all, it must be held to the same demanding requirements as when it sues for the delict of injurious falsehood. The for-profit company must allege and prove that the statements are false, that the false statements were made wilfully

[3] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at paras 42-3.

and that the false statements cause patrimonial loss. Absent this, its claim cannot succeed.

5.5 The current common law position, as laid down by the majority decision in *SA Taxi*,[4] does not comply with these principles. When it comes to claims for general damages for defamation, it treats for-profit companies identically to natural persons. This is unconstitutional.

5.6 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.

6 In what follows, we deal with the following issues in turn:

6.1 The background;

6.2 The present state of the common law;

6.3 The differences between for-profit companies and natural persons;

6.4 The unconstitutionality of the common law as it stands; and

6.5 Leave to appeal.

[4] *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) (*SA Taxi*).

THE BACKGROUND

7 The defendants are environmental lawyers and activists. The plaintiffs are mining companies and their executives.

8 The plaintiffs companies have brought a trio of defamation claims against the plaintiffs.[5] They are, in total, claiming R14 million from the defendants.[6]

9 The plaintiffs have never alleged that they suffered patrimonial loss because of the applicants' statements. Yet, they claim an astonishing R14 million as general damages to compensate for damage to reputation.

10 The defendants proceeded to raise two special pleas in each of the actions.[7] These prompted exceptions from the mining companies.[8]

11 The first special plea (**the SLAPP special plea**) was that the mining companies' actions were brought for the ulterior purpose of discouraging, censoring, intimidating and silencing the applicants and members of the public in relation to public criticism of the mining companies.[9]

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5 The *Reddell* matter (High Court of South Africa, Western Cape Division, Cape Town Case No. 7595 / 2017), the *Dlamini* matter (High Court of South Africa, Western Cape Division, Cape Town Case No. 14658 / 2016), and the *Clarke* matter (High Court of South Africa, Western Cape Division, Cape Town Case No. 12543 / 2016). See applicants' founding affidavit at para 14; Record: 374.

6 Applicants' Founding Affidavit at para 16; Record: 375.

7 The special plea in the *Clarke* matter is at Record: 123. The special plea in the *Dlamini* matter is at Record: 205. The special plea in the *Reddell* matter is at Record: 238.

8 The exception in the *Clarke* matter is at Record: 154. The exception in the *Dlamini* matter is at Record: 216. The exception in the *Reddell* matter is at Record: 271.

9 The SLAPP special plea in the *Clarke* matter is at Record: 123-127, paras 1-7. The SLAPP special pleas in the other matters are identical.

11.1 The mining companies raised an exception in response,[10] contending that this SLAPP special plea did not give rise to any defence in South Africa law and excepted to it.

11.2 The High Court dismissed this exception. It did so in paragraph 1 of its order. It held that the SLAPP special plea disclosed a proper defence.

11.3 The mining companies seek leave to appeal to this Court against this part of the order. That application is the subject matter of CCT 66/21 and is not addressed further in these heads of argument.

12 The second special plea (**the corporate defamation special plea**) was that the claims of the mining companies are bad in law for a different reason.[11]

12.1 The defendants first pleaded that a for-profit company has no remedy available to it in relation to defamation without alleging and proving that:[12]

12.1.1 the defamatory statements concerned are false;

12.1.2 the false defamatory statements were made wilfully; and

12.1.3 it suffered patrimonial loss arising from the defamatory statements concerned.

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[10] The exception in the *Clarke* matter is at Record: 154. The exception in the *Dlamini* matter is at Record: 216. The exception in the *Reddell* matter is at Record: 271.

[11] The corporate defamation special plea in the *Clarke* matter is at Record: 128-129, paras 8-14. The corporate defamation special pleas in the other matters are identical.

[12] See the second special plea in the *Clarke* matter at Record 128, para 10.

12.2 The defendants then pleaded, in the alternative, that in the event that a for-profit company had remedies in defamation available without pleading falsity, wilfulness and patrimonial loss, these excluded a claim for general damages. [13]

12.3 The corporate defamation special plea also included the express averment that to the extent that the common law did not accord with these positions, it is unconstitutional and falls to be developed in terms of sections 8(2) and 39(2) of the Constitution.[14]

12.4 The mining companies raised an exception in response.[15] They contended that the corporate defamation special plea did not give rise to any defence in South African law.

12.5 The High Court upheld the mining companies' exception to the corporate defamation special plea. It did so at in paragraph 2 of its order and explained why in paragraph 9 of its judgment.

> "It is common cause between the parties that in view of the approach adopted by the Supreme Court of appeal in [*SA Taxi*] the second special plea cannot be sustained and [the exception to it] must be upheld. The defendants have conceded that the current law relating to the requirements of a juristic person to sue for defamation, does not support their

[13] See the second special plea in the *Clarke* matter at Record 129, para 14.

[14] See the second special plea in the *Clarke* matter at Record 128 para 11 and Record 129 para 14.2.

[15] The exception in the *Clarke* matter is at Record: 154. The exception in the *Dlamini* matter is at Record: 216. The exception in the *Reddell* matter is at Record: 271.

contentions. This court therefore only need to determine the exception to the first set of special pleas."[16]

12.6 We accept that the High Court was bound to uphold the mining companies' second exception because of the SCA decision in *SA Taxi*. Only this Court can alter the decision of the SCA in *SA Taxi* – not the High Court.

12.7 It is against this part of the High Court judgment that the applicants seek leave to appeal.

THE CURRENT STATE OF THE COMMON LAW

Claims by natural persons for defamation

13 The law regarding defamation claims by natural persons has been essentially settled by this Court's decision in *Khumalo v Holomisa.*[17]

14 There, this Court had to consider whether the common law of defamation was inconsistent with the Constitution. In particular, it had to answer 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.*"[18]

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[16] Record: 281.

[17] *Khumalo* above note 3.

[18] Id at para 4.

15 The Court emphasized that there were two competing constitutional rights at stake – the right to freedom of expression and the right to human dignity:

> "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…."[19]

16 It ultimately concluded that that an "appropriate balance" was indeed struck between these two constitutional rights and therefore that the common law was not unconstitutional.

17 The position in our law when a natural person sues for defamation is therefore clear.[20]

17.1 The natural person need only allege and prove that the defendant has published a defamatory statement about him or her.

17.2 There is no need for the natural person to allege falsity or patrimonial loss.

17.3 Once the natural person establishes that a defendant has published a defamatory statement about him or her, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for

[19] Id at para 28.

[20] Id at para 18.

defamation must then raise a defence which rebuts unlawfulness or intention. These include the defences of truth and public benefit; fair comment; qualified privilege; or, for media defendants, reasonable publication.

18 The corporate defamation special plea filed by the defendants would not alter these principles of the law at all – insofar as they relate to natural persons.

Claims by for-profit companies for injurious falsehood

19 We now turn from the position of natural persons to the position of for-profit companies – also known as trading corporations.

20 The common law protects the capacity of a for-profit company to attract custom by its good name and reputation. It does so as part of the protection it affords to the liberty of for-profit companies to carry on business without unlawful interference from others.

21 One of the species of unlawful interference recognised by the common law is the wilful publication of false statements concerning a trader's business. This is the delict of "*injurious falsehood"*.[21]

[21] *Geary & Son v Gove* 1964 (1) SA 434 (A) at 441D; *Dun and Bradstreet v SA Merchants Combined Credit Bureau (Cape)*1968 (1) SA 209 (C) at 216G-H; *Post Newspapers v World Printing & Publishing Co* 1970 (1) SA 454 (W) 455G to 456H; *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 181H; and *Schultz v Butt* 1986 (3) SA 667 (A) at 678I-J.

22 As explained in *Geary*, the elements of a claim for injurious falsehood are that:

22.1 the defendant has made a false representation;

22.2 the defendant knew the representation to be false;

22.3 the plaintiff has lost or will lose customers as a result of false representation; and

22.4 that the defendant intended to cause the plaintiff that loss by the false representation.[22]

23 The plaintiff bears the onus of proving all these elements of its cause of action.

24 In other words, while the common law recognises that for-profit companies must have some protection from statements that damage their reputation, it does so in a manner that strikes the balance very differently from the law of defamation as it applies to natural persons.

24.1 It requires that the plaintiff prove that the statement is false.

24.2 It requires that the plaintiff prove that the defendant made the statement wilfully – that is that he knew his representation was false and intended to cause the plaintiff loss by making it.[23]

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[22] *Geary* id at 441D.

[23] See: *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) at para 86 and *Dantex Investment Holdings v Brenner* 1989 (1) SA 390 (A) 396A-H.

24.3 It requires that the plaintiff prove that he suffered patrimonial loss as a consequence of the statements.[24]

25 The corporate defamation special plea filed by the defendants would not alter these principles of the law at all.

Claims by for-profit companies for defamation and the majority decision in SA Taxi

26 But under the current common law – as laid down by the majority of the SCA in *SA Taxi* – for-profit companies are not always required to meet the demanding requirements of injurious falsehood claims just outlined.

27 Instead, they can seek to sidestep those claims by bringing claims for defamation instead of injurious falsehood. In other words, they can seek to take advantage of the defamation principles developed by our courts in the context of claims by natural persons and use them to bring defamation suits. This is so even though, as we show later, their interests and the constitutional rights at stake are sharply different.

28 This is precisely the route on which the mining companies have embarked.

28.1 They have sued the defendants for many millions in general damages for defamation.

[24] *Dun and Bradstreet* above note 21 at 221H to 222A.

28.2 They have done so by essentially alleging little beyond an allegation that the defendants made defamatory statements about them.

28.3 They have not alleged that the statements are false, they have not alleged that the false statements were wilfully made and they have not alleged that the statements caused them patrimonial loss.

29 Under the existing common law, all of this is permissible. The mining companies can succeed in their claims for general damages without alleging or proving any falsity, any wilfulness or any patrimonial loss.

30 This is the effect of the majority decision of the SCA in *SA Taxi.*

30.1 In that case, decided in 2011, the Court had to decide – amongst other issues – whether a for-profit company was entitled to general damages for defamation and the requirements for such a claim.

30.2 The SCA was divided.

30.3 Brand JA held for the majority that in respect of special damages, the for-profit company would have to plead and prove at least falsity,[25] and possibly also wilfulness.[26]

30.4 However, he held that for-profit companies were also entitled to general damages for defamation and that they could claim them in the same way

[25] *SA Taxi* above note 4 at paras 15 – 16.

[26] Id at paras 11 – 14.

as natural persons can. That is, they could do so without any duty to plead or prove falsity, wilfulness and patrimonial loss.[27]

30.5 Nugent JA disagreed with Brand JA on general damages. He held that for-profit companies could not claim general damages for defamation.[28]

30.6 In a third judgment, Snyders JA agreed broadly with Nugent JA's views regarding general damages, but held that under some circumstances general damages could "conceivably" be permissible.[29]

31 The state of the law then, post-*SA Taxi*, is therefore as follows:

31.1 A for-profit company can claim general damages in a defamation suit in precisely the same way as a natural person can.

31.2 A for-profit company can claim general damages for defamation without any need to allege or prove the falsity of the statements concerned, the wilfulness of the false statements concerned or patrimonial loss.

32 In what follows, we demonstrate that this position is not sustainable in light of the Constitution and the profound differences between natural persons and for-profit companies. Instead, the current position produces a violation of freedom of expression and is unconstitutional. The common law accordingly falls to be

[27] Id at paras 17 – 55.

[28] Id at paras 65 – 111.

[29] Id at paras 113 – 115.

developed in terms of sections 8(3) and 39(2) of the Constitution to resolve the violation.

DIFFERENCES BETWEEN FOR-PROFIT COMPANIES AND NATURAL PERSONS

33 The present common law treats a for-profit company suing for general damages for defamation identically to a natural person suing for general damages for defamation.

34 The for-profit company derives the same substantial advantages as the natural person. All it needs to do is allege and prove that the defendant made defamatory statements regarding it. Once this is so, it receives the benefit of the various presumptions that apply and the onus rests on the defendant to negate intention or unlawfulness.

35 But this approach of treating for-profit companies like natural persons is inappropriate, unsustainable and unconstitutional. There are two critical differences between them.

35.1 The first is that, unlike natural persons, for-profit companies are not the bearers of the constitutional right to human dignity.

35.2 The second is that, unlike natural persons, the only interest a for-profit company has in its reputation is a financial one.

36 Given these differences, Brand JA was quite wrong to hold in *SA Taxi* that treating for-profit companies differently to natural persons would violate section 9(1) of the

Constitution.[30] As we demonstrate, the differences between for-profit companies and natural persons not only permit but require a different treatment in defamation law.

37 We address each difference in turn.

For-profit companies are not the bearers of the right to human dignity

38 As we have explained above, in *Khumalo v Holomisa* this Court upheld the constitutionality of the common law position regarding defamation. However, it did so – quite expressly – by relying on the right to human dignity of those suing for defamation and concluding that the common law struck an "appropriate balance" between this right and the right to freedom of expression.

39 In the context of for-profit companies suing for defamation, the position is entirely different. For-profit companies are not the bearers of the right to human dignity. This is clear both from this Court's jurisprudence and from first principles.

40 In respect of this Court's jurisprudence, the position is clear.

40.1 In *Hyundai*, this Court held expressly that juristic persons are not the bearers of human dignity.[31]

[30] *SA Taxi* above note 4 at para 40.3.

[31] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) at para 18.

40.2 This Court held so in the context of analysing the right to privacy. This Court held that privacy is a right that becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This conception of privacy flows from human dignity.

40.3 But, the Court held, juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings.[32] Without dignity, there is no intimate core, and so privacy for juristic persons is different in kind from the privacy of natural persons.

40.4 This Court subsequently confirmed in *Tulip Diamond* that juristic persons cannot bear the right to human dignity.[33]

40.5 The law is therefore settled. For-profit companies are not the bearers of the right to human dignity.

41 But even if there were any doubt on this score (which there is not), it must be correct from first principles that for-profit companies are not the bearers of the constitutional right to human dignity.

42 Section 8(4) provides that "[j]uristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons".

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[32] Id.

[33] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC); 2013 (2) SACR 443 (CC) at para 35.

So determining whether a juristic person bears a constitutional right depends on (a) the nature of the right and (b) the nature of the juristic person.

43 The nature of the right to human dignity is such that juristic persons cannot bear it.

43.1 Section 10 is headed "human" dignity, implying that the right only accrues to humans.

43.2 This Court has held that the Constitution guarantees the right to dignity to contradict the past, in which human dignity for black South Africans was routinely and cruelly denied. The Constitution also guarantees dignity to inform the future, "to invest in our democracy respect for the intrinsic worth of all *human beings*".[34] If the rationale behind section 10 is to guarantee the intrinsic worth of human beings, against a backdrop of systemic denial of that intrinsic worth, then the right to dignity cannot accrue to for-profit companies.

43.3 As this court explained in *Khumalo:*

> "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

[34] *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35. The Court made this finding in the context of discussing dignity as a value. But at the end of the same paragraph, the Court held that "section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected".

of self-worth as well as the public's estimation of the worth or value of an individual."[35]

43.4 The right to human dignity has been linked to more than just the intrinsic value of human beings.

43.4.1 Human dignity includes the ability to develop one's "humanness" and unique talents.[36]

43.4.2 Human dignity includes the ability to enter relationships of defining significance.[37]

43.4.3 Human dignity "comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context".[38]

43.4.4 The right to human dignity protects us against degrading and invasive stigmatisation of our consensual sexual conduct.[39] Human dignity entails certain living conditions.[40]

43.5 These facets of dignity are self-evidently inapplicable to for-profit companies.

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35 *Khumalo* above note 3 at para 27.

36 *Ferreira v Levin NO ; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 49.

37 *Dawood* above note 34 at para 37.

38 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) at para 52.

39 Id at para 55.

40 *Mtolo v Lombard* [2021] ZACC 39 at para 42; *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 31.

44 The nature of for-profit companies is such that they do not require a right to human dignity.

44.1 For-profit companies do not have any kind of intrinsic value. Their value is contingent on the amount of money they generate for shareholders and other stakeholders. Hence, once a for-profit corporation is no longer making money, it can (and sometimes must) be wound up.

44.2 The upshot is that a for-profit corporation does not "require" the right to dignity as envisaged in section 8(4). There is, simply put, no intrinsic value in need of protection.

45 The conclusion that for-profit companies are not the bearers of the right to human dignity is hardly surprising. There are numerous rights that do not accrue to companies. Companies have neither conscience nor religious belief within the meaning of section 15. They are neither citizens for the purposes of sections 19 and 20, nor children for the purposes of section 28. They do not have the right to life in terms of section 11.[41]

46 The conclusion that for-profit companies are not the bearers of the right to human dignity has a significant effect on this case.

47 First, it means that the findings in *Khumalo v Holomisa* cannot be transplanted and applied in this context of for-profit companies. On the contrary, the absence of a

[41] S Woolman "Application" in *Constitutional Law of South Africa* OS 02-05, ch31-p39.

countervailing constitutional right in this case means that a different constitutional approach is required from that in *Khumalo v Holomisa*.

48 Second, it means that the majority decision in *SA Taxi* is wrong.

48.1 In *SA Taxi*, Brand JA held for the majority that juristic persons' reputation is protected by section 10 of the Constitution. This finding was a key plank in the majority's reasoning. The relevant paragraph reads:

> "[I]t will be anomalous if the corporation's right to reputation which, through inferential reasoning, gave rise to the acknowledgement of its right to privacy, would be held not to enjoy the same constitutional protection as its right to privacy. In the present context, I can see no conceptual difference between the corporation's right to privacy, on the one hand, and its right to reputation, on the other. Both privacy and reputation fall outside the ambit of the narrow meaning of 'human dignity' which a corporation cannot have. At the same time, they are both included in the wider meaning of 'dignity', protected by section 10 of the Constitution."[42]

49 We make three points about this passage.

50 First, it begs the question. The majority refers to the "inferential reasoning" of Corbett CJ in *Financial Mail*. In that matter, Corbett CJ made the point, *obiter*, that because Courts have allowed companies to sue in defamation, courts have at times equated the personality interests of natural and juristic persons.[43] In that sense,

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[42] *SA Taxi* above note 4 at para 42.

[43] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 460G – 461H:

> "This Court has held that a trading corporation can sue for damages in respect of a defamation which injures its good name and business reputation; and that it may recover such damages without having to prove actual loss [....] In addition, a corporation so defamed may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation […]These developments in the law of defamation are not directly pertinent to the issues in the present case, but I refer to them to indicate that,

Corbett CJ held, courts have recognised juristic persons' "right to reputation". But the issue before Brand JA, and before this Court, is whether Courts *should* recognise that "right to reputation". Courts may have done so in the past, before the advent of the Constitution, but that does not mean that they should do so now.

51 Second, Brand JA assumes that because juristic persons have a right to privacy that is constitutionally protected, they therefore have a right to a reputation that is constitutionally protected.

51.1 But that is not correct. There is a conceptual difference between a right to privacy and a right to reputation. While there is a link between privacy and dignity in the context of natural persons, dignity and privacy are not necessarily linked.

51.2 Indeed, in *Hyundai*, this Court held squarely that juristic persons do enjoy the right to privacy but do not bear the right to dignity. Moreover, the right to privacy enjoyed by juristic persons was justified based on democracy and conducting affairs.[44] The right to privacy was not explained with reference to a right to reputation or dignity.

51.3 Therefore, just because companies have a right to privacy does not mean that they have a constitutionally protected right to reputation or dignity.

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as a matter of general policy, the Courts have, in the sphere of personality rights, tended to equate the respective positions of natural and artificial (or legal) persons where it is possible and appropriate for this to be done. In the sphere of defamation this can be done."

[44] Id.

The right to privacy can be, and has been by this Court, founded on other bases.

52 Third, Brand JA sought to invoke the decision in *Le Roux* which distinguished between wide and narrow dignity.[45]

52.1 Wide dignity, which is the type protected by section 10, "covers a number of different values" including "both the individual's right to reputation and his or her right to a sense of self-worth".[46] Narrow dignity, which is the type recognised by the common law, "is confined to the person's feeling of self-worth".[47] Brand JA invokes this distinction to find that juristic persons cannot have narrow dignity, but bear wide dignity as protected by section 10.

52.2 But this Court in *Hyundai* and *Tulip Diamonds* did not make this distinction. On the contrary, they were clear: juristic persons do not bear the right to dignity as guaranteed by section 10. So, to adopt Brand JA's distinction, juristic persons bear neither narrow nor wide dignity. They do not bear any dignity that is protected by section 10 of the Constitution.[48]

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[45] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) at para 138.

[46] Id.

[47] Id.

[48] A further issue is that Brand AJ's distinction is at tension with this Court's finding in *Khumalo* at para 27 that "[n]o sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution".

52.3 It is one thing to say that for-profit companies have a common law right to reputation. That much is accepted. It is quite another to say that that their right to reputation is constitutionally enshrined by section 10's guarantee of human dignity. That is quite wrong.

53 For these reasons, for-profit companies do not have the right to dignity. In holding otherwise, *SA Taxi* was wrong.

For-profit companies have only a financial interest in their reputation

54 The difference between natural persons and for-profit companies goes further. It concerns the nature of their interest in their reputation.

55 A natural person's interest in her reputation is a personal interest – not merely a financial interest.

55.1 This has been recognised for many years. As Melius de Villiers explained more than 100 years ago:

> "By a person's reputation is here meant that character for moral or social worth to which he is entitled amongst his fellow-men; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.
>
> …
>
> It must be clearly understood … that in an action of injury such as we have to do with in the present title, compensation is not sought for patrimonial or material loss, that is to say, loss to or in respect of property, business or prospective gains caused to one person through the act of another. The interests that are

impaired by an injury are purely ethical; and the reparation claimed in the action is on account of that pain of mind which is naturally felt by any one who has been the object of vexatious personal aggression on the part of another, or who has been humiliated by becoming the object of that feeling of repulsion which is naturally entertained by others towards a person who bears an evil reputation or is otherwise obnoxious, or of that disrespect which is evidenced by exposing another to contempt, ridicule, dislike, disfavour or disesteem…"[49]

55.2 That remains the position now.[50]

56 But a for-profit company is in a quite different position.

56.1 The reputation of a for-profit company affects its goodwill, that is, its capacity to attract custom and make profit. If its reputation is damaged, the damage ordinarily diminishes its capacity to attract custom and make profit. This damage is reflected in and can be measured by the diminished profits of the business and the resultant reduction in the value of its goodwill.

56.2 In other words, the interest of a for-profit company is not personal or about its feelings – it is purely financial.

57 This difference was emphasised by Lord Hoffmann and Baroness Hale in their dissenting judgments in *Jameel.*

57.1 Lord Hoffmann explained the point as follows:

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[49] Melius de Villiers, *The Roman and Roman-Dutch Law of Injuries* (1899) at 24-25

[50] See *Khumalo* above note 3 at para 27.

"In the case of an individual, his reputation is part of his personality, the 'immortal part' of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation."[51]

57.2 Lady Hale made the same point, quoting the scholar Tony Weir:

"There is still some justification, however, for the rule that the human plaintiff need not prove any harm. If the statement is defamatory, he will feel bad and others will think badly of him; the first need not be proved and the second cannot be. Indeed, this duality of harm can be presumed precisely because it is required: you get damages only if someone has been rude about you to someone else.

But it was absurd to give substantial damages to a trading company:

It was absurd because (the company) had no feelings which might have been hurt and no social relations which might have been impaired. The two kinds of presumptive harm could not be presumed because they could not have occurred ... the reasons for which we absolve the human plaintiff from the usual requirement of proving loss cannot add and do not apply to the inhuman plaintiff ... To prefer the interest in maintaining corporate image to the right of the citizen to say what he reasonably believes to be true is a grim perversion of values."[52]

[51] *Jameel (Mohamed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) at para 91.

[52] Id at para 154.

58 In those circumstances, for the common law to equate the position of a for-profit company suing for defamation and a natural person suing for defamation is quite wrong and, in the words of Tony Weir quoted by Lady Hale, "absurd".[53]

58.1 The natural person is suing because of a personal harm and hurt feelings, which exist irrespective of any question of actual financial loss. It is thus understandable that general damages can be claimed without any proof of financial harm.

58.2 But the for-profit company has only a financial interest. To allow it to sue for general damages where it can show actual or even likely financial harm makes no principled sense whatsoever.

THE COMMON LAW POSITION IS UNCONSTITUTIONAL

59 The common law enabling for-profit companies to sue for general damages without alleging and proving falsity, wilfulness and patrimonial loss unjustifiably limits a defendant's right to freedom of expression.

[53] Id at para 154.

60 The starting point is the now trite proposition that that the laws prohibiting defamation are limitations on the right to freedom of expression. This Court has repeatedly made this clear.[54]

60.1 The common law prohibits defamatory statements about for-profit companies. Such statements are forms of expression.

60.2 Such statements are prohibited on the pain of general damages, a remedy that chills the exercise of the right to freedom of expression.[55]

60.3 Notably the statements are prohibited on pain of general damages even where the for-profit corporation has not alleged or proven that they are false. This despite the fact "no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation".[56]

60.4 The statements are also prohibited on pain of general damages even though no patrimonial loss has been alleged or proved.

61 Accordingly, the common law rules regarding defamation claims by for-profit companies must be justified in terms of section 36(1) of the Constitution. If these rules cannot be justified, then they must be developed to cure their unconstitutionality.[57]

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[54] *Khumalo* above note 3 at para 33; *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 90; *Le Roux* above note 45 at para 123.

[55] *Dikoko* above note 54 at para 92; *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 131.

[56] *Khumalo* above note 3 at para 35.

[57] *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28 and 32.

62 In what follows, we show how the rule allowing for-profit companies to sue for general damages for defamation without alleging and proving falsity, wilfulness and patrimonial loss unjustifiably limits the right in section 16 of the Constitution.

63 We submit that, having regard to the factors listed in section 36(1) of the Constitution, this limitation is unjustified in a series of respects. We deal with each in turn. We then canvass relevant international and comparative law to show how the international and foreign position largely accords with the defendants' position.

The limitation is unjustified

64 First, the nature of the right at stake.

64.1 This Court has repeatedly emphasised the critical importance of freedom of expression.

64.2 As this Court explained in *Qwelane:*

> "Freedom of expression 'is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm'. This is because it 'is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability'."[58]

64.3 Moreover, the nature of the right is such that it is linked to various other constitutional rights. In *SANDU*, this Court held:

> "[F]reedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion

[58] *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC) at para 68.

(section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."[59]

64.4 Accordingly, when the right to freedom of expression is limited, various other rights are often limited too. On the facts of this case, for instance, the right to a safe environment, as guaranteed by section 24, may be limited by the mining companies' ability to sue environmental activists for defamatory statements.

65 Second, the absence of a compelling legitimate justification.

65.1 This Court has repeatedly held that the law of defamation is justified with respect to the dignity of the plaintiff.[60] This Court has never justified defamation law by reference to any other legitimate purpose.

65.2 This is for good reason. The rationale behind defamation law has always been to compensate the plaintiff for injury to their reputation. Even in *SA*

[59] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 at para 8.

[60] For instance *Le Roux* above note 45 at para 138; *Dikoko* above note 54 at para 92; *Khumalo* above note 3 at para 28.

Taxi, the Supreme Court of Appeal justified juristic persons' right to sue for defamation by reference to their reputation.[61]

65.3 But in constitutional South Africa, reputation is legitimate *in virtue of* the right to dignity. The right to dignity is what gives reputation constitutional impetus and recognition. As this Court has explained: "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".[62]

65.4 If the vindication of reputation is the justification for defamation, and if the vindication of reputation is only legitimate because of the right to dignity, then for-profit companies cannot sue for defamation. Reputation, without dignity, means very little in a constitutional analysis of rights limitations. For-profit corporation have no dignity; so, there is at most a very weak legitimate purpose to their defamation suit.

65.5 This is especially because the only other potential legitimate purpose is the *patrimonial* interest companies have in their reputation. Once we accept that companies have no dignity, or as Nugent JA put it, that they cannot "feel",[63] then companies cannot be said to have constitutionally recognised non-patrimonial interests.

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[61] *SA Taxi* above note 4 at para 49.

[62] *Khumalo* above note 3 at para 27.

[63] *SA Taxi* above note 4 at para 80. Compare Lord Hoffman in *Jameel* above note 51 at para 91:

> "In the case of an individual, his reputation is a part of his personality, the 'immortal part' of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of

66 Third, the absence of a proper connection between the purpose and the limitation.

66.1 The link between a general damages defamation suit and protecting profit-making is tenuous. Under the current common law, claims for general damages do not concern patrimonial loss and loss is not an element of the delict of defamation.

66.2 General damages awarded in defamation are aimed at assuaging harm done to a natural person's dignity, not compensating for patrimonial loss.[64]

66.3 General damages are a therefore blunt, ineffective tool to compensate a for-profit corporation for patrimonial loss suffered due to defamation. This strongly speaks against the proportionality of the limitation imposed by allowing for-profit companies to sue for defamation.

66.4 Moreover, general damages become punitive if they are not awarded as compensation for harm. This was the finding rightly made by the minority in *SA Taxi*. Nugent JA held as follows:

66.4.1 If damages do not compensate for harm, then they are punitive;

66.4.2 General damages awarded for the defamation of for-profit companies do not compensate for harm;

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financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers."

64 *Dikoko* above note 54 at paras 92 and 95; *Le Roux* above note 45 at 142.

66.4.3 Therefore, general damages awarded for the defamation of for-profit companies are punitive.

66.5 The second premise in Nugent JA's reasoning flows from accepting that for-profit companies do not bear human dignity. If there is no human dignity, there is no harm, so general damages for defamation are not compensatory.[65]

66.6 But Nugent JA's second premise flows equally from accepting that general damages cannot compensate for the pecuniary loss suffered by a for-profit company. Once there is a disconnect between general damages and the actual loss suffered by a corporation, then the damages are not compensatory. Those damages are punitive. If general damages for corporate defamation are punitive, then they are unconstitutional. Punitive damages, in the context of civil suits, are unconstitutional.[66]

67 Fourth, even if the purpose of allowing for-profit companies to sue for defamation is a legitimate one, there are obvious means available to achieve this which are less restrictive of freedom of expression.

68 If the justification for prohibiting defamation is protecting a for-profit corporation's pocket, then there are various means of achieving that purpose that are less restrictive of the right to freedom of expression.

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[65] By contrast, general damages for the defamation of a natural person are awarded to compensate that person, even if crudely, for the harm caused to their human dignity by defamation.

[66] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 at para 70.

68.1 The first less restrictive means available concerns the availability of the delict of injurious falsehood.

68.1.1 The reputation of for-profit companies is already protected by the delict of injurious falsehood. Protection in this form is appropriate because for-profit companies only have a patrimonial interest in their reputation – the harm to which they are exposed if their reputation is damaged is purely financial.

68.1.2 There is no reason that this is not an adequate remedy for for-profit companies who complain about statements made about them by competitors or others.[67]

68.1.3 The delict of injurious falsehood does not provide for-profit companies with as much protection as defamation. For instance, the for-profit corporation will have to prove patrimonial loss, falsity, knowledge of falsity, and intention. The fact that for-profit companies must prove these elements means that the limitation on defendants' right to freedom of expression is not as restrictive as defamation suits.

[67] Contrary to what the respondents contend at para 15 of their Answering Affidavit (Record: 397), unlawful competition is not a requirement for injurious falsehood. The action may have been developed in the context of unlawful competition, but the requirements do not include establishing that the defendant is a competitor. See further *Geary & Son v Gove* 1964 (1) SA 434 (A) at 440-441; *Dun and Bradstreet v SA Merchants Combined Credit Bureau (Cape)*1968 (1) SA 209 (C) at 216-222; *Post Newspapers v World Printing & Publishing Co* 1970 (1) SA 454 (W) at 455-456; *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 181-186; *Schultz v Butt* 1986 (3) SA 667 (A) at 678-679.

68.1.4 The more demanding requirements of the delict of injurious falsehood, compared to defamation, are appropriate. For-profit companies' protectable interests are fundamentally different to natural persons. The law of defamation primarily protects a fundamental personality interest which inures in every human being, while the law of injurious falsehood protects a mere financial interest.

68.2 The second less restrictive means is to develop the law of defamation to mirror the delict of injurious falsehood for for-profit companies.

68.2.1 For-profit companies should be required to allege and prove falsity, wilfulness. This would ensure that the law of defamation affords no greater protection to the reputation of for-profit companies than does the law of injurious falsehood.

68.2.2 This would preserve the right of for-profit companies to sue for defamation, even general damages.

68.2.3 But it would hold them to the same more demanding standards that the common law already sets under the delict of injurious falsehood.

68.3 The third less restrictive means is to develop the law of defamation so that a for-profit corporation cannot claim general damages, but only special damages.

68.3.1 General damages, in contrast to alternative remedies like patrimonial damages, constitute a severe limitation on the right to freedom of expression. This Court has recognised the chilling effect of general damages.[68]

68.3.2 This chilling effect is especially acute in the context of corporate defamation because the potential claims for the loss of profits of for-profit companies tend to be considerably higher than the damages claim of natural persons. On the other hand, special damages closely track the actual loss suffered by a for-profit corporation.

68.4 A final alternative means to protecting a for-profit corporation's reputation is limiting their defamation claims to an interdict, an apology, a declaration of falsity, or retraction. All of these are part of our law.[69]

69 The plaintiffs complain that the first two alternatives are too hard on for-profit companies. They, and to some extent the majority in *SA Taxi*,[70] argue that because for-profits may struggle to prove loss, intention, or falsity, they should not be made to prove these elements of defamation.

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[68] *Dikoko* above note 54 at para 92; *McBride* above note 55 at para 131.

[69] See *Le Roux* above note 45 at para 199-203; *Economic Freedom Fighters v Manuel* [2020] ZASCA 172; [2021] 1 All SA 623 (SCA) ; 2021 (3) SA 425 (SCA) at paras 87 – 130.

[70] *SA Taxi* above note 4 at para 40.

69.1 But that is no answer. The issue before this Court is precisely whether the Constitution permits a for-profit company to sue for defamation when it cannot prove loss, and whether imposing an onus for truth and intention better balances reputation against freedom of expression.

69.2 The fact that companies will sometimes struggle to prove loss, intention, or falsity does not mean that they should still be able to sue in defamation. The point is that by making it more difficult harder for companies, freedom of expression is properly protected and respected. This is not merely permissible – it is what the Constitution requires, especially in the absence of a countervailing constitutional right.

70 This is demonstrated by this Court's judgment in *Laugh It Off*.[71] Laugh *It Off* concerned an interdict preventing the trade of certain T-shirts which mimicked the logo of Carling Black Label, the famous beer.

70.1 Section 34(1)(c) of the Trade Marks Act 194 of 1993 prohibited the dilution and in particular blurring or tarnishment of a registered trade mark. The applicant had succeeded in securing a final interdict against the respondents for violating section 34(1)(c).

70.2 The issue before this Court was whether that final interdict should have been granted. In particular, the issue was whether the T-shirts were taking

[71] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

unfair advantage of or being detrimental to the trade mark, as prohibited by section 34(1)(c).

70.3 The Court, as part of its reasoning, considered how section 34(1)(c) must be interpreted to be constitutionally compliant. This Court held that it must interpret the section "as most compatible with the right to freedom of expression".[72] Moreover, "[t]he reach of the statutory prohibition must be curtailed to the least intrusive means necessary to achieve the purpose of the section".[73]

70.4 The interpretation that was most compatible with the right to freedom of expression was an interpretation that "the detriment relied upon must not be flimsy or negligible. It must be substantial in the sense that it is likely to cause substantial harm to the uniqueness and repute of the marks".[74] This Court then concluded:

> "The exercise calls for an evaluation of the importance of the purpose, nature, extent and impact of the limitation of free expression invoked against claims of unfair advantage or of likelihood of material detriment to a registered mark. I n sum, in order to succeed the *owner of the mark bears the onus to demonstrate likelihood of substantial harm or detriment* which, seen within the context of the case, amounts to unfairness."[75] (Emphasis added).

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[72] Id at para 48.

[73] Id.

[74] Id at para 49.

[75] Id at para 50.

70.5 The upshot of *Laugh It Off* for this case is clear. *Laugh It Off* demonstrates how corporate interests can be balanced against freedom of expression. The medium for that balance in *Laugh It Off* is the same medium for the balance in this case: for-profit companies must prove loss to justify infringements on the right to freedom of expression. That is what a less restrictive means requires. That is what respect for the right to freedom of expression demands.

71 In all the circumstances, the existing common law approach to claims by for-profit companies for general damages for defamation is not consistent with the Constitution because it violates the right to freedom of expression.

72 This Court is accordingly obliged to by sections 8(3) and 39(2) of the Constitution to develop the common law to resolve the breach of rights.[76] It can do so in at least two ways:

72.1 It could, for example, develop the common law to provide that in any claim of any sort for defamation by a for-profit company, the company must allege and prove falsity, wilfulness and patrimonial loss.

72.2 Alternatively, it could develop the common law to provide that where a for-profit company does not allege and prove falsity, wilfulness and patrimonial loss, it is precluded from claiming general damages.

[76] *Thebus* above note 57 at para 28 and 32.

International and comparative law

73 The position under international law and several foreign jurisdictions largely accords with this conclusion.[77]

74 The leading international law case on the issue is *Steel*.[78] In *Steel*, the European Court of Human Rights considered whether the English common law enabling for-profit companies to sue in defamation was a proportional interference with article 10 of the European Convention of Human Rights (**ECHR**).[79]

74.1 On the facts of *Steel*, the defendants had published a pamphlet containing various defamatory statements about McDonald's, a multi-national for-profit corporation.[80] McDonald's sued the defendants for defamation and won in the English courts. The defendants approached the European Court and argued (among other arguments) that the English common law disproportionally interfered with their article 10 right.

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[77] This Court must consider international law and may consider foreign law when interpreting the right to freedom of expression in this matter. Section 39(1)(b) and (c) of the Constitution.

[78] *Steel and Morris v United Kingdom* [2005] ECHR 103.

[79] Article 10 reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[80] The trial in the United Kingdom, which ran for over nine years, was dubbed the "McLibel" litigation.

74.2 The Court refused to find that companies should, "in principle", be deprived of a right to defend themselves against defamatory allegations.[81] It held that there is an interest in protecting "the *commercial success* and viability of companies, for the benefit of shareholders and employees, but also for the wider *economic* good".[82] Therefore, the Court concluded that the United Kingdom "enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation".[83]

75 This finding appears to contradict the applicants' argument in this matter. But it does not.

75.1 First, the European Court couched the justification for the protection of corporate reputation in commercial and economic terms. This confirms that there is only a relatively weak interest in justifying corporate defamation suits.

75.2 Second, the Court reached its conclusion by invoking its doctrine of margin of appreciation. The doctrine applies when the Court is asked to adjudicate on value judgments made by European states.[84] The doctrine is wholly inapplicable to constitutional litigation before this Court and this

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[81] Id at para 94.

[82] Id.

[83] Id.

[84] Id at para 87.

Court had made clear that judgments relying on it are "not necessarily a safe guide" as to what our Constitution requires.[85]

75.3 Third, the Court went on to find that the defendants' right to freedom of expression had been violated. One of the reasons was that the damages awarded against the defendants were disproportionate. The disproportionality was linked to how the plaintiffs were large and powerful corporate entities "but that, in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication".[86] This finding supports the defendants' made here: general damages are regularly disproportional given how they are removed from any financial loss suffered by for-profit companies.

76 Shortly after *Steel*, the House of Lords had to consider the question of whether for-profit companies should be able to sue for general damages in defamation. It did so in *Jameel*.[87]

76.1 The Court was sharply divided. Lords Bingham, Hope and Scott all held that for-profits should be able to sue for general damages. Lord Hoffman and Lady Hale held to the contrary.

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[85] *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 at para 109.

[86] Id at para 96.

[87] *Jameel* above note 51.

76.2 We commend the dissents of Lord Hoffman and Lady Hale to this Court. They are, in our respectful submission, more in keeping with our constitutional scheme.

76.3 Lord Hoffman, for example, held that there is "no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation".[88]

76.4 Lady Hale urged that a change to the English common law —

> "would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government."[89]

77 The dissents of Lord Hoffman and Lady Hale proved persuasive. In 2013, The UK Parliament passed the UK Defamation Act. Section 1 reads:

> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

[88] Id at para 91.

[89] Id at para 158

78 English law today thus requires that a for-profit corporation suffer financial loss due to defamation. It cannot sue for general damages. Courts have required that for-profit companies adduce evidence as to financial loss to succeed in defamation suits.[90]

79 The English approach under the 2013 Defamation Act is like several other jurisdictions.

79.1 In New Zealand, section 6 of the Defamation Act 1992 allows a body corporate to bring a claim for defamation where the defamatory publication has, or is likely to, cause the body corporate a *pecuniary* loss.

79.2 In Australia, various defamation reforms have totally removed the right to sue for defamation from companies with ten or more employees.[91] If a company has fewer than 10 employees, it must still prove that the publication has caused, or is likely to cause, serious harm to the company's reputation *and* serious financial loss.[92]

79.1 In Germany, a company may not be awarded damages for non-pecuniary loss according to section 253(1) of the German Civil Code.[93]

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[90] Examples include *Undre v Harrow* [2016] EWHC 931; *Pirtek (UK) Limited v. Robert Jackson* [2017] EWHC 2834; and *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628.

[91] Defamation Act 2005 (NSW, Qld, Vic, SA, Tas) sec 9; Defamation Act 2006 (NT) sec 9; Civil Law (Wrongs) Act 2002 (ACT) sec 121; New South Wales Government, Statutory Review Defamation Act 2005, June 2018, para 2.8.

[92] Model Defamation Amendment Provisions 2020, section 10A(2): PCC-541 d30 (approved by the Council of Attorneys-General, 27th July 2020) (MDAP). See further Coe, P. (2020) An analysis of three distinct approaches to using defamation to protect corporate reputation from Australia, England and Wales, and Canada. *Legal Studies*, 40(4). pp. 1-19.

[93] Jan Oster, "The Criticism of Trading Corporations and Their Right to Sue for Defamation" Journal of European Tort Law 2(3) (2011): 255-279 at 258.

79.1 In Canada, juristic persons can sue for general damages for defamation. However, small general damages awards are the norm for corporate plaintiffs in the absence of proof of actual loss.[94]

79.1 In the United States, most corporate libel claims are unsuccessful because public figures must prove actual malice on the part of the defendant.[95]

80 Accordingly, various other democratic societies have recognised the need to limit for-profit companies' ability to sue for defamation. Commentators largely support these curtailments.[96] Those academics who support companies' right to sue for defamation base their justifications in companies' right to property,[97] with some accepting that general damages are therefore an inappropriate remedy for corporate defamation.[98]

LEAVE TO APPEAL

81 We respectfully submit that direct leave to appeal should be granted to this Court.

82 This is because:

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[94] To the extent that corporate plaintiffs are awarded large amounts in general damages, the position is heavily criticised by Canadian commentators. See Hilary Young, 'Rethinking Canadian Defamation Law as applied to corporate plaintiffs' (2013) 46(2) *University of British Colombia Law Review* 529-557 at 535; Coe above.

[95] Roxanne Watson, Roberto Roldan & Andres Faza (2017) Toward Normalization of Defamation Law: The U.K. Defamation Act of 2013 and the U.S. SPEECH Act of 2010 as Responses to the Issue of Libel Tourism, *Communication Law and Policy*, 22:1, 1-63 at 42.

[96] Oster above; Coe above; Young id; David J. Acheson (2018) Corporate reputation under the European Convention on Human Rights, Journal of Media Law, 10:1, 49-76;

[97] Coe, P. and Brown, J. (2020) "What's in a name? The case for protecting the reputation of businesses under Article 1 Protocol 1 of the European Convention on Human Rights". *Journal of European Tort Law*, 10 (3). pp. 286-315.

[98] Cara Gao, "Serious Harm to Corporate Reputation - More than Just the Money," *Oxford University Undergraduate Law Journal* 2018 (2018): 10-38; Gary KY Chan "Corporate defamation: reputation, rights and remedies", *Legal Studies*, Vol. 33 No. 2, June 2013, pp. 264–288.

82.1 When a substantive exception is upheld, this is always appealable where prospects of success are established.[99]

82.2 If leave to appeal is not granted, the High Court's order upholding the second set of exceptions will stand and the plaintiffs will be allowed to proceed with their claims for R14 million in general damages without pleading or proving falsity, wilfulness or patrimonial loss.

82.3 The SCA has already spoken on this matter in *SA Taxi* and would be bound by its own decision if direct leave to appeal were refused and the matter were referred to the SCA.

82.4 The matter is plainly of considerable importance both to the parties in the matter and to the broader public.

83 It is therefore in the interests of justice for leave to appeal to be granted.

CONCLUSION

84 In all the circumstances we submit that the defendants' second special plea in each of the three cases is correct as a matter of law and that the plaintiffs' exception to it is unsustainable.

85 This is because:

[99] *Khumalo* above note 3 at para 6 and the cases cited there.

85.1 The existing common law approach to claims by for-profit companies for general damages for defamation is not consistent with the Constitution because it violates the right to freedom of expression.

85.2 When the common law is developed to resolve this unconstitutionality, as sections 8(3) and 39(2) require, a for-profit company suing for general damages for defamation for defamation must allege falsity, wilfulness and patrimonial loss.

85.3 Because the plaintiffs' particulars of claim in the three cases do none of these, the second special plea in each of the three cases is correct as a matter of law.

86 This Court should accordingly:

86.1 grant leave to appeal against paragraph 2 of the High Court order;

86.2 set aside paragraph 2 of the High Court order and replace it with an order dismissing the second set of exceptions; and

86.3 direct that the costs of the application for leave to appeal and the appeal be paid by the plaintiffs, including the costs of three counsel.

GEOFF BUDLENDER SC
STEVEN BUDLENDER SC
SHA'ISTA KAZEE
ESHED COHEN
Counsel for the defendants

Chambers, Cape Town and Johannesburg
9 December 2021