CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/21

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

Neutral citation:	*Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* [2022] ZACC 38
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgments:	Majiedt J (majority): [1] to [152]

Unterhalter AJ (dissenting): [153] to [210]

Heard on: 17 February 2022

Decided on: 14 November 2022

Summary: Defamation — constitutionality of awarding general damages to trading corporations — partially unconstitutional — public discourse on issues of public interest

Section 16 of the Constitution — section 10 of the Constitution — common law right to reputation

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ORDER

On direct appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal directly to this Court is granted.
2. The appeal is upheld 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.

JUDGMENT

MAJIEDT J (Madlanga J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J and Tshiqi J concurring):

Introduction

> "The preoccupation of [the] law of defamation with damages has been a crippling experience over the centuries. The damages remedy is not only singularly inept for dealing with, but actually exacerbates, the tension between protection of reputation and freedom of expression, both equally important values in a civilised and democratic community. A defamed plaintiff has a legitimate claim to vindication in order to restore his damaged reputation, but a settlement for, or even an award of damages, is hardly the most efficient way to obtain that objective."[1]

[1] There is much debate generally around damages awards as solace for injured feelings, particularly in respect of defamation.[2] This case is about a narrower issue, whether a trading corporation[3] ought to be able to sue for general damages in a defamation suit and, if so, whether it ought to be able to do so without having to allege or prove—

(a) the falsity of the impugned statement;

(b) the wilfulness of the false statement; and

(c) that it suffered any patrimonial loss.

[2] As will appear, the case condensed even further at the hearing. The only issue before us is the alternative claim that, in the event that a trading corporation has remedies in defamation available without pleading the aforementioned requirements, those remedies do not include a claim for general damages. A related issue is the claim that, to the extent that the common law was not consonant with this contention, it is unconstitutional and falls to be developed in terms of sections 8(2) and 39(2) of the Constitution.

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[1] Fleming "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 *University of British Columbia Law Review* 15 at 15.

[2] Compare, for example the lament in the minority judgment in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at paras 197-8. The New South Wales Law Commission, in a report published in 1995, which was referred to by Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 26, remarked that "[a] legal system which effectively promotes damages as the sole remedy in defamation is remedially crude".

[3] During the hearing, and in the parties' written submissions, various terms were used to refer to what I refer to in this judgment as a "trading corporation". One such term is "for-profit company". In this judgment, I will predominantly use the term "trading corporation".

[3] This case originates from three defamation suits instituted by the present respondents – Australian mining companies – and some of their executives, as plaintiffs in the High Court of South Africa, Western Cape Division, Cape Town (High Court). The defendants in the suits are the present applicants and are environmental lawyers and activists. For ease of reference, the parties will be referred to as they are in this Court, although the context may sometimes require reference to them as they were in the High Court.[4] The parties may, from time to time, also be referred to as "the mining companies" or "the mining executives" (plaintiffs/respondents) and "the environmentalists" (defendants/applicants).

[4] The three defamation actions emanated from various allegedly defamatory statements made by the environmentalists. The claims in the actions total in excess of R14 000 000. In response to the defamation actions, the defendants raised two special pleas in each of the actions that elicited exceptions from the plaintiffs. This matter concerns the second set of exceptions that became known as the "corporate defamation defence special plea".[5] In essence, that exception entails a contention by the plaintiffs that the corporate defamation special plea of the defendants did not give rise to any defence in our law. This case does not deal with the mining executives' personal rights as natural persons to sue for general damages for the alleged defamatory statements, but with the defamation claims of the mining companies (hence the distinction between "the mining companies" and "the mining executives" in the nomenclature).

[5] The High Court heard the two exceptions together.[6] It upheld the mining companies' exception to the corporate defamation special plea on the basis that

[4] Although there are three separate cases with different case numbers in the High Court, only one judgment was delivered in respect of all of them; and there is only one application in this Court. The applicants and respondents are therefore numbered differently in this Court and the High Court.

[5] The first set of exceptions concern the so-called "SLAPP" (Strategic Litigation Against Public Participation) special plea. Those exceptions are the subject of a related case in this Court, *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* CCT 66/21.

[6] *Mineral Sands Resources (Pty) Ltd v Reddell and Two Related Cases* 2021 (4) SA 268 (WCC).

the Court was bound by the precedent of the Supreme Court of Appeal in *SA Taxi*, where it was decided that a trading corporation can sue for general damages for defamation.[7] This application for leave to appeal directly to this Court, thus bypassing the Supreme Court of Appeal, is based on the fact that only this Court can overrule the decision in *SA Taxi*.

Background

[6] The plaintiffs are engaged in extensive mining operations in the exploration and development of major mineral sands projects in South Africa, namely the Tormin Mineral Sands Project and the Xolobeni Mineral Sands Project. There appears to be fierce community opposition to these mining activities and the defendants are apparently at the forefront of that opposition. In the course of this opposition, the defendants are alleged to have made statements which are defamatory of the plaintiffs.

[7] The first to third applicants made the alleged defamatory statements as presenters of a lecture series at the University of Cape Town, concerning the respondents' Tormin mining project, entitled "Mining the Wild and West Coast: 'Development' at what cost?". The alleged defamatory statements concern claims of the duplicitous and unlawful nature of the mining operations which were said to be ravaging the environment. The claims against them total R1 250 000.

[8] The fourth and fifth applicants participated in a radio interview in which the present fourth respondent (the second plaintiff in the High Court) was also a participant. The interview was posted on the radio station's website. The fourth and fifth applicants discussed the mining activities, expressed certain contentious opinions and trenchantly criticised the plaintiffs' mining operations. They were sued for a total of R3 000 000.

[7] *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA).

[9] Lastly, in respect of the sixth applicant, the alleged defamatory statements appeared in: two e-books[8] published by him; several of his radio interviews; video clips posted by him on YouTube; numerous emails that he had written; and a number of his interviews published on various social media platforms online. He also participated in a panel discussion relating to mining and mineral regulation issues, on a television programme known as 50/50; posted an article on an online journalism platform called *Medium*, entitled "Behind the Irony Curtain: Blood Diamond, Xolobeni and the Real Story of MRC";[9] and engaged in general advocacy around environmental issues. In the end, the plaintiffs instituted 27 defamation claims against him totalling R10 000 000.

[10] The plaintiffs sought damages for the alleged defamation, alternatively, public apologies. The defendants' corporate defamation defence special plea was that a trading corporation has no remedy available to it in relation to defamation without alleging and proving that the defamatory statements concerned—

(a) are false;
(b) were made wilfully; and
(c) caused it to suffer patrimonial loss.

[11] Secondly, and in the alternative, the defendants pleaded that in the event that a trading corporation had remedies in defamation available without pleading falsity, wilfulness and patrimonial loss, those remedies do not include a claim for general damages. Lastly, it was pleaded that to the extent that the common law was not consonant with these two contentions, it is unconstitutional and falls to be developed in terms of sections 8(2) and 39(2) of the Constitution. As stated, the plaintiffs excepted successfully to this second set of special pleas, on the basis that no defence of this type exists in South African law.

[8] An e-book is a book publication made available in digital form. The first e-book, is Clarke *The Promise of Justice* (2013), and the second is Clarke *Survivor: Wild Coast – Before and Beyond 'The Shore Break'* (2015).

[9] Clarke "Behind the Irony Curtain: Blood Diamond, Xolobeni and the Real Story of MRC" *Medium* (25 March 2018), available at https://johngiclarke.medium.com/behind-the-irony-curtain-blood-diamond-xolobeni-and-the-real-story-of-mrc-6a626c9c2913.

Parties' submissions

The applicants' principal submissions

[12] On jurisdiction and leave to appeal, the applicants submit that when a substantive exception is upheld, it is always appealable where prospects of success are established. They contend that, 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 substantial claims in general damages without pleading or proving falsity, wilfulness or patrimonial loss. Since the Supreme Court of Appeal has already spoken on this matter in *SA Taxi*, it would be bound by its own decision if direct leave to appeal is refused and the matter is referred to that Court. The applicants contend that the matter transcends the parties' narrow interests and is plainly of considerable importance, not only to the parties, but also to the broader public. They submit that leave to appeal ought therefore to be granted.

[13] On the merits, the applicants contend that if the common law allows trading corporations to succeed in a defamation claim for general damages without meeting these requirements, it is unconstitutional. This is because, so they argue, allowing defamation claims for general damages imposes significant restrictions on the right to freedom of expression in the Constitution. This is constitutionally permissible in the case of plaintiffs who are natural persons, since they are the bearers of the constitutional right to human dignity and the principles of defamation law strike an "appropriate balance" between the competing constitutional rights to human dignity and freedom of expression. But not so with trading corporations that sue for defamation. The applicants submit that they are not bearers of the constitutional right to human dignity. Furthermore, the interest of trading corporations in their reputation is not personal, but purely financial. In those circumstances, the Constitution demands that if a trading corporation 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.[10] As a result, the applicants contend that the trading corporation must allege and prove that the statements are false, that the false statements were made wilfully and that the false statements caused patrimonial loss.

[14] According to the applicants, the majority in *SA Taxi* was wrong in upholding a claim for general damages by a trading corporation, as that claim does not meet the principles outlined. Thus, insofar as the common law in terms of *SA Taxi* equates the position of trading corporations with that of natural persons, it is unconstitutional. This Court should thus overrule *SA Taxi*. In the event that this Court concludes that *SA Taxi* was correctly decided, the common law must be developed, in accordance with sections 8(3) and 39(2) of the Constitution, in order to address this violation of the right to freedom of expression. Restricting trading corporations to claims for injurious falsehoods would be a more appropriate balance, different to the law of defamation as it applies to natural persons. The requirements that a trading corporation prove falsity of the statement, wilfulness and that it had suffered patrimonial loss, achieves this balance.

[15] The applicants contend further that the majority in *SA Taxi* erred in its finding that treating trading corporations differently to natural persons would violate section 9(1) of the Constitution. The differences between trading corporations and natural persons not only permit, but require, different treatment in the law of defamation. Juristic persons are not bearers of the right to human dignity and thus cannot lay claim to constitutional protection on the basis of the right to human dignity under section 10 of the Constitution.[11]

[10] Citing *Geary & Son v Gove* 1964 (1) SA 434 (A) at 441D, the applicants submit that the elements of a claim for injurious falsehood are: the defendant has made a false representation; the defendant knew the representation to be false; the plaintiff has lost or will lose customers as a result of the false representation; and that the defendant intended, by the false representation, to cause the plaintiff that loss.

[11] Section 10, headed "Human dignity", provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[16] They contend further that when one considers the nature of the right to dignity and the nature of trading corporations, it is abundantly clear that they cannot be the bearers of the right to human dignity. A trading corporation only has a financial interest in its reputation, that is, goodwill (its capacity to attract customers and make a profit). If its reputation is damaged, the damage ordinarily diminishes its capacity to attract customers and make profit. A trading corporation has no feelings that can be injured.[12] Thus, there are no competing constitutional rights at stake here and the principles enunciated in *Khumalo*,[13] where there was a weighing up of the competing rights to human dignity and freedom of expression, do not find application. Thus, contend the applicants, the majority judgment in *SA Taxi* was wrongly decided and that decision ought to be overruled.

[17] The applicants further argue that the common law rules in respect of claims for general damages for defamation by trading corporations are unconstitutional. They submit that a justification analysis in terms of section 36(1) of the Constitution demonstrates that the limitation of the section 16 right to freedom of expression is unjustified and that the common law must be developed. The common law can be developed in one of two ways, according to the applicants. First, by providing that in any claim of any sort for defamation by a trading corporation, it must allege and prove falsity, wilfulness and patrimonial loss. Second, and in the alternative, it could be developed to provide that where a trading corporation does not allege and prove falsity, wilfulness and patrimonial loss, it is precluded from claiming general damages. Finally, with reference to various international and comparative law sources, the applicants contend that various other democratic societies have recognised the need to limit trading corporations' ability to sue for defamation and that legal commentators largely support these restrictions.

[12] In this regard, the applicants cite the dissenting judgments of Lord Hoffmann and Baroness Hale in *Jameel (Mohamed) v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 (*Jameel*).

[13] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC).

The respondents' principal submissions

[18] The respondents accept that the application raises constitutional issues, but contend that those issues have already been determined and, therefore, do not require the attention of this Court. The respondents, thus, contend that the appeal bears no reasonable prospects of success and, as a result, it is not in the interests of justice to grant leave. The respondents argue that the debates which the applicants seek to raise were, to a large extent, comprehensively dealt with by the Supreme Court of Appeal in *SA Taxi* and, on that authority, the appeal bears no prospects of success.

[19] In respect of the merits, according to the respondents, the cumulative impact of both special pleas before this Court must be considered. If the defendants succeed in defending both their special pleas, then businesses operating as juristic persons in South Africa will be faced with three challenging hurdles which will inhibit business enterprise and discourage foreign and local investment in this country. These hurdles are: first, proof of an absence of ulterior or improper motive in suing for defamation (this relates to the so-called "SLAPP" defence special plea in CCT 66/21); second, proof that the defamatory statement is false and that it was made wilfully, that is, with the intent to defame;[14] and third, and possibly the most difficult requirement, proof that the defamatory statement caused financial loss. The last of these is said to potentially be the most difficult, because an injury to the reputation of a trading company will not always be measurable in terms of lost profits.[15]

[20] The respondents caution that there are four troubling features of the drastic reforms to the common law proposed by the applicants. First, there has been a marked

[14] This, according to the respondents, is a difficult requirement as it is quite cumbersome for the target of defamation to show that the perpetrator thereof (the defendant) is lying. Since it is the defendant who published the statement, she is in the best position to show that what she published is true. They cite *Khumalo* id at para 38 where it was held:

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

[15] The respondents cite *SA Taxi* above n 7 at para 40.2.

increase in the irresponsible spreading of fake news through social media platforms, which has become one of the most significant threats to democracy and the search for truth in open societies. The respondents therefore argue that, if it is made virtually impossible for trading corporations to sue for defamation in such circumstances, it will become far too easy for conveyors of conspiracy theories and other fake news to harm our democracy and undermine an important object of the protection of freedom of expression, which is the pursuit of truth.

[21] Second, the respondents contend that the applicants' approach draws no distinction between for-profit and not for-profit companies. It would be severely detrimental to the latter to apply this approach to them, as any damage to their reputation could be devastating. Third, the respondents submit that there is no evidence that claims for general damages by trading corporations have proliferated in recent times. Trading corporations face additional obstacles - their claim is restricted to an injury to reputation (*fama*). That reputation must first be established, it must then be shown that it is likely that the statement will harm their reputation, and it must be shown that it is more probable than not that harm will occur, and not a mere tendency or propensity to harm. Fourth, and finally, as far as the alleged need to plead and prove falsity is concerned, the respondents submit that this issue was comprehensively addressed by this Court in *Khumalo.* In that case it was held that the defence of reasonable publication, developed by the Supreme Court of Appeal in *Bogoshi*,[16] saved the common law from invalidity and resulted in an appropriate balance between the interests of a plaintiff and a media defendant in defamation cases. The extension of that defence to non-media defendants would address the concerns raised by the applicants in the present matter. That is the development of the common law for which the applicants should instead be advocating for, and not the drastic reforms now being espoused.

[22] The respondents also point out certain anomalies in the applicants' case. They say that those anomalies arise because the applicant's case – that it is an unjustifiable

[16] *National Media Ltd v Bogoshi* [1998] ZASCA 84; 1998 (4) SA 1196 (SCA).

limitation of the right to freedom of expression to equate the right of trading corporations to sue for general damages for defamation to that of natural persons – rests on two faulty pillars. The first is that a narrowly defined human dignity is the only basis on which the limitation of freedom of expression inherent in the law of defamation can be justified. That is not so – reputation (*fama*, as distinct from *dignitas*) justifies such a limitation as well. Reputation finds a constitutional home in the wider approach to human dignity adopted by this Court, contend the respondents.[17] Trading corporations have a right to their reputation, worthy of constitutional protection even though they do not have *dignitas*, that is narrow dignity in the sense of self-worth.

[23] The second faulty pillar is that the applicants contend that the interest a trading corporation has in its reputation can always be vindicated by an action for special damages. This is not so, submit the respondents, because the value of a trading corporation's reputation for its profits may be intangible. It is not easily quantifiable. To restrict corporations who wish to vindicate their reputations to instances where they can prove financial loss will, in some instances, deprive them of a remedy altogether. The alleged differences between trading corporations and natural persons, for which the applicants contend, do not justify the drastic developments which they advocate, and they fail to strike an appropriate balance between the competing rights at stake here.

[24] The respondents submit that there is a long line of cases in which our courts established that there is no difference between the defamation claims made by natural and juristic persons, from the *obiter dictum* in *Fichardt*,[18] to the *rationes decidendi* in *Dhlomo*[19] and *SA Taxi*.[20] Strong reliance is placed on the majority judgment in *SA Taxi*, penned by Brand JA, a matter to be presently discussed in some detail.[21] In any event,

[17] They rely on *Khumalo* above n 13 at para 13 and *Le Roux* above n 2 at para 138.

[18] *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 at 5-6.

[19] *Dhlomo N.O. v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A).

[20] *SA Taxi* above n 7.

[21] The respondents submit that academic opinion is also supportive of the majority judgment, citing Loubser and Midgley (eds) *The Law of Delict in South Africa* (Oxford University Press Southern Africa, Cape Town 2010) and Neethling et al *Neethling on Personality Rights* (LexisNexis Butterworths, Durban 2019).

contend the respondents, the references in *SA Taxi* as to the requirements of the *Aquilian action* and those relating to the claim for injurious falsehood are entirely irrelevant in this matter.

[25] The respondents point out that the minority judgment of Nugent JA in *SA Taxi* is no authority for the contention that a trading corporation should plead and prove the falsity and wilfulness of a defamatory statement in a defamation claim. It relates only to the remedy of general damages. They assert that the majority decision is unassailable and that the applicants' proposition to have additional obligations imposed on trading corporations or to have their remedies limited in the manner that the applicants propose (in a manner akin to the *lex Aquilia* or the delict of injurious falsehood), is inconsistent with our law. International and comparative law support that majority judgment.[22] The corporate defamation special plea is, therefore, excipiable as the High Court correctly held pursuant to the binding authority of *SA Taxi*. In order for the applicants to succeed, this Court will have to adopt the developments of the common law for which they contend. As to the proposed development of the common law, the respondents reiterate that the majority in *SA Taxi* was correct in rejecting the drastic development[23] proposed by the applicants and the United Kingdom judgments in *Steel and Morris* and *Jameel* confirm this.

Jurisdiction and leave to appeal

[26] For leave to appeal to be granted in this Court, an applicant must meet two requirements. First, the matter must fall within the jurisdiction of this Court in that it

[22] They refer to *Steel and Morris v United Kingdom* [2005] ECHR 103 and *Jameel* above n 12.

[23] The respondents submit that the Supreme Court of Appeal majority in *SA Taxi* above n 7, rejected the proposed development that:

> "[F]or-profit companies should plead and prove patrimonial loss (special damages) in defamation action or whether they should (as a less drastic alternative) be precluded from claiming general damages (and restricted to other remedies, such as a claim for an apology)."

They then state that:

> "The same development was also rejected by the majority of the (then) House of Lords in *Jameel (Mohamed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) which was found not to violate the European Convention for the Protection of Human Rights and Fundamental Freedoms in *Steel and Morris v United Kingdom* (2005) 41 EHRR 403."

raises a constitutional issue or an arguable point of law of general public importance; and second, the interests of justice must warrant that leave to appeal be granted.

[27] This Court's constitutional jurisdiction is plainly engaged. The matter concerns the balance to be struck between the right to freedom of expression in section 16 of the Constitution[24] and a trading corporation's right to its reputation. A defamation action implicates these two rights. As will be more fully explicated, the one is a constitutional right, freedom of expression, and the other emanates from the common law, that is the right to reputation. Where the law renders defamation actionable and compensable, it plainly entails a limitation to freedom of expression.[25] 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. The applicants seek the development of the common law to disallow trading corporations an action in defamation for general damages so as to promote the right of freedom of expression. This development entails, in the first place, restricting trading corporations to an action for defamation only in instances where it meets the requirements for injurious falsehood. In the alternative, the development entails preventing trading corporations from ever receiving general damages for defamation.

[24] Section 16 reads:

> "(1) Everyone has the right to freedom of expression, which includes—
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> (a) freedom of the press and other media;
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> (b) freedom to receive or impart information or ideas;
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> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
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> (2) The right in subsection (1) does not extend to—
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> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[25] *Khumalo* above n 13 at para 33 and *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 90.

[28] 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. I am also satisfied that the application bears reasonable prospects of success and that the importance and nature of the issues raised demonstrates that the matter transcends the narrow interests of the parties. Therefore, the constitutional and general jurisdiction of this Court is engaged.

[29] But should leave to appeal directly to this Court be granted? Direct appeals to this Court are permitted only in exceptional instances. As stated, the Supreme Court of Appeal has already, in *SA Taxi,* decided the central issue in this case. That Court would be bound by its own decision if direct leave to appeal were refused and the matter were to be referred to it. While the Supreme Court of Appeal may, by virtue of the doctrine of precedent, reverse its *SA Taxi* decision, the matter would, in all likelihood, end up in this Court. Since we have the benefit of the views already expressed in *SA Taxi,* the interests of justice require that this Court finally determine the matter.

[30] As indicated above, the matter is plainly of considerable importance both to the parties in the matter and to the broader public. This is so because awarding general damages to trading corporations for defamation may potentially shackle public participation, particularly in environmental matters, where meaningful public participation is required. That is indisputably a matter of general public importance. In *Khumalo* this Court granted leave to appeal directly to it. In granting leave, this Court held that:

> "The extent to which the Constitution requires a development of the law of defamation is a question which has been frequently asked. The issue was raised but not answered in an early decision of this Court, *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658) and has been considered in a considerable number of High Court judgments since. It is also a matter which has received the attention of the Supreme Court of Appeal in *National Media Ltd v Bogoshi* and has also

> troubled courts in many other jurisdictions. In all these circumstances, therefore, it seems that it would be in the interests of justice for this Court to consider the appeal. The application for leave to appeal is therefore granted."[26]

[31] While *Khumalo* settled the position as regards the intersection between the law of defamation and the constitutional right to freedom of speech insofar as it relates to plaintiffs that are natural persons, the position in respect of plaintiffs that are trading corporations remains contested, particularly in light of the divergent decisions in *SA Taxi*. These considerations strongly support the grant of direct access to this Court.

[32] The next question concerns appealability. In *Zweni*, the Supreme Court of Appeal held that decisions that can be appealed must have the following three attributes: they must be final in effect and not susceptible of alteration by the court of first instance; they must be definitive of the rights of the parties; and they must have the effect of disposing of a substantial portion of the relief claimed.[27] However, where an exception is not upheld, an appeal will not lie because it does not meet the criteria enumerated in *Zweni*.[28] Previously, the Supreme Court of Appeal has pertinently declined to reconsider the question of the appealability of decisions dismissing exceptions.[29] But when a substantive exception is upheld as is the case here, this is usually appealable where prospects of success are established.[30] As stated, there are reasonable prospects of success here. This set of exceptions plainly raise questions concerning the constitutional validity of the common law of defamation, as was the case in *Khumalo*. Therefore, in considering and then dismissing the applicants' contentions, the High Court was clearly concerned with a constitutional matter and its order constitutes a decision on such a matter as contemplated by rule 19 of the Rules of this Court.[31] Leave to appeal directly to this Court ought therefore to be granted.

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[26] *Khumalo* id at para 16.

[27] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I-533A.

[28] Id at 536A-C.

[29] *Minister of Safety and Security v Hamilton* [2001] ZASCA 22; 2001 (3) SA 50 (SCA) at 53E.

[30] *Khumalo* above n 13.

[31] Rule 19(2) provides:

Preliminary remarks on the applicants' case

[33] At the hearing, the applicants' case took an unexpected turn which significantly altered the course of the matter and considerably narrowed the issues. It will be recalled that the applicants initially contended that 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. This position was abandoned at the hearing and the applicants only persisted with their alternative claim on the constitutionality of awarding general damages to trading corporations in defamation cases.

[34] The applicants no longer pursue their further special plea because they conceded that a trading corporation may pursue a defamation action in the ordinary way and seek remedies other than general damages. This means that the applicants no longer contend that a trading corporation must plead that the defamatory statements were false, made wilfully and caused patrimonial loss. They also appear to accept that a trading corporation has a reputation to defend and that its reputation is not simply commercial goodwill which, if sullied, requires the trading corporation to sue under the *actio legis Aquiliae* for patrimonial loss. Thus, they appear to accept that a trading corporation may defend its reputation by suing in the ordinary way for defamation and seek declaratory relief and also an apology.

[35] It is necessary to interpose briefly to discuss the applicants' now abandoned submission that trading corporations should be restricted to a claim for injurious falsehood (sometimes referred to as untrue disparagement) to protect their reputation. In this way, so the applicants contended, a more appropriate balance is struck between

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"A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

the interests of natural persons and trading corporations in respect of defamation. This contention self-evidently fell flat when the applicants abandoned their initial submission that trading corporations must prove falsity, wilfulness, and patrimonial loss. But there is, in any event, a serious difficulty with that approach.

[36] Injurious falsehood is concerned with lost customers and patrimonial loss. As the respondents point out, that type of claim forms part of the delict of unlawful competition, which is not what this case is about. One of that delict's principal features is that it consists of non-defamatory statements.[32] In practice, its most important appearance is in the form of passing off.[33] Injurious falsehood is an inappropriate remedy for harm to a trading corporation's reputation. Nothing more needs therefore to be said about this. Personality infringement and loss that is not patrimonial in nature can conceivably exist without injured feelings, an aspect to be considered next.

[37] In light of the above, this Court thus only has to answer the question of the constitutionality of awarding general damages to trading corporations in defamation cases. In addressing the issues before this Court, the following matters will be discussed. First, I will set out the present state of our common law of defamation. Second, the constitutionality of awarding general damages to trading corporations in defamation cases will be assessed. In light of the fact that the allegation is that this practice infringes section 16 of the Constitution, a determination will be made on whether there is a limitation and, if there is, a section 36 analysis will be conducted to determine whether the limitation is reasonable and justifiable in an open and democratic society. Under that rubric, I will also discuss the applicability of the right to dignity of trading corporations. This discussion is particularly important because dignity plays a central role in this case. Additionally, it is important because this Court has repeatedly grounded our law of defamation solely on a plaintiff's dignity, the right to self-worth, a

[32] McKerron *The Law of Delict* 7 ed (Juta & Co Ltd, Cape Town 1971) at 213.

[33] Id at 214.

good name and reputation.[34] Third, I will consider comparative and international law, whereafter I will provide my conclusion.

The state of our common law of defamation

[38] The intentional infringement of personality rights, such as the right to a good name and reputation, is addressed in our law by the *actio iniuriarum*. In *Dikoko*, this Court expressed it thus:

> "The law of defamation is based on the *actio injuriarum*, a flexible Roman-law remedy which afforded the right to claim damages to a person whose personality rights had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation."[35]

[39] This Court has consistently applied the common law of defamation.[36] In *Khumalo* this Court held that:

> "At common law, the elements of the delict of defamation are:
>
> (a) the wrongful and
> (b) intentional
> (c) publication of
> (d) a defamatory statement
> (e) concerning the plaintiff.
>
> It is not an element of the delict in common law that the statement be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. Although not a closed list, the most commonly raised defences to rebut unlawfulness are that the publication was true and in the public

[34] See, amongst others, *Le Roux* above n 2 at para 138; *Khumalo* above n 13 at para 28; and *Dikoko* above n 25 at para 92.

[35] *Dikoko* id at para 62.

[36] Id; *Le Roux* above n 2.

> benefit; that the publication constituted fair comment and that the publication was made on a privileged occasion. Most recently, a fourth defence rebutting unlawfulness was adopted by the Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*."[37]

[40] The Court noted that "[t]his fourth defence for rebutting unlawfulness, therefore, allows media defendants to establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances".[38] In our law that defence is not available to non-media defendants.[39] *Khumalo* concerned the constitutionality of our common law of defamation as it applied to natural person plaintiffs and media defendants. The Court was required to answer the question whether—

> "to the extent that the law of defamation does not require a plaintiff in a defamation action to plead that the defamatory statement is false in any circumstances, the law limits unjustifiably the right to freedom of expression as enshrined in section 16 of the Constitution."[40]

[41] In that case, Mr Bantubonke Holomisa, a well-known South African politician, and the leader of a political party, sued the publishers of the *Sunday World* for defamation for an article published in that newspaper. In the article it was stated, amongst other things, that Mr Holomisa was involved with a gang of bank robbers and that he was under police investigation for this involvement.

[42] This Court held that there can be "no doubt" that the law of defamation limits section 16 of the Constitution.[41] The Court, mindful that there were two competing constitutional rights involved in the case, namely the right to dignity (enjoyed by the

[37] *Khumalo* above n 13 at para 18. This position was confirmed in *Le Roux* id at para 84-5.

[38] *Khumalo* id at para 19.

[39] Id at para 19. The Court unequivocally states that the defence is available to media defendants.

[40] Id at para 4.

[41] Id at para 33.

defamed politician) and the right to freedom of expression (held by the media company), stated that:

> "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."[42]

[43] This Court answered the question before it – that is whether the burden and difficulty of proving truth or falsity made the common law of defamation unconstitutional, as far as media defendants are concerned – holding:

> "At the heart of the constitutional dispute lies the difficulty of establishing the truth or falsehood of defamatory statements. Burdening either plaintiffs or defendants with the onus of proving a statement to be true or false, in circumstances where proof one way or the other is impossible, therefore results in a zero-sum game. Either plaintiffs will benefit from the difficulties of proof, as happened previously under common law rules; or defendants will win, as the applicants propose. Such a zero-sum result, in whomsoever's favour, fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and human dignity.
>
> Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi*'s case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result."[43]

[44] It is therefore plain that this Court adopted the view that the law of defamation as it applied to media defendants, absent the reasonable publication defence developed in *Bogoshi*, was unconstitutional on account of the burden and difficulty (sometimes impossibility) of having to prove truth or falsity. It is further clear that this Court considered the unconstitutionality to have been remedied or cured by the reasonable publication defence developed in *Bogoshi*. As stated above, the reasonable publication defence only applies to media defendants. But here we are dealing with defamation

[42] Id at para 28.

[43] Id at paras 42-3.

cases instituted by juristic persons, more particularly trading corporations, against non-media defendants.

[45] In *Le Roux*, this Court outlined the defences available to a non-media defendant in a defamation action:

> "[T]he plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence."[44]

[46] The applicants no longer take issue with the constitutionality of the law of defamation as it applies to trading corporations. As stated, at the hearing they abandoned their original contention that the common law enabling trading corporations to sue for general damages without alleging and proving falsity, wilfulness and patrimonial loss unjustifiably limits a defendant's right to freedom of expression. What remains of their challenge is a consideration of the constitutionality of awarding general damages to trading corporations in defamation cases.

The current position of trading corporations in our common law of defamation

[47] The common law distinguished reputation (*fama*) and self-worth (*dignitas*) as separate personality rights deserving of protection. That protection was afforded through the *actio iniuriarum* applied in actions for defamation. This much is

[44] *Le Roux* above n 2 at para 85.

uncontentious.[45] In *SA Taxi*, the Supreme Court of Appeal affirmed that at common law, a trading corporation has a right to the protection of its reputation.[46] In that regard, there was unanimity between the majority and minority judgments.[47]

[48] The conceptual basis of the right accorded to juristic persons is the acceptance that there are aspects of reputation enjoyed by juristic persons that do not equate to the patrimonial value of goodwill.[48] Thus, the protectable interests of trading corporations extend beyond mere goodwill. A trading corporation is a social entity that enjoys a reputation among many stakeholders that has a value that is not reducible to reputation as a profit-making asset. Corporate reputation is arguably of little less importance than individual reputation, as it is not only vital for the health and prosperity of both large and small businesses, but also for the communities within which they operate.

[49] Large corporations play a vital role in communities and in the affairs of the economy and politics. Large corporations are, for example, often well regarded by employees, present, past and prospective. Large, influential corporations are often national champions and contribute to national identity, and sometimes even pride as symbols of national success. And they may sometimes be held in high esteem for the role they play as partners in national social projects. None of this is directly connected to patrimonial gain or loss. The need to protect their reputation thus extends beyond self-interest.

[50] This right to a good name has not always been consistently recognised in our law. In a line of cases, the view was taken that juristic persons have no personality

[45] See, for example, *Khumalo* above n 13 at para 27.

[46] *SA Taxi* above n 7 at para 30.

[47] Id at para 65, Nugent JA states that "[w]e agree that a trading corporation has a protectable interest in its reputation, and we agree that it is entitled to redress once the elements of unlawful defamation have been established in the ordinary way".

[48] There are some who argue for a denial to a trading corporation of "any right to reputation, and generally any non-patrimonial (personality) rights, since they are incapable of suffering any loss if these are violated". See Descheemaeker "Three Keys to Defamation: Media 24 in a Comparative Perspective" (2013) 130 *SALJ* 435 at 437.

rights, including the right to a good name.[49] For this reason, it was held that juristic persons could not sue for defamation.[50] But there were, conversely, also cases that held that a trading corporation could sue, if the impugned statement was calculated to injure it in its business reputation or to have an adverse effect on its trade or business.[51]

[51] Then came *Dhlomo*.[52] There, the Appellate Division decided that a trading corporation should be entitled to sue for defamation and it pertinently approved of the *obiter dictum* to this effect, some 70 years before, in *Fichardt*.[53] With respect to the requirement of proof of injury to business reputation or proof of adverse effect on its trade or business, the Court held:

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[49] See, amongst others, *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 384. This finding was confirmed, in part, by the Appellate Division in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 453-4.

[50] *Church of Scientology in SA (Incorporated Association not for gain) v Reader's Digest Association SA (Pty) Ltd* 1980 (4) SA 313 (C) at 317 and *Ahmadiyya Anjuman Ishaati-Islamlahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 865.

[51] *Fichardt* above n 18; *Goodall v Hoogendoorn Ltd* 1926 AD 11; *Gold Reef City Theme Park (Pty) Ltd*; *Akani Egoli (Pty) Ltd v Electronic Media Network Ltd* 2011 (3) SA 208 (GSJ) at 220; and *SA Taxi* above n 7 at para 7. McKerron above n 32 at 182 states that:

> "A trading corporation, being in law a person distinct from its members and having therefore a reputation of its own to maintain, can sue for a defamatory statement which affects it in its trade, property or reputation."

[52] *Dhlomo* above n 19.

[53] Id at 952, Rabie ACJ held that:

> "The aforesaid statements of the law by Innes CJ and Solomon JA [in *Fichardt's* case] were . . . strictly speaking not necessary for the decision of that case. . . . It is clear at the same time, however, that those statements were made as reflecting settled law. Innes CJ, as pointed out above, stated: 'That the remedy by way of action for libel is open to a trading company admits of no doubt', and Solomon JA, as has also been shown above, regarded it as settled law that a trading corporation could sue for defamation. In the *Spoorbond* case *supra* decided thirty years after *Fichardt's* case, Watermeyer CJ, without discussing the matter, accepted the law to be that a trading corporation can sue for defamation. I appreciate that it may be said that the recognition of the right of a trading corporation to sue for defamation involves an extension of the principles of Roman and Roman-Dutch law which dealt with the right of action only in relation to natural persons, but, having considered all this, and having taken account of South African academic writings in textbooks and legal journals *pro* and *contra* the idea that a trading corporation should have the right to sue for defamation, I have come to the conclusion that it would be unrealistic not to hold that the law as stated by this Court in *Fichardt's* case more than seventy years ago has become the law of South Africa. I accordingly so hold."

> "It would be wrong . . . to demand of a corporation which claims for an injury done to its reputation that it should provide proof of actual loss suffered by it, when no such loss is required of a natural person who sues for an injury done to his reputation."[54]

[52] *Dhlomo* was followed by *Caxton*.[55] In that case, the respondents, also trading corporations, sued for both general and special damages for alleged defamation. There, the right to sue for general damages, even though these were trading corporations was uncontentious on the basis of the precedent established in *Dhlomo*. This was, of course, confirmed by the majority in *SA Taxi*. Before undertaking an analysis of the judgments in *SA Taxi*, it is necessary to have regard to human dignity and the source of a trading corporation's reputation rights.

The source of a trading corporation's reputation rights

[53] This Court in *National Coalition I*,[56] with reference to *Hugo*,[57] acknowledged that:

> "Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society."[58]

[54] Early on in its jurisprudence, this Court in *Makwanyane*,[59] emphasised the importance of dignity in our Constitution, given our lamentable history:

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[54] Id at 953. See further *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA) at para 36.

[55] *Caxton Ltd v Reeva Forman (Pty) Ltd* [1990] ZASCA 47; 1990 (3) SA 547 (A).

[56] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[57] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), which referred to *Egan v Canada* (1995) 29 CRR (2d) 79 at 106, wherein it was held: "This Court has recognised that inherent human dignity is at the heart of individual rights in a free and democratic society".

[58] *National Coalition I* above n 56 at para 28. See also more recently, *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) at para 66.

[59] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. *Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. . . . Respect for the dignity of all human beings is particularly important in South Africa.* For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[60] (Emphasis added.)

[55] More recently in *Freedom of Religion*,[61] this Court underscored the importance of the right to human dignity:

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights."[62]

[56] And in *Khumalo*, this Court said:

> "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

[60] Id at paras 328-9. See also *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35:

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

[61] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC).

[62] Id at para 45.

> people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual."[63]

[57] Having set out the content and importance of the right to dignity, the question becomes who can bear this right, more specifically, whether juristic persons can bear this right.

[58] In answering the above question, the first inquiry should be whether the nature of the right permits of application to a juristic person. To this end, we must establish the content of the right. As the applicants correctly assert, there are numerous facets to human dignity which simply cannot be of application to trading corporations:

(a) Human dignity includes the ability to develop one's "humanness" and unique talents.[64]

(b) Human dignity includes the ability to enter relationships of defining significance.[65]

(c) Human dignity "comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context".[66]

(d) The right to human dignity protects us against degrading and invasive stigmatisation of our consensual sexual conduct.[67]

(e) Ubuntu, "an idea based on deep respect for the humanity of another", is the core foundation for the constitutional right to dignity.[68]

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[63] *Khumalo* above n 13 at para 27.

[64] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 49.

[65] *Dawood* above n 60 at para 37.

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

[67] Id at para 55.

[68] *Dikoko* above n 25 at para 68.

(f) Recently, this Court held that human dignity entails certain living conditions.[69]

[59] It bears emphasis that a clear distinction must be drawn between the broader concept of personhood that is exclusive to humans and the contrasting notion of corporate identity. Human dignity resides and is given expression to within the former, whereas the latter is historically and legally structured outside of the notion of personhood. Care must be taken to keep those identities apart in order not to diminish or dilute what it means to be a person. While humans form corporations, they do so to enjoy the benefit of a legal person that is separate from the identity of natural persons.

[60] Provisions in the Bill of Rights must be understood contextually and purposively.[70] This includes an analysis of the history of the provision and the reason for its adoption.[71] The purpose of the right to dignity is, by its very nature, "human-centric". Its introduction into the Bill of Rights was intended to cure a situation in which *human beings* were not treated as worthy of respect and concern. It was not introduced to ensure that companies are treated as entities worthy of respect. A company was not meant to have "intrinsic self-worth", as this Court has repeatedly referred to the essence of human dignity.

[61] A company's right to be treated equally is protected elsewhere – amongst others, by section 9 and section 8(4), but certainly not by section 10 of the Constitution. As a result, it is not mere formalism to rely on the fact that the section 10 right is headed "*human* dignity". Understood purposively, the right is intended to protect human beings. And this purposive understanding is buttressed by the important aspect of textual context – that the right is headed "human dignity". The fact that a company's right to equality is protected in, amongst others, section 8(4) of the Constitution, does

[69] *Mtolo v Lombard* [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) at para 42. See also *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 31.

[70] *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 at para 16.

[71] Id.

not lead to the extension of the provisions of section 10 to juristic persons, including companies. For, as the *Certification Judgment* makes plain:

> "[S]ome rights are not appropriate to enjoyment by juristic persons, [and] the text of section 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not."[72]

[62] That the right to dignity is undergirded, in part, by a protection of reputational interests does not mean that because companies have reputational interests, they have a right to dignity. Instead, dignity protects human beings' reputational interests, because protection of those interests is necessary to ensure that a specific purpose is realised – that human beings are treated as worthy of respect and concern.[73] The position in respect of corporations is self-evidently quite different. They do not possess these traits of natural personhood. The nature of their right to a good name and reputation must necessarily be distinguished from that of a natural person. Put differently, the mere fact that an entity has an interest which is protected by a certain right does not mean that the entity enjoys that right.

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[72] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 57.

[73] As long ago as 1899, de Villiers, in *The Roman and Roman-Dutch Law of Injuries* (Nabu Press, 2012), recognised at 24-5 that—

> "[b]y 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 anyone 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."

Nothing has changed with regard to this lucid exposition of the nature of a person's right to a good name and reputation.

[63] It is quite legitimate to argue that a human being's reputational interests are in need of a more demanding form of protection than a company's, for example, and that this protection is therefore to be moored in a constitutional right. Conversely, it is fair to reason that a company's reputational interest is sufficiently protected by the common law, and therefore does not enjoy the protection of a constitutional guarantee. In short, section 8(4) does not require that companies are afforded a section 10 right simply because they enjoy an interest which that right protects. In my view, the purpose of the right described above points in the opposite direction.

[64] In *Hyundai*,[74] a case upon which much reliance was placed by the majority in *SA Taxi*, this Court held:

> "The protection of the right to privacy may be claimed by any person. . . . Neither counsel addressed argument on the question of whether there was any difference between the privacy rights of natural persons and juristic persons. But what is clear is that the right to privacy is applicable, where appropriate, to a juristic person. . . . *Juristic persons are not the bearers of human dignity*. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy."[75] (Emphasis added.)

[65] This Court in *Hyundai* referred to section 8(4) of the Constitution, which provides that a "juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person". This qualification in section 8(4) was explained in the *Certification Judgment*:

> "[M]any 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of section 8(4) specifically recognises this. The

[74] *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).

[75] Id at para 17-8.

> text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not."[76]

[66] *Hyundai* was concerned with the right to privacy. While this Court did link that right and the right to dignity (referencing *Bernstein*[77] in that regard), it pertinently held that "*[j]uristic persons are not the bearers of human dignity*".[78] This was confirmed by this Court in *Tulip Diamonds*.[79] Plainly then, the law in this regard has been emphatically settled by this Court in *Hyundai* and *Tulip Diamonds*. Self-evidently, human dignity is a personal value and right, bearing on the intrinsic self-worth of all human beings.[80] The assessment whether a juristic person bears a constitutional right to dignity in terms of section 10 entails an enquiry into the nature of the right and the nature of the juristic person. For the reasons already stated, on both these bases the answer to that enquiry must emphatically be in the negative. This Court has authoritatively said so not once, but twice that the nature of the right to dignity is such that it cannot apply to juristic persons. This settled law must be accorded the requisite jurisprudential recognition.

[67] In *Gcaba*, this Court cautioned:

> "A highest court of appeal – and this Court in particular – has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order – as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and

[76] *Certification Judgment* above n 72 at para 57.

[77] *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

[78] *Hyundai* above n 74 at para 18 (emphasis added).

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

[80] Compare to *Dawood* above n 60 at para 35.

> for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts."[81]

[68] I have had the pleasure of reading the judgment penned by my Brother, Unterhalter AJ (second judgment). The second judgment evades the thrust of this Court's definitive judgments in *Hyundai* and *Tulip Diamonds* because there is no need to "make a dispositive interpretation on this score".[82] The import of those two cases is no trifling matter. They provide much of the rationale why trading corporations do not enjoy the right to general damages. Having established that a trading corporation's right to reputation is not sourced in section 10 of the Constitution, I proceed to an analysis of the judgments in *SA Taxi*.

The judgments in SA Taxi

Majority judgment of Brand JA

[69] As stated, the High Court regarded itself bound by the Supreme Court of Appeal precedent in *SA Taxi* and, understandably, the mining companies place heavy reliance on the majority judgment. *SA Taxi* was the first occasion where the Supreme Court of Appeal and, before it, the Appellate Division, was required to pertinently rule as a triable issue in the case, what kind of loss is occasioned when a trading corporation sues for defamation. Neither *Fichardt*, *Spoorbond*, *Dhlomo*, nor *Caxton* decided this point. *SA Taxi* was the first case to do so. It broke new ground in our defamation law as it relates to trading corporations' right to sue for general damages.

[70] That case concerned a defamation action instituted by SA Taxi, a finance company that provides financial assistance to purchasers and lessees of taxis. The

[81] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 62.

[82] Second judgment at [159].

first defendant, Media 24, published a newspaper, *City Press*, which was distributed countrywide in South Africa. The second defendant is the editor of that newspaper. The action emanated from an article which was published in *City Press* in June 2008 under the title "Taxi owners taken for a ride by finance body". SA Taxi claimed amounts for general as well as special damages (for lost profits). After its exception was dismissed, Media 24 filed a special plea that challenged SA Taxi's right to obtain either general or special damages under the law of defamation. Media 24 contended that for general damages SA Taxi had no claim at all in defamation, while its claim for special damages was not available under the *actio iniuriarum*, from which the action for defamation derives, but only under the *actio legis Aquilia*.

[71] After a comprehensive analysis of case law and legal principles, the majority found it unnecessary to arrive at a final decision as to whether the requirements of a claim for special damages resulting from defamation should mirror the requirements of injurious falsehood. In respect of general damages, Brand JA, writing for the majority, correctly pointed out that in our law, the defamation action originates from the *actio iniuriarum*, which was a claim for wounded feelings and not for patrimonial loss.[83] It was meant to compensate a plaintiff by compelling an intentional wrongdoer to pay a private penalty to the plaintiff.[84] Brand JA referred to the *obiter dictum* of Innes CJ in *Fichardt*, to which I have alluded, and the separate *dictum* of Solomon JA in that case, also made *obiter*. Further reference was made to a later *obiter dictum* in *Spoorbond*[85] and the uncertainty that prevailed, precisely because even though these were decisions of the highest court in the land at that time, they were non-binding *obiter dicta*. Thus, although the Appellate Division had in these cases expressed strong views that general damages are available to trading corporations in defamation actions for injury to their reputation, they did not set precedent. Unsurprisingly, in numerous subsequent cases

[83] *SA Taxi* above n 7 at para 7.

[84] See Visser "Genoegdoening in die deliktereg" (1988) 51 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 468 at 486.

[85] *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999. There, equally firm views were expressed by Watermeyer CJ and Schreiner JA in favour of general damages being available to trading corporations in defamation claims, but again, these were made as *obiter*. Interestingly, in *Spoorbond* at 1011, Schreiner JA acknowledged that a corporation has "no feelings to outrage or offend".

there were findings both for and against this view (some of these cases have been mentioned). That uncertainty was settled by the Appellate Division in *Dhlomo*.[86]

[72] With reference to a number of decisions of Provincial Divisions, the Appellate Division and the Supreme Court of Appeal, Brand JA continued and observed that—

> "it has consistently been accepted by our courts, including this court [the Supreme Court of Appeal], that corporations, both trading and non-trading, have a right to their good name and reputation which is protected by the usual remedies afforded under our law of defamation, including a claim for damages."[87]

[73] Dealing seriatim with the three principal bases of Media 24's attack against what Brand JA regarded as "powerful authority", the Judge rejected the first two (first, that as far as trading corporations are concerned, the decisions by the Supreme Court of Appeal were either *obiter* or based on assumptions as to the legal position and second, that they were all wrongly decided). Nothing further need be said about these two grounds. For present purposes, the findings in respect of the third ground of attack, that the extension of the common law of defamation to trading corporations is unconstitutional, is of cardinal importance. It is therefore necessary to refer in some detail to the majority's key findings.

[74] The challenge against the constitutionality of placing trading corporations in the same position as natural persons in respect of general damages awards in defamation actions was dismissed by the majority:

> "Though these are obviously forceful arguments [by Media 24], I am left unpersuaded that the recognition of a corporation's claim for general damages in defamation constitutes an unjustified limitation to freedom of expression. As to the argument based on the thesis that the reputation of a corporation is not protected by the Constitution, I

[86] *Dhlomo* above n 19.

[87] *SA Taxi* above n 7 at para 30.

> am not convinced that the premise is well founded. Section 8(4) of the Constitution provides that 'a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person'. Subject to these qualifications, juristic persons therefore also possess personality rights, *which are protected as fundamental rights*."[88] (Emphasis added.)

[75] The majority examined the concept of dignity in our constitutional landscape and concluded:

> "[Dignity] has a wide meaning which covers a number of different values. So, for example, it protects both the right to reputation and the right to a sense of self-worth. Under our common law, on the other hand, 'dignity' has a narrower meaning. It is confined to the feeling of self-worth."

[76] In the latter regard, it cited *Khumalo*[89] and *Le Roux.*[90] It added that—

> "[i]t is plain therefore that the protection of 'dignity' in section 10 is not confined to 'dignity' in the narrower – common law – sense but that it also extends to other personality rights, and that at least some of these can be possessed by corporations, for example the right to privacy."[91]

[77] The *obiter dictum* in *Financial Mail*[92] is cited in support of the finding that "[o]ur common law recognises the personality right of a non-natural person to privacy" – this is said to be by way of inferential reasoning from that *obiter dictum.*[93] And it was

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[88] Id at para 43. Reference was made to Neethling "n Vergelyking Tussen die Individuele en Korporatiewe Persoonlikheidsreg op Identiteit" (2011) *Tydskrif vir die Suid-Afrikaanse Reg* 62. The title of the article, loosely translated, is "A comparison between the individual and corporate personality right to identity".

[89] *Khumalo* above n 13 at para 27.

[90] *Le Roux* above n 2 at para 138.

[91] *SA Taxi* above n 7 at para 44.

[92] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [1993] ZASCA 3; 1993 (2) SA 451 (A).

[93] *SA Taxi* above n 7 at para 45. The passage from *Financial Mail* reads:

> "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 or 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*

pointed out that this Court in *Hyundai* had confirmed that right to privacy in respect of juristic persons.[94]

[78] On the authority of these cited passages in *Financial Mail* and particularly *Hyundai*, the majority held:

> "In the light of this historical development it will be anomalous if the corporations' 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 corporations' 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."[95]

[79] And, finally, the majority reached the conclusion that:

> "But even if the reputation of a corporation is not protected by the Constitution, it by no means follows that its reputation is not protected by the law of defamation. Though freedom of expression is fundamental to our democratic society, it is not of paramount value . . . . Nor does it enjoy superior status in our law . . . . Accordingly, limitations of the right to freedom of expression have been admitted in the past for purposes not grounded on fundamental rights . . . . For the reasons I have given, I believe that the reputation of a corporation is worthy of protection. Moreover, I believe that the common law rule protecting that reputation is in turn recognised by section 39(3) of the Constitution. In *Khumalo* the Constitutional Court considered our common law of defamation and concluded that it strikes a proper balance between the protection of the

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present case, but I refer to them to indicate that 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." (Emphasis added.)

[94] *Hyundai* above n 74. The *dictum* of Langa DP at paras 17 and 18 was cited.

[95] *SA Taxi* above n 7 at para 47.

> right to freedom of expression, on the one hand, and the right to reputation, on the other. As I see it this also applies to the reputation of corporations."[96]

[80] The majority found fortification for its findings in the decisions of *Steel and Morris*[97] and *Jameel.*[98] The ultimate conclusion of the majority that there is nothing constitutionally objectionable about awarding general damages will be dealt with presently. Before discussing the minority judgment of Nugent JA, I record the instances of and reasons for my respectful disagreement with the reasoning in the *SA Taxi* majority judgment. Some of these have already been mentioned, but they are repeated for emphasis. It is convenient to follow the sequence of the findings by the majority as outlined above.

[81] First, there is the invocation of section 8(4) of the Constitution as support of its finding that a trading corporation has a right to dignity. That reliance is misplaced for at least two reasons:

(a) It overlooks the crucial qualification that juristic persons' entitlement to the rights in the Bill of Rights is limited to "the extent required by the nature of the rights and the nature of that juristic person". As stated, the *Certification Judgment* emphasised this qualification. And it bears repetition that trading corporations can by their very nature not lay claim to the deeply personal right to human dignity contained in section 10 of the Constitution – they have no feelings and intrinsic self-worth like human beings have, which can be assuaged. The myriad facets of human dignity simply cannot apply to trading corporations as juristic persons.

(b) Furthermore, the majority asserted that "subject to these qualifications, juristic persons therefore also possess personality rights, *which are protected as fundamental rights*".[99] In the context of the majority

[96] Id at paras 48 and 49.

[97] *Steel and Morris* above n 22.

[98] *Jameel* above n 12.

[99] *SA Taxi* above n 7 at para 43 (emphasis added).

> judgment as a whole, although reference is made to "fundamental rights", what is meant is plainly only the right to human dignity in section 10. But, for the reasons stated, that cannot be the case. The protectable right of juristic persons, more particularly for present purposes trading corporations, to good name and reputation is founded not in the section 10 right to human dignity, but in the uncontroversial common law right to its reputation *(fama*, as opposed to *dignitas*) and arguably in the equality rights under section 9 and 8(4) of the Constitution.

[82] The second area of my disagreement concerns the view of the majority that—

> "the protection of 'dignity' in section 10 is not confined to 'dignity' in the narrower – common law – sense but that it also extends to other personality rights, and that at least some of these can be possessed by corporations, as for example the right to privacy."[100]

It will be recalled that in respect of the former aspect, the *dictum* in *Le Roux*[101] was relied upon. And in respect of the latter aspect, the *dictum* of Corbett CJ in *Financial Mail* is invoked for support.

[83] Again, there are four conceptual difficulties with this approach. First, the reliance on *Le Roux* is misplaced. The distinction finds no application in respect of a trading corporation, since they simply do not have either wide or narrow dignity under section 10 of the Constitution. *Le Roux* concerned the dignity of a natural person, Dr Dey, the then deputy headmaster of the school which the applicants attended at that time. Dignity, under section 10, thus occupied a central role in the adjudication of his

[100] *SA Taxi* above n 7 at para 44.

[101] *Le Roux* above n 2 at para 138. This Court drew a distinction between wide and narrow dignity:

> "In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her right to a sense of self-worth. But under our common law 'dignity' has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation."

claims for injury to his dignity and defamation.[102] Not so here – no section 10 right to human dignity is available to a trading corporation. Moreover, as stated, in *Hyundai* and *Tulip Diamonds*, this Court drew no such distinction and unequivocally held that a juristic person bears no right to human dignity.

[84] The second conceptual difficulty is that, as alluded to, the *dictum* of Corbett CJ in *Financial Mail* was a non-binding *obiter dictum*. It was a general observation in passing about what courts have permitted in the past in respect of general damages for defamation of juristic persons. Here, as in *SA Taxi*, the pertinent question is whether, under our constitutional dispensation, our courts should allow such a claim.

[85] The third point of disagreement is the majority's equating the right to privacy to the right to dignity, by referencing *Hyundai*. It is uncontentious that juristic persons have a right to privacy. But that cannot be summarily equated to the right to dignity. They are two entirely different concepts, as this Court made clear in *Hyundai* – juristic persons have the right to privacy, but they do not bear the right to dignity. This Court did not base its finding regarding the right to privacy with reference to a right to reputation or dignity. It was solely focused on the "the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs . . . . [leading] to grave disruptions and would undermine the very fabric of our democratic state".[103]

[86] Lastly, I disagree with the majority's finding that "[t]hough freedom of expression is fundamental to our democratic society, it is not of paramount value . . . . Nor does it enjoy superior status in our law".[104] That finding is untenable. It is based on a fundamental misconception that the Court in *SA Taxi* was faced with two competing *fundamental rights* that is, the section 16 right to freedom of expression and the section 10 right to human dignity, but I have already explained why the fundamental

[102] *En passant*, it is noted that members of this Court held divergent views on the merits of the two claims.

[103] *Hyundai* above n 74 at para 18.

[104] *SA Taxi* above n 7 para 48.

right to dignity does not find application. I reiterate that I accept that another fundamental right, the right to equality, may well be applicable.

[87] In sum, the majority judgment in *SA Taxi* is 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. I unreservedly accept that a trading corporation has a right at common law to its good name and reputation and that right is enforceable through a common law claim for defamation. And, as I see it, there can be no legitimate objection to such a claim also being recognised constitutionally, particularly in view of the equality protection contained in the provisions of sections 8(4) and 9 of the Constitution. More about that later. Where I part ways with the majority reasoning in *SA Taxi* is, for the reasons advanced, its finding that a trading corporation has a defamation claim based on the constitutional right to dignity. The second leg of that finding, the question whether the remedies available to it includes a claim for general damages, will be considered presently.

Minority judgment of Nugent JA

[88] In his minority judgment, Nugent JA reasoned thus:

> "Damages in our law are meant to compensate for loss. Humans suffer loss from defamation because humans experience feeling, and they experience feeling because they are alive. They experience the feeling of pleasure and they experience the feeling of pain. A human experiences the feeling of joy and the feeling of grief. And amongst the desires of humans is to enjoy the feeling that comes with a dignified life. That desired feeling waxes when they are held in esteem and it wanes when they are not. The loss that is compensated for when a human is defamed is the diminution in the desired feeling that comes with living a dignified human life. What is compensated for is harm to feelings.
>
> Juristic persons do not experience feeling because they exist but they are not alive. They are capable of possessing property, and engaging in property transactions, because the law is capable of giving them that capacity, but the law has no capacity to bring them to life. They are not capable of sustaining human loss from defamation

> because that is unique to human beings. If a trading corporation sustains loss from defamation it must necessarily be loss of a different kind."[105]

[89] Nugent JA differed from the majority judgment only on the remedy of general damages, primarily by reason of the fact that to award such damages to a trading corporation would be punitive in nature and not compensatory. He agreed with the majority, though, that a trading corporation has a claim for defamation that is not barred by the Constitution. Nugent JA held that:

> "[G]eneral damages to a trading corporation are inherently punitive, and thus not permitted by our law, from which it must follow that to award general damages to a trading corporation is also an unjustified intrusion upon the right of free expression."[106]

That is the issue which bears discussion next.

Ought a trading corporation to be awarded general damages for defamation?

[90] Prior to engaging with the question whether awarding general damages to trading corporations in defamation cases is constitutional, we must first determine whether they have a right to claim general damages.

[91] It is well established in our law that damages in respect of natural persons to vindicate reputation and good name is compensatory. Thus, this Court held in *Fose*:

> "Past awards of general damages in cases of defamation, *injuria* and the like coming before our courts have sometimes taken into account a strong disapproval of the defendant's conduct which was judicially felt. That has always been done, however, on the footing that such behaviour was considered to have aggravated the actionable harm suffered, and consequently to have increased the compensation payable for it. Claims for damages not purporting to provide a cent of compensation, but with the

[105] *SA Taxi* above n 7 at paras 79-80.

[106] Id at para 65.

> different object of producing some punitive or exemplary result, have never on the other hand been authoritatively recognised in modern South African law."[107]

This authoritative statement of the law still holds true.

[92] The central question in respect of the compensation of harm in respect of the infringement of a trading corporation's reputation is whether it can suffer harm other than patrimonial loss in such instances. Insofar as patrimonial loss is concerned, there was uncertainty in our law as to whether damages for patrimonial loss flowing from a defamatory statement should be claimed with the *Aquilian action* or the *actio iniuriarum.*[108] The question, left open in *Caxton*, was answered in *SA Taxi* where the Supreme Court of Appeal held that the appropriate action is the *actio legis Aquiliae.* Insofar as injury to personality is concerned, the remedy is the *actio iniuriarum.* That remedy is mainly directed at providing personal (psychological) satisfaction to a plaintiff by compelling the defendant to pay a certain amount of money as *solatium* (solace) to a plaintiff. It is a remedy for injured feelings. Compensation by way of providing some or other equivalent for the impaired personality interest does not feature.[109]

[93] There is a strongly held view that since a juristic person, as a legal construct, cannot experience the personal suffering which normally results from the infringement of a personality interest, it does not have personality rights.[110] But there is an equally strong view, one to which I subscribe, that juristic persons can lay claim to personality rights because they can objectively suffer personality harm without experiencing

[107] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 80.

[108] *Caxton* above n 55.

[109] Neethling, Potgieter and Visser *Law of Delict* 6 ed (LexisNexis, Durban 2010) at 250-1.

[110] *SA Taxi* above n 7 at para 88.

subjective injured feelings.[111] Thus, a juristic person such as a trading corporation has a legitimate interest in the protection of its reputation.

[94] The objection to affording a juristic person personality rights, which is premised on the notion that it does not experience wounded feelings, appears to be based on a misconception. In this regard it is necessary to revert briefly to a consideration of the *actio iniuriarum* and its origins. In his Edict, Ulpian provided the classical subdivision of the Roman delict of *iniuria* – it could be inflicted upon the *corpus* (body), *fama* (reputation) or *dignitas* (dignity).[112] This exposition was adopted and developed further in Roman-Dutch law, primarily by Voet. It is the fundamental division of our law of delict. This Ulpianic distinction is of considerable importance in considering why, despite not being able to experience "wounded feelings", a trading corporation as a juristic person and abstract legal entity could possibly have recourse to a claim for personality infringement (harm to its reputation) and a claim for general damages.

[95] That distinction not only subdivides the injury in respect of a civil wrong into these three categories, but it also importantly separated the internal interest of the claimant which is protected by a solace award (*solatium*) as the redress for hurt feelings, from the external interest. In respect of the latter, injured feelings play no role. Descheemaeker points out that:

> "Emotional tranquility – the interest protected through the redress of wounded feelings – does not stand on a par with the likes of corpus, *dignitas* and *fama*. Rather, it is their reverse side: it is through the violation of their reputation, dignity or body that plaintiffs will – ordinarily – be wounded in their feelings. They thus operate on a separate, and parallel, level."[113]

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[111] Neethling "Personality Rights: A Comparative Overview" (2005) 38 *The Comparative and International Journal of Southern Africa* 210 at 244-5.

[112] 47.10.1.2 (Ulpian, Edict at 56):

> "Every contumely is inflicted on the person or relates to one's dignity or involves disgrace: it is to the person when someone is struck; it pertains to dignity when a lady's companion is led astray; and to disgrace when an attempt is made on a person's chastity." (Watson's translation)

[113] Descheemaeker above n 48 at 438.

[96] Thus viewed, the objection to affording juristic persons personality rights and a possible claim for general damages falls flat. What matters in this perspective is the juristic person's objective external interest, its right to reputation and a good name. The argument that simply because it has no wounded feelings and it cannot suffer non-patrimonial loss, then becomes untenable. I am prepared to accept that a trading corporation can suffer non-patrimonial harm in an infringement of its right to reputation. That means that in principle, it may be entitled to sue for general damages for that harm. There is strong support for the development of the common law of defamation to do away with general damages in defamation claims.[114] Thus, in *Le Roux*, Cameron J and Froneman J bemoaned the fact that—

> "[t]he present position in our Roman-Dutch common law is that the only remedy available to a person who has suffered an infringement of a personality right is a claim for damages. One cannot sue for an apology and courts have been unable to order that an apology be made or published, even where it is the most effective method of restoring dignity. A person who is genuinely contrite about infringing another's right cannot raise an immediate apology and retraction as a defence to a claim for damages. At best it may influence the amount of damages awarded. This is an unacceptable state of affairs, illustrated by what happened in this case."[115]

[97] What bears consideration next is whether a claim for general damages for defamation by a trading corporation passes constitutional muster. It bears mentioning that, under the present rubric, the discussion centred around the question whether, a trading corporation ought to be awarded general damages for defamation, it having been established that a trading corporation has a defamation claim available to it, both at common law and constitutionally. That is the premise being tested for constitutionality next. It does not concern the question whether a trading corporation has a right at

[114] Neethling and Potgieter "Defamation of a Corporation: Aquilian Action for Patrimonial (Special) Damages and *Actio Injuriarum* for Non-Patrimonial (General) Damages" (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 304 at 310-1.

[115] *Le Roux* above n 2 at para 195.

common law and under the Constitution to claim for reputational damage in respect of harm that is non-patrimonial. I have already accepted that it has that right.

[98] Before that discussion, it is necessary first to say something briefly about the position of unincorporated entities being eligible for general damages. The second judgment asserts that what it calls the "presumptive exclusion" of non-trading corporations: leads to anomalies, gives rise to arbitrariness, and infringes on the right to equal protection and benefit of the law in section 9(1) of the Constitution.[116] But that is not the approach that I take. I unhesitatingly accept that to distinguish between different types of entities in respect of the awarding of general damages would be arbitrary and would implicate section 9 of the Constitution. That is precisely why the test I propose stands on two legs, namely: (a) the nature of the entity (that is, not a natural person); and (b) the nature of the speech. While the question in this matter was posed by the applicants in the context of trading corporations (or for-profit companies), I emphasise that my judgment concerns all corporate entities, incorporated or not, both trading and non-trading, for-profit and not. It includes unincorporated businesses, non-profit organisations (NPOs) as well as political parties. The only distinction I draw in this judgment is between natural persons and corporate entities.

[99] It is also necessary to dispel the notion in the second judgment that an NPO has no claim for patrimonial damages. It can obviously claim for lost donations where there is proof that its goodwill was lost due to the harm caused by defamatory speech. An NPO does not suffer undue hardship as contended in the second judgment. And while an NPO, like any other non-trading corporation, also has the right to a good name and reputation, they are not automatically beyond reproach simply because they do not make profits.

[116] Second judgment at [187].

Constitutionality of awarding general damages to trading corporations: section 36 analysis

[100] For the reasons that follow, I hold that the availability of general damages to a trading corporation for harm to its reputation infringes the section 16 right to freedom of speech, specifically in relation to speech which is of public importance or which requires public debate and participation. Put differently, this limitation analysis must be conducted in light of (a) the nature of the plaintiff and (b) the nature of the speech concerned.

Is there a limitation of the right entrenched in section 16 of the Constitution?

[101] Generally, awards of general damages for defamation, particularly in substantial amounts, tend to have a chilling effect on free speech.[117] Self-evidently, if a juristic person such as a trading corporation suffers harm by way of patrimonial loss as a result of defamatory remarks and such patrimonial loss can be proved, it has a valid claim. That much is uncontentious – I did not understand the environmentalists to contend to the contrary. The bone of contention here is the constitutionality of non-patrimonial damages. There is an important difference between these two types of damages, one that is pertinent in the context of this case for the central question presently under consideration. The severe limitation of the right to freedom of expression, specifically in debates that are of public importance, by awards of general damages is a breach of that right. Is this breach justifiable in terms of section 36 of the Constitution?[118] What bears consideration next are the factors outlined in section 36.

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[117] *Dikoko* above n 25 at para 92; *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 132.

[118] Section 36 of the Constitution reads:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and

Justification analysis

The nature of the right

[102] The nature and importance of the right to freedom of expression is trite. Ronald Dworkin identified two categories into which the various defences to free speech can be classified.[119] First, instrumental arguments defend free speech because of what it can do for us: free speech is important "not because people have an intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us".[120] Second, the constitutive conception of free speech sees it as valuable because expression is an important part of what it means to be human:

> "[F]reedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members . . . as responsible moral agents. That requirement has two dimensions. First, morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith. . . . We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it."[121]

[103] Further, the right to freedom of expression commands an important place in our constitutional landscape. It is a right which lies at the core of our constitutional democracy, "not only because it is an "essential and constitutive feature" of our open democratic society, but also for its transformative potential".[122] In *Qwelane*, this Court articulated that "[t]he right to freedom of expression, as enshrined in section 16(1) of

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(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[119] Summarised in Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 339.

[120] Dworkin *Freedom's Law* (Harvard University Press, Cambridge 1996) at 200.

[121] Id.

[122] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 95.

the Constitution, is the benchmark for a vibrant and animated constitutional democracy like ours".[123] And in *Democratic Alliance*, it held:

> "This Court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views, it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.
>
> What is more, being able to speak freely recognises and protects 'the moral agency of individuals in our society'. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human."[124]

The importance of the purpose of the limitation

[104] The purpose of the limitation, being the award of general damages, is to restore a plaintiff's reputation and/or dignity (depending on the nature of the plaintiff) that has been harmed by the defamatory speech. This limitation is important to the extent that it attempts to strike a balance between a defendant's right to freedom of expression and protecting a plaintiff's right to its reputation and/or dignity. However, the scale is tipped, as is the case here, where the nature of the speech is such that it is of public importance and the plaintiff is a trading corporation whose reputation rights are not sourced in the Constitution and are, at best, only enjoyed objectively. In such an instance, the importance of the limitation shrinks dramatically. Conversely, where the plaintiff is a natural person whose dignity and reputation rights are sourced in section 10 of the Constitution and/or where the speech concerned is not part of a debate of public importance, the importance of the limitation increases.

[123] *Qwelane* above n 58 at para 67.

[124] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at paras 122-3.

[105] This Court has distinguished between "core values" of freedom of expression and "expression of little value which is found at the periphery of the right".[125] The latter type of expression receives less protection in that limitation on such forms of expression is relatively easily justified, compared to expression at the core.[126] Thus, certain speech is more valuable than others and worthy of higher protection – this has a bearing on the exception made here in respect of general damages where the speech falls within an important public debate. For example, political expression is at the core of the right.[127] Public participation created by activists regarding environmental compliance, or a lack thereof, by large mining companies which has a negative effect on the communities surrounding the mines and South Africa generally, would similarly be at the core of the right and warrant a high standard of protection.

The nature and extent of the limitation

[106] As stated at the outset of this analysis, 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. This Court has recognised the chilling effect of general damages. In *Dikoko*, Moseneke DCJ observed:

> "The extent of sentimental damages for defamation has implications for the properly mediated connection between dignity and free expression. It is plainly so that overly excessive amounts of damages will deter free speech and foster intolerance to it. As it is often said, robust awards will have a 'chilling effect' on free expression, which is the lifeblood of an open and democratic society cherished by our Constitution."[128]

[125] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 59.

[126] Currie and De Waal above n 119 at 341.

[127] *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions* [2008] ZACC 14; 2009 (1) SA 141 (CC); 2009 (3) BCLR 309 (CC) at para 52.

[128] *Dikoko* above n 25 at para 92.

[107] The allegations made in this case starkly remind us of the potential chilling effect an award of general damages may have on the right to freedom of expression. Axiomatically, the larger the corporation, the more extensive the potential loss of (future) profits, which would constitute general damages. And, of course, it would be far higher than the quantum in a general damages award in respect of a natural person. It is uncontentious, as I see it, that the respondents are large trading corporations. They appear to mine on an extensive scale. The applicants are natural persons, activists in the environmental field. The amount of damages sued for is not insubstantial, in excess of R14 000 000. As stated, our environmental legislation places a high premium on public participation. And environmental issues are increasingly coming to the forefront of general public discourse.

Absence of a rational connection between purpose and limitation

[108] 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. For the reasons advanced, trading corporations have no section 10 right to human dignity. I have already concluded that a trading corporation has, at best, an objectively enjoyed common law right to reputation. In light of the fact that general damages cannot be justified on this basis, there is no compelling justification for their limitation on the right to freedom of expression in an instance such as this.

[109] There is only a very nebulous connection between a general damages defamation suit and protecting a trading corporation's bottom line. The current legal position is that general damages claims do not concern patrimonial loss and loss is not an element of the delict of defamation. As stated, general damages awarded in defamation are aimed at assuaging harm done to a natural person's dignity, not compensating for patrimonial loss[129] and it cannot legitimately and effectively be utilised to compensate a trading corporation for patrimonial loss suffered due to defamation.

[129] Id at paras 92 and 95.

Availability of less restrictive means

[110] 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: an interdict, a declarator, a retraction, or an apology.

[111] Plainly, in this instance two important rights require to be weighed up against each other – the common law right to reputation and good name, protected by the Constitution's equality provisions, and the constitutional right to freedom of expression. The finding that an unqualified award of general damages to a trading corporation for a defamation claim is unconstitutional does not mean that such awards will never pass constitutional muster. Having recognised a trading corporation's protectable interest in its good name and reputation, leads to the question whether general damages in certain circumscribed instances can bear consideration. This is because general damages are not confined to awarding some compensation for hurt feelings which a trading corporation cannot suffer. They are instead a monetary recognition that there is harm to reputation that does not always reflect in patrimonial loss.

[112] An important consideration here is the context within which the alleged defamation took place. That alleged defamation concerns engagements over important issues of public debate, here alleged environmental harm caused by mining. Public discourse about matters that affect all or many of us and are of grave public concern, such as damage to the environment, must be encouraged and not stifled in a vibrant democracy like ours.[130] As this Court held in *Democratic Alliance*, the Constitution

[130] Compare *The Citizen 1978 (Pty) Ltd v McBride* above n 117 at para 141; *Khumalo* above n 13 at para 141; and *Qwelane* above n 58 at para 67.

"recognizes that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy".[131]

[113] Generally, some relief by way of general damages must be available as recompense for non-patrimonial harm to juristic persons caused by defamatory statements. The way to achieve this is to distinguish between speech which forms part of public discourse on issues of public interest, and that which does not.

[114] As such, 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.

[115] The second judgment expresses criticism about the approach adopted here to accept "the constitutional validity of damages for patrimonial loss, but not for general damages". It says:

> "Indeed, the first judgment holds that general damages, in contrast to alternative remedies, such as damages for patrimonial loss, constitute a severe limitation on the

[131] *Democratic Alliance* above n 124.

> right to freedom of expression. . . . And so the first judgment leaves unexplained why general damages have harmful effects upon free speech that damages for patrimonial loss do not."[132]

[116] The first and obvious point to make is that this case does not concern the constitutional validity of damages for patrimonial loss. The reason for refraining from making any pronouncement on that aspect is that damages for patrimonial loss were not the subject of the challenge before this Court.

[117] It is doubtful, in any event, that it is fair to draw the contrast between patrimonial and general damages, as the second judgment seeks to do. While both these remedies entail the payment of a sum of money, there are important differences between them:

(a) First, damages for patrimonial loss are claimed by way of the *actio legis Aquiliae* and general damages are claimed via the *actio iniuriarum*.

(b) Second, the purpose of the *actio legis Aquiliae* is different to that of the *actio iniuriarum*.

(c) Thirdly, it follows then that there is a marked difference between the purpose of damages for patrimonial loss to that of general damages. The first restores quantifiable patrimonial loss, whereas the other assuages dignity and hurt feelings or other protectable, non-patrimonial reputational interests that an entity may have.

[118] There is no precedent to my knowledge, nor has any been proffered by the second judgment, that a section 36 analysis of the availability of less restrictive means includes an enquiry into the constitutionality of such less restrictive means. It has never been our law that an analysis has to be conducted under section 36 into the constitutional compliance of available remedies that constitute less restrictive means. I am not aware of any judgment to this effect, particularly of this Court, where there has ever been a

[132] See the second judgment at [175] and [177].

section 36 analysis to test whether the proposed less restrictive means were constitutionally compliant.

[119] A conspectus of the judgments of this Court reveals that its approach in determining whether a proposed alternative remedy constitutes less restrictive means, is simply to demonstrate—

(a) the extent of the limitation imposed by the proposed less restrictive alternative;
(b) that the extent of the limitation imposed by the less restrictive alternative is less than the one sought; and
(c) that it has not been demonstrated that the remedy sought would be *materially more effective* at achieving the object of the limitation than the alternative remedy would.

[120] The seminal decision of this Court in *Makwanyane*,[133] where the constitutionality of the death penalty was in issue, serves as a good example. In concluding that the death sentence was unconstitutional, this Court considered whether there were any less restrictive means available to achieve the objects pursued by the death sentence. This Court considered life imprisonment to be such a less restrictive alternative. A reading of the judgment reveals that, in finding life imprisonment to be a less restrictive alternative, this Court did not make a pronouncement on the constitutionality of life imprisonment.[134] This Court simply enquired into whether—

(a) prima facie,[135] life imprisonment was capable of achieving the constitutionally permissible objectives pursued via the death sentence;
(b) the limitation imposed by life imprisonment is less than that imposed by the death sentence; and

[133] *Makwanyane* above n 59.

[134] Such a pronouncement cannot be found in the main and in the concurring judgments. Instead, Ackermann J at para 170, in his concurring judgment, states that he "appreciate[s] the concern of not wishing to anticipate the issue as to whether life imprisonment, however executed and administered, is constitutional or not".

[135] I say "prima facie" because it does not appear that there was a robust enquiry into whether and how life imprisonment is capable of achieving the purposes pursued via the death penalty.

(c) those defending the death sentence "[had not shown] that the death sentence would be *materially more effective* to deter or prevent murder than the alternative sentence of life imprisonment would [do]".[136]

[121] In sum, a court has to do no more than what this Court has done in *Makwanayane* as far as the less restrictive means enquiry is concerned. A further, related ground of criticism in the second judgment is that "the ultimate remedy of a declarator or interdict, as opposed to an award of general damages, makes very little practical difference to the calculation of a person as to whether to publish or not".[137]

[122] In raising this drawbridge, the second judgment makes what appears to me to be a self-defeating assertion as it immediately leads to the question: if it is indeed the very threat of a defamation lawsuit that deters the publication of false speech, what then would be the purpose of general damages? If, as the second judgment finds, they are not punitive (which I accept), do not assuage reputational harm any better than a public apology and are not a true deterrent against publishing false information; then they really serve no purpose and their infringement of freedom of expression cannot be justified on any ground in terms of section 36. In any event, the costs of defending any litigation will, I imagine, exceed the awards of damages by some margin. The threat of litigation is thus serious, weighty, and will be considered carefully by prudent individuals (and imprudent ones will not be swayed by it in any event).

[136] *Makwanyane* above n 59 at para 146. And at para 133 this Court stated:

> "It has been argued before this Court that one of the purposes of such punishment is to protect the life and hence the dignity of innocent members of the public, and if it in fact does so, the punishment will not negate the constitutional norm. On this analysis it would, however, have to be shown that the punishment serves its intended purpose. This would involve a consideration of the deterrent and preventative effects of the punishment and whether they add anything to the alternative of life imprisonment. If they do not, they cannot be said to serve a life protecting purpose."

[137] Second judgment at [181].

[123] Notably, a similar line of reasoning was advanced by Skweyiya J in his dissenting judgment in *Dikoko*.[138] That case concerned the immunity from liability for defamation claims of municipal councillors. There, Skweyiya J held:

> "It *may well* be that it is not so much the eventual outcome of a court case but rather the possibility of being taken to court in the first place which operates as a deterrent. Much research has been conducted into this idea in the context of sentencing, particularly with regards to the efficacy of the death penalty as a deterrent. The research indicates that it is not so much the sentence which deters potential criminal perpetrators but the possibility of getting caught. Just as deterrence in the criminal law context stems from the possibility of getting caught, rather than the range of possible sentences which may be imposed, so in the civil context, any 'chilling effect' derives most of its potency from the fact that a person who goes beyond the accepted boundaries of expression may be sued for defamation."[139] (Emphasis added.)

[124] There is plainly some similarity between this minority approach in *Dikoko* and the reasoning in the second judgment here. It cannot be gainsaid that the threat of litigation constitutes a deterrent to the exercise of free speech. But it does not follow that, because the threat of getting caught for committing a crime constitutes a greater deterrent than the punishment, by parity of reasoning the threat of litigation constitutes a greater deterrent than the damages award or the threat thereof. This is a typical argument by analogy. Such arguments are only valid to the extent that the two things being compared are substantially similar. In this case, in order to be valid one would have to demonstrate that the incentives and disincentives for committing crime are the same or substantially similar to those for committing an act of defamation. It seems to me that the incentive and disincentive of the two are markedly different and thus the argument by analogy does not bear scrutiny.

[138] *Dikoko* above n 25.

[139] Id at para 144.

[125] In any event, the hypothesis postulated here is precisely that – mere conjecture. Absent any evidence evincing the effect of the threat of litigation constituting a greater deterrent to freedom of expression than any remedy that a court can award following a successful defamation claim, there is no basis for the proposition advanced in the second judgment. In that regard, the approach of this Court in *Makwanyane* commends itself to me. There, the Attorney-General had conceded that there is no proof that the death sentence is in fact a greater deterrent than life imprisonment because, the Attorney-general said, it was "a proposition that is not capable of proof, because one never knows about those who have been deterred; we know only about those who have not been deterred, and who have committed terrible crimes". This Court in response held that, while the Attorney-General's observation was "*no doubt true*, the fact that there [was] no proof that the death sentence [was] a greater deterrent than imprisonment [did] not necessarily mean that the requirements of section 33 [of the Interim Constitution] cannot be met".[140]

[126] As I see it, once it is accepted, as demonstrated earlier and as other courts have accepted on a number of occasions, that general damages limit the right to freedom of expression and that the limitation cannot be justified in terms of section 36 of the Constitution, the limitation imposed by the threat of litigation itself, irrespective of its degree, matters little. Absent any proof (as opposed to conjecture) that damages for patrimonial loss constitute a greater deterrent to the exercise of free speech than general damages, I expressly refrain from expressing an opinion on which remedy is the greater deterrent, as discussed by this Court in *Makwanyane*.[141] I prefer to confine myself to the challenge before this Court, and no more. That is the approach adopted in *Makwanyane* that, as I have said, commends itself to me.

[127] There is a further self-destructive implication in the second judgment's assertion. It is this. Accepting for the moment that, as the second judgment would have

[140] *Makwanyane* above n 59 at para 127.

[141] Id.

it, the threat of litigation itself constitutes a greater deterrent than any available remedy, that proposition appears to fortify my view that awarding general damages to trading corporations is unconstitutional. This is so for the following reason. If it is accepted that: (a) general damages do indeed limit the right to freedom of expression; and (b) the threat of litigation constitutes a greater deterrent to the exercise of free speech, then it must follow that the limitation imposed by general damages would further increase the extent to which the right to freedom of expression is limited. In that event, if the cumulative extent of the limitation imposed by both the threat of litigation and general damages is constitutionally unacceptable, it seems to me that general damages, and not the threat of litigation itself, is the one that must yield to conduce to an overall limitation that is constitutionally acceptable.

[128] Then, the second judgment observes that false speech seldom has any value (if at all). My colleague states that "[s]uch speech counts for little in the recognition that is due to freedom of expression".[142] That is fair comment, but this Court has already provided some insight in respect of this question. In *Islamic Unity*, this Court in endorsing the view of the European Court of Human Rights in *Handyside*,[143] pointed out that section 16 is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[144] The point was reiterated in *De Reuck*.[145] In *Islamic Unity*, this Court outlined the purview of that section:

> "Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression *must satisfy the requirements of the limitations clause to be constitutionally valid*. Subsection (2) deals with expression that is specifically excluded from the protection of the right. . . . Where the state extends the scope of regulation beyond

[142] Second judgment at [194].

[143] *Handyside v the United Kingdom* [1976] ECHR 5.

[144] *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 26.

[145] *De Reuck* above n 125 at para 49. See also *Qwelane* above n 58 at para 73.

> expression envisaged in section 16(2), it encroaches on the terrain of protected expression and *can do so only if* such regulation meets the justification criteria in section 36(1) of the Constitution."[146] (Emphasis added.)

[129] Thus, where speech does not fall under section 16(2), the limitation imposed must pass constitutional muster, irrespective of whether the limitation relates to defamatory speech. This means that if both the threat of litigation and the remedy impose a limitation on free speech, both must pass constitutional muster. Remedies cannot escape scrutiny simply because they follow after a finding that speech is defamatory. It bears emphasis that the question to be asked here is: prior to any individual making any type of utterance, whether known or suspected to be defamatory, does the prospect of being mulcted in damages deter the free exercise of free speech? The enquiry is not whether, after speech has been found to be defamatory by a court, the prospect of being mulcted in damages limits the right to freedom of expression.

[130] The second judgment opines that there is no reason why the threat of general damages by a trading corporation should hold some risk to free speech that other plaintiffs do not.[147] That opinion does not bear scrutiny. The point is not that general damages by a trading corporation are a greater risk to free speech than other plaintiffs, but rather that they cannot be justified like they can with natural persons who have hurt feelings, dignity and self-worth as expounded earlier.

[131] Before concluding on this point, I must discuss the argument made by the second judgment that awards for general damages are historically modest and therefore do not pose an unjustifiable threat to freedom of expression.[148] All that needs to be said in this regard is that this reaffirms the point that if the awards are modest they do very little then to assuage reputational damage. This begs the question, if general damages awards are so modest, then what purpose do they serve and why would a public apology or

[146] Id at paras 31 and 34.

[147] Second judgment at [205].

[148] Second judgement at [175] and [177].

retraction not be sufficient? As such, general damages go no further in restoring the rights of an unlawfully defamed entity than a public apology or retraction. One could argue that general damages may be even less effective at restoring an entity's reputation if the award of general damages is not published in the media, or ordered together with a public apology or retraction which makes the unlawful defamation known to the public.

[132] In sum, 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. That brings me to a final aspect for consideration, international and comparative law.

International and comparative law

[133] As is explained in the minority judgment in *SA Taxi*, comparable jurisdictions have in recent years legislatively introduced innovative remedies aimed at expeditiously repairing damaged reputation.[149]

[134] Libel as a tort has long been recognised in England. The seminal case of *South Hetton*[150] led the way regarding whether a juristic person may sue for general damages for defamation. There, the Court of Appeal held that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damages.[151] The newspaper in that case had published an article strongly critical of the way in which the plaintiff, a colliery owner, housed its workers, and the company had not pleaded or

[149] See *SA Taxi* above n 7 at paras 67-70, where mention is made of England's Defamation Act 1996, Ireland's Defamation Act 2009, New South Wales' Defamation Act 2005 and New Zealand's Defamation Act 1992.

[150] *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133.

[151] Id at 138.

proved any actual damage. It was argued for the publisher that a corporation could have no personal character, and that the article had not related to the business of the company. The Court of Appeal unanimously rejected this argument. Lord Esher MR held the law of libel to be one and the same for all plaintiffs, be they an individual or a corporation.[152] Lopes and Kay LJJ concurred, with the latter adding that—

> "a trading corporation may sue for libel calculated to injure them in respect of their business, and may do so without any proof of damage general or special. Of course if there be no such evidence the damages given will probably be small."[153]

[135] In *Lewis*, Lord Reid pointed out that a company cannot be injured in its feelings but only in its pocket.[154] *Derbyshire County Council*[155] concerned the entitlement of a local authority, not a trading corporation, to sue in libel. In the court of first instance, Morland J's conclusion that the local council could sue was largely premised on the *South Hetton* decision. On appeal, counsel for the newspaper sought to distinguish *South Hetton* on the ground of the colliery company's trading character and counsel for the local authority relied on it. No member of the Court of Appeal questioned the decision. Balcombe LJ not only accepted *South Hetton* as binding for what it decided, but also expressed his agreement with it. In the House of Lords, counsel for the local authority cited *South Hetton*. Counsel for the newspaper did not criticise it, but distinguished it as applicable to a company with a business reputation which a local authority did not have. In his opinion, with which the other members of the House agreed, Lord Keith cited *South Hetton* at some length, and also *Gillian*,[156] in which a

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[152] Id Lord Esher MR held:

> "[I]n every action of libel, whether the statement complained of is, or is not, a libel, depends on the same question – viz., whether the jury are of opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule, or to injure his character. The question is really the same by whomsoever the action is brought – whether by a person, a firm, or a company."

[153] Id at 148.

[154] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 262 where the Court held that "[i]ts reputation can be injured by libel, but that injury must sound in money. The injury need not necessarily be confined to loss on income. Its goodwill may be injured".

[155] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

[156] *National Union of General and Municipal Workers v Gillian* [1946] KB 81.

non-trading corporation (a trade union) had been assimilated to a trading corporation. Despite finding that under English common law a local authority does not have the right to maintain an action of damages for defamation, Lord Keith nonetheless held:

> "The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it. The *South Hetton Coal Company* case would appear to be an instance of the latter kind, and not, as suggested by Browne J., an authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business."[157]

[136] In *Shevill*,[158] decided some three years later by a differently constituted Committee of the House of Lords, one of the plaintiffs was a trading corporation and the presumption of damage in libel cases was treated as part of English substantive law. In sum then, under current English law a trading company with a trading reputation may recover general damages without pleading or proving special damage if the publication complained of tends to damage it in the way of its business.

[137] Then there are the two cases of *Steel and Morris* and *Jameel*. In *Steel and Morris*, the European Court of Human Rights found that the award of damages to a trading corporation will not necessarily infringe the protection of free speech in Article 10 of the European Convention on Human Rights.[159] That case was decided in

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[157] *South Hetton* above n 150 at 547.

[158] *Shevill v Presse Alliance SA* [1995] EUECJ C-68/93 at para 94.

[159] 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,

accordance with the "margin of appreciation" principle. The facts were briefly these. The defendants had published a pamphlet containing various defamatory statements about McDonald's, a multi-national for-profit company. McDonald's sued the defendants for defamation and won in the English courts. The defendants approached the European Court of Human Rights and argued (amongst others) that the English common law disproportionally interfered with their Article 10 right to free speech.

[138] The Court refused to find that companies should, "in principle", be deprived of a right to defend themselves against defamatory allegations. 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".[160] 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".[161]

[139] The doctrine of margin of appreciation applies when the European Court for Human Rights is asked to adjudicate on value judgments made by European states.[162] The doctrine is self-evidently wholly inapplicable to constitutional litigation before this Court. The Court in *Morris and Steel* 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 plaintiffs, despite being large and powerful corporations, were not in accordance with the principles of English law required to, and did not, establish that they had in fact suffered any financial loss as a result of the impugned publication.[163]

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for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[160] *Steel and Morris* above n 22 at para 94 (emphasis added).

[161] Id at para 94.

[162] Id at para 87.

[163] Id at para 96.

[140] *Jameel* concerned a defamation claim against the appellant, the publisher of *The Wall Street Journal Europe*, described in the majority judgment of Lord Bingham as "a respected, influential and unsensational newspaper".[164] It was sued by the respondents, who were prominent Saudi Arabian businessmen, for defamation pursuant to an article, headed "Saudi Officials Monitor Certain Bank Accounts" with a smaller sub-heading "Focus Is on Those With Potential Terrorist Ties" published by the appellant in the *The Wall Street Journal Europe.* One of the main issues was whether a trading corporation is entitled to sue and recover damages without pleading or proving special damages.

[141] The House of Lords split three-two. Lords Bingham, Hope and Scott all held that trading corporations should be able to sue for general damages. Lord Bingham provided a detailed overview of English law, including the leading cases of *South Hetton*, *Lewis* and *Derbyshire County Council*. He considered the newspaper's argument that a domestic rule entitling a trading corporation to sue in libel when it can prove no financial loss is an unreasonable restraint on the right to publish protected by Article 10 of the European Convention on Human Rights. That argument was rejected on three principal grounds, including that the question had already authoritatively been decided in *Steel and Morris*.[165] He also rejected the argument of a possible chilling effect that a claim by a company may have.[166]

[142] Importantly, in assessing whether corporations with a commercial reputation ought to be afforded redress for unjustified injury to reputation, Lord Bingham opined:

> "There are of course many defamatory things which can be said about individuals (for example, about their sexual proclivities) which could not be said about corporations. But it is not at all hard to think of statements seriously injurious to the general commercial reputation of trading and charitable corporations: that an arms company has routinely bribed officials of foreign governments to secure contracts; that an oil

[164] *Jameel* above n 12 at 369.

[165] Id at para 20.

[166] Id at para 21.

> company has wilfully and unnecessarily damaged the environment; that an international humanitarian agency has wrongfully succumbed to government pressure; that a retailer has knowingly exploited child labour; and so on. The leading figures in such corporations may be understood to be personally implicated, but not, in my opinion, necessarily so."[167]

[143] Lord Bingham rejected the notion that a corporation ought to be restricted to suing only where it can prove financial loss:

> "First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value which the law should protect. Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury. Secondly, I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue."[168]

[144] Lord Hope made the point that while a corporation does not have feelings that can be injured, "[t]rade is its business, and it is injury to its reputation in regard to its trade that is of the essence in its case".[169] All that is required, is that a trading corporation must show that it is liable to be damaged in a way that affects its business as a trading company.[170] And Lord Scott agreed that there is no reason of principle why

[167] Id at para 25.

[168] Id at para 26.

[169] Id at para 95

[170] Id at para 95.

the long-standing rule of law enabling a company to pursue a remedy in a defamation action without the need to allege or prove actual damage should be changed.[171]

[145] Lord Hoffman and Lady Hale held the opposite view. Baroness Hale commences her minority speech by stating the trite principle that "[t]he tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed".[172] She pointed out that:

> "[T]he authority for the proposition that a company is in the same position as an individual is the Court of Appeal decision in *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133. This House is therefore free to overrule it, although of course it would only disturb an authority of such long-standing if there were good reason, in modern circumstances, to do so. Among those modern circumstances is the importance now attached in all developed democracies to freedom of expression, especially on matters of political interest."[173]

[146] Baroness Hale urged that the Court should scrutinise the impact of general damages awards for trading corporations in defamation claims "with some care to see whether it may have a disproportionately chilling effect upon freedom of speech".[174] In concurring with Baroness Hale, Lord Hoffmann stated:

> "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 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."[175]

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[171] Id at para 125.

[172] Id at para 152.

[173] Id at paras 152-3.

[174] Id at para 154.

[175] Id at para 91.

[147] For the reasons expounded, I am not persuaded by the minority's reasoning in *Jameel*. In any event, Baroness Hale's opinion does not support the applicants' case. All that she held is that a plaintiff should be obliged to show a likelihood of financial loss, not actual financial loss, in order to succeed with an action of defamation.[176] She also did not seek to saddle corporate plaintiffs with the onus of proving falsity and intent, as the applicants initially contended, an argument which they have now abandoned.

[148] Likewise, the United Kingdom Defamation Act 2013, does not assist the applicants. A trading corporation is not required to plead and prove special damages. In order to claim general damages, a plaintiff is required to plead and prove actual or likely serious harm.

[149] Trading corporations are permitted to sue for general damages for defamation in various other jurisdictions, albeit often in restricted form. For example:

(a) In England, it is required that a trading corporation suffers financial loss due to defamation. It cannot sue for general damages. Courts have required that such companies adduce evidence as to financial loss to succeed in defamation suits.

(b) 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 caused, or is likely to cause, the body corporate a *pecuniary* loss.

(c) In Australia, various defamation reforms have totally removed the right to sue for defamation from companies with 10 or more employees. Where 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.

[176] Id at para 157.

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

(e) In Canada, juristic persons can sue for general damages for defamation. Modest awards for general damages are the norm for corporate plaintiffs in the absence of proof of actual loss.

(f) In the United States of America, public figures must prove actual malice on the part of the defendant to be successful in corporate libel claims.

Conclusion

[150] I hold that an unqualified award of general damages to a trading corporation in respect of harm to its reputation limits the right to freedom of speech. A trading corporation has no hurt "human" feelings to assuage, to provide solace by way of an amount for general damages. In this regard, it does not have a right to dignity and cannot lay claim to the rights in section 10 of the Constitution. Instead, it has a common law right to its good name and reputation, protected by the Constitution's equality provisions, and can enforce that right by a claim for general damages under the qualification outlined, namely, excluding, in a court's discretion, in cases of public discourse in public interest debates. The underlying rationale for this is that it bears recognition that a trading corporation has a personality right to protect its reputation and good name. This extends beyond mere goodwill. Subject to this qualification, general damages are a competent remedy for the unlawful defamation of a trading corporation. Absent this qualification, a claim for general damages for defamation poses an unjustifiable limitation on freedom of expression.

Costs

[151] Both parties have attained some measure of success. There should consequently be no order as to costs, as both are private parties engaged in this litigation.

Order

[152] The following order is issued:

1. Leave to appeal directly to this Court is granted.
2. The appeal is upheld 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.

UNTERHALTER AJ (Kollapen J concurring):

[153] I have had the pleasure of reading the judgment of my brother, Majiedt J (first judgment). The first judgment provides a full exposition of the following propositions. First, a juristic person has no right to human dignity, and hence no right to the protection afforded by section 10 of the Constitution. Second, a trading corporation, at common law, has a right to the protection of its reputation. To impugn the reputation of a trading corporation may cause loss of goodwill. But the harm it suffers may extend beyond patrimonial loss. A trading corporation thus enjoys an action under the *actio iniuriarum.* Third, a trading corporation that suffers harm to its reputation may claim general damages. However, such a claim is not unqualified in that if the defamatory speech forms part of public discourse on issues of legitimate public interest, then a trial court has a discretion to exclude an award of general damages. This qualification is required because an award of general damages to a trading corporation that has been defamed would otherwise impermissibly limit the right to freedom of expression guaranteed by section 16 of the Constitution, and cannot be justified under section 36 of the Constitution.

[154] Since there are many aspects of the first judgment with which I am in agreement, I commence by setting these out. First, a trading corporation has a right to protect its reputation. The reputational harm done to a trading corporation is not reducible to its goodwill and, as a result, a trading corporation enjoys an action under the *actio iniuriarum* to protect its reputation. Second, and for reasons I shall offer, a trading corporation is not precluded from claiming general damages under the *actio iniuriarum.* This is so because general damages are not confined to recompense

for hurt feelings, which only a natural person, and not a trading corporation, may suffer. General damages are compensatory and not punitive, and may therefore be awarded to a trading corporation.

[155] On a number of matters, regrettably, I am unable to agree with the first judgment. I commence with the issue raised in this case as to the claim of a trading corporation to the constitutional right of dignity.

[156] I entertain some doubt that the right conferred by section 10 of the Constitution cannot be enjoyed by a trading corporation. The injunction of section 8(4) of the Constitution is that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. Section 10 of the Constitution is headed "[h]uman dignity". But the right of everyone to have their dignity respected and protected is not confined to a narrow conception of dignity, that is to say, the idea of dignity as a person's sense of self-worth. Dignity also embraces a person's reputation. That is the regard with which others hold a person. We do not, in general, give a parsimonious reading to the scope of the rights entrenched in the Bill of Rights. On the contrary.

[157] It follows that the right to dignity in section 10 includes the right to reputation. The question then is this: who can enjoy the right? Section 10 answers this question: everyone, it tells us. Whether a trading corporation falls within the class of everyone, depends upon an application of section 8(4) of the Constitution. There is little question that a juristic person is capable of enjoying a reputation, and if, as seems uncontroversial, the content of section 10 extends to dignity in the sense of reputation, then there seems little reason why the nature of the right should not be of application to a juristic person. The requirements of section 8(4) are satisfied. On this reasoning, everyone includes a trading corporation.

[158] The textual obstacle to this interpretation is the heading of section 10 – "[h]uman dignity". That can be understood to mean that everyone in

section 10 references natural persons as legal subjects and excludes juristic persons. That would be to interpret section 10 as an exception to the general application of section 8(4), an interpretation of some difficulty. The heading can also be understood to mean that the conceptions of dignity ordinarily attributable to humans is what section 10 protects. Whether those conceptions of dignity give rise to any entitlement by a juristic person is a question determined by section 8(4). And since dignity in section 10 embraces reputation, and a trading corporation has a reputation to protect, there is no reason to withhold the entitlement of a juristic person to protect its reputation under section 10.

[159] I recognise that *Hyundai*[177] says that juristic persons are not the bearers of human dignity, and *Tulip Diamonds*[178] followed suit. This may have appeared axiomatic, but as the analysis offered above indicates, there are interpretative questions that entail some greater nuance. However, for reasons that will become clear, I do not need to make a dispositive interpretation on this score. For even if a trading corporation is not entitled to the protection of its reputation under section 10, the trading corporation does enjoy a common law right to protect its reputation. The first judgment also supports this proposition.

[160] After the decisions of the Appellate Division in *Dhlomo* and *Caxton*, it was made clear that, at common law, a trading corporation can sue for defamation for an injury to its reputation. Thus, a trading corporation has a common law right to the protection of its reputation. This much is uncontroversial. What has occasioned more difficulty is whether a trading corporation should enjoy the remedy of damages for non-patrimonial loss in respect of an actionable defamation.

[161] On this point, the Supreme Court of Appeal in *SA Taxi* was divided. Brand JA, writing for the majority, held that damages for defamation, at least in the modern law,

[177] *Hyundai* above n 74 at para 18.

[178] *Tulip Diamonds* above n 79.

need not be based on giving solace for injured feelings. Non-patrimonial damages, even in the absence of proof of hurt feelings, may be awarded for the harm done to a person's reputation. So, even though a trading corporation has no feelings to hurt, it does have a reputation that may suffer from a defamation in ways that do not amount to lost profits or a diminution of its goodwill. Non-patrimonial damages compensates for that harm.[179]

[162] Nugent JA in *SA Taxi* held a different position. That difference is narrow, though important, and its proper demarcation warrants restatement. Nugent JA affirmed the prior holdings of the appeal court that a trading corporation has an interest in its reputation that is deserving of legal protection and it is entitled to redress in an action for damages. As he framed the matter:

> "I see no reason why a trading corporation should not have the right to insist that others must not damage its good name unless they show legal justification for doing so, and that it is entitled to a legal remedy when that occurs."[180]

The point of difference was this: what should that legal remedy be?

[163] Nugent JA considered an award of non-patrimonial damages to a defamed trading corporation to be a punitive award. The trading corporation has no feelings to assuage. Damages are for compensation not punishment and, if we cannot identify what is being compensated by an award of non-patrimonial damages, the law should rather look to other remedies. The Constitution does not permit of punishment without the safeguards of criminal proceedings.[181] An award of non-patrimonial damages can therefore not be a justified intrusion upon freedom of expression. Other remedies would serve to vindicate the reputational interests of a trading corporation. These remedies

[179] *SA Taxi* above n 7 at para 38.

[180] Id at para 78.

[181] *Fose* above n 107 at para 70.

are an interdict, declaratory relief, and the publication of a retraction or a correction, with or without an apology.

[164] What divided the appeal court in *SA Taxi* was this: the majority held that non-patrimonial damages could be awarded to a trading corporation that has suffered an actionable defamation, and that to do so entailed no unjustified limitation of the constitutional right to freedom of expression.[182] The minority found an award of patrimonial damages, in these circumstances, to be punitive damages and constitutionally objectionable for this reason.[183]

[165] The first judgment favours the position taken by the majority in *SA Taxi* that, in principle, at common law, the infringement of a trading corporation's right to its reputation entitled it to sue for general damages for the non-patrimonial harm suffered by it.[184]

[166] I too agree that the award of general damages to a trading corporation is not excluded, contrary to Nugent JA's holding in *SA Taxi*. The premise of Nugent JA's judgment is that because a trading corporation has no feelings that may be hurt, the only basis for an award of general damages to a trading corporation is absent. And hence, such an award is not compensatory but punitive.

[167] That premise, in my view, only holds good if no basis can be found that would permit of the conclusion that an award of general damages to a trading corporation for defamation is compensatory. Nugent JA considered there to be none. That, however, is not so. It is uncontroversial that, whatever else they may do, general damages offer compensation for hurt feelings. They do so, not because such feelings permit of any metric for the quantification of that harm; they plainly do not. General damages for hurt feelings is solace in the form of money. A monetary award compensates only in

[182] *SA Taxi* above n 7 at para 43.

[183] Id at para 105.

[184] Id at para 92.

the sense that it is recognition of the hurt inflicted. The award is not restitutionary. The hurt, once inflicted, cannot be taken away. But a court can mark what has been done by a monetary award. It is solace. It is restorative in that it recognises the harm and requires that money be paid. In this sense it is compensatory.

[168] If that is so of hurt feelings, why is an award of damages not apt to compensate for harm to the reputation of a trading entity that does not amount to patrimonial loss? There are aspects of reputation that are of great importance to a trading corporation but are not reflected as goodwill, nor as a quantifiable asset of the firm. It is the firm's social capital. It does not appear in the firm's accounts. But it is nevertheless of value, seen most clearly when it is harmed and, sometimes, when that harm leads to ruination. The firm that loses public trust, or is no longer well regarded by employees, or is treated with suspicion by suppliers, is diminished, even if the harm that it suffers by reason of an unlawful defamation cannot be fully quantified as lost profits.

[169] Why then should this harm be any less compensable by way of general damages than the harm arising from hurt feelings? The harm is real. It flows from the reputational diminishment that the defamation inflicts. Like hurt feelings, the award cannot put back what has been taken from the firm in this dimension. But it is restorative. It marks the best a court can do to recognise this harm. And if it is thought that a monetary award is a modest form of recognition, it is rather more so than a mere declaration of illegality. A monetary award may be an imperfect form of compensation for this type of harm, but it is no less so than in the case of general damages for hurt feelings.

[170] In my view, the common law has recognised that general damages are a competent remedy for the unlawful defamation of a trading corporation. Its compensatory function has no more or less utility than its recognition in the case of the hurt feelings suffered by a natural person as a result of a defamation. Such damages are not punitive. Once this is so, the holding of Nugent JA cannot prevail.

[171] What then is the constitutional infirmity that afflicts the recognition at common law of the trading corporation's remedy of general damages for an actionable defamation? The first judgment finds that affliction in the following way. First, an award of general damages to a trading corporation, unlike an award of damages for patrimonial loss, has a chilling effect on free speech and, hence, is a severe limitation of the right of freedom of expression.[185] Second, a consideration of the factors in section 36 of the Constitution does not justify that infringement without a qualification of the entitlement of the trading corporation to general damages.[186] Freedom of expression commands an important place in our constitutional landscape: it is the lifeblood of a vibrant democracy and a wellspring of moral agency.[187] A trading corporation's right to reputation is not sourced in the Constitution. It is a lesser right and, hence, compensation for its infringement carries less weight as a basis to justify the chilling effect that an award of general damages has upon a prized constitutional right.[188] Furthermore, speech that takes place by way of public debate on matters of importance engages the very core of the right to freedom of expression and, thus, a constraint on this species of expression requires greater justification.[189] Large trading corporations may command greater awards of general damages, and thus pose a greater danger to freedom of expression.[190] Finally, less restrictive remedies are available to the trading corporation: an interdict, a declarator, a retraction or an apology.[191]

[172] These considerations lead the first judgment to the conclusion that, in a case where the trading corporation has been unlawfully defamed and claims general damages, the court has a discretion to exercise as to whether to award

[185] See [101] of the first judgment.

[186] Id at [132].

[187] Id at [102] and [106].

[188] Id at [104].

[189] Id at [105].

[190] Id at [107].

[191] Id at [110].

general damages. 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 gratuitous defamation of a trading corporation, engaging no issue of public interest, would count strongly in favour of making an award. By recourse to this Solomonic judicial discretion, a proper balance is struck between freedom of expression and the reputational interests of the trading corporation.

[173] There is a seductive attraction that attaches to the resolution of hard questions of law by recourse to discretionary judgments that take account of conflicting values so as to avoid their conceptual resolution. With no small measure of regret, it is an attraction to be resisted.

[174] I commence with a consideration of the first judgment's diagnosis of the constitutional infirmity that attaches to an award of general damages to a trading corporation that has been unlawfully defamed.

[175] If, at common law, reputational harm may be compensated by an award of general damages, why does this pose some special, unjustifiable risk to freedom of expression at the instance of trading corporations that other remedies sought by trading corporations do not? Given the scale of commercial operations undertaken by some trading corporations, it is logical to conclude that it is the claims of trading corporations to compensation for patrimonial loss that would pose the greatest threat to plaintiffs who would exercise their rights to free speech. This is so because a trading corporation's loss of profits, caused by the unlawful defamation, may be sizeable and quantifiable. The first judgment finds, on the contrary, that general damages are likely to be greater, and hence pose a greater threat to freedom of speech. That is not so. At common law, awards of general damages in defamation cases for non-patrimonial harm have been modest, reflecting the recognition by the courts that the basis of such awards is somewhat impressionistic, and hence caution is warranted. Yet the first judgment grants the constitutional validity of damages for patrimonial loss, but not for general damages. Indeed, the first judgment holds that general damages, in

contrast to alternative remedies, such as damages for patrimonial loss, constitute a severe limitation on the right to freedom of expression.[192]

[176] The first judgment considers a trading corporation to enjoy a valid claim to damages for patrimonial loss caused by defamatory speech but holds that awards of general damages made to trading corporations have a chilling effect on free speech.[193] This is said to reflect an important difference in the two types of damages. The first judgment explains that the larger the corporation, the greater its potential loss of future profits that would constitute general damages and hence the chilling effect of an award of such damages.[194]

[177] Our law, in my respectful view, reflects the very opposite of this position. It is 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. Awards of general damages to trading corporations are generally modest, reflecting the different compensatory basis, as I have explained, of such awards. The particular harm to free speech that arises from the award of general damages to a defamed trading corporation is not explained by the enhanced threat such damages pose, in contrast to an award of damages for patrimonial loss. Quite the reverse is true. And so the first judgment leaves unexplained why general damages have harmful effects upon free speech that damages for patrimonial loss do not.

[178] The first judgment goes on to explain that the constitutional validity of damages for patrimonial loss is not an issue with which this case is concerned.[195] And, in any event, there are important differences between patrimonial and general damages.[196] The first judgment observes that they are remedies that arise from different actions, having

[192] See [101] of the first judgment.

[193] Id at [101] and [106].

[194] Id at [107].

[195] Id at [116].

[196] Id at [101] and [117].

distinctive remedial purposes. That is indeed so. But it is not clear how these differences explain why it is that general damages awarded to a defamed trading corporation pose some special danger to free speech that damages for patrimonial loss do not. And while the constitutional validity of damages for patrimonial loss is not directly in issue, the first judgment draws a distinction between the two types of damages to justify its conclusion as to the risk of special harm to free speech resulting from awards of general damages to trading corporations. This ground of justification, in my view, cannot be made out.

[179] The first judgment endorses the proposition that the consideration of the availability of less restrictive means in a section 36 analysis does not entail an enquiry into the constitutionality of the less restrictive means.[197] I have altogether less confidence that this proposition can hold good, formulated in a manner so unqualified. I have some doubt that this Court in *Makwanyane* would have raised no constitutional query if serial torture had been proposed as a less restrictive means of punishment than the death sentence. However, the proposition relied upon in the first judgment need not be resolved because it fails to advance the enquiry. The other remedies available to a defamed trading corporation that the first judgment considers unobjectionable are not shown to be less restrictive means to achieve the same purpose as an award of general damages. The first judgment, as I have endeavoured to show, has not provided any basis, for example, to suppose that damages awarded for patrimonial loss to a trading corporation are less restrictive of free speech. Quite the contrary seems probable. Nor indeed are the other remedies available to a defamed trading corporation less restrictive means to achieve the same purpose. Each of these remedies has a distinct remedial purpose.

[180] It is also not evident why the award of non-patrimonial damages at the instance of a trading corporation poses a distinct and special danger to freedom of speech. Why does a wealthy individual with a thin skin and deep pockets not constitute an equal or

[197] See [118] – [119] of the first judgment.

greater danger? The distinction that the first judgment would appear to rely upon is the claim that a natural person has the right to dignity in section 10 of the Constitution. But that is simply a reason why the risk of harm to freedom of speech has to be more readily tolerated. It is not a reason to suppose that general damages claimed by natural persons are any less inimical to freedom of speech than such a claim made by a trading corporation. All depends upon the contingent features of a particular plaintiff and not whether the plaintiff is a trading corporation.

[181] If, as I understand the first judgment, a trading corporation will remain entitled to other remedies at common law to seek redress for an unlawful defamation, and these remedies are beyond constitutional reproach, it is hard to see why that is so, but general damages are constitutionally suspect. The threat of litigation by a trading corporation is the source of the constraint on a defendant in deciding whether to publish a defamatory statement. The ultimate remedy of a declarator or interdict, as opposed to an award of general damages, makes very little practical difference to the calculation of a person as to whether to publish or not. The remedy of disproportionate significance is a claim for patrimonial loss, but that is considered by the first judgment to be constitutionally benign.

[182] The first judgment considers these observations to be self-defeating on the basis that if general damages pose no greater deterrent to defamatory speech than any other remedy, then such damages serve no purpose and cannot be justified in terms of section 36. This is unavailing. It fails to distinguish purpose and effect. The award of general damages to a trading corporation has an entirely legitimate purpose the compensation of non-pecuniary loss by reason of reputational harm. That is plainly a matter to be weighed in terms of section 36(1)(b) and (d) of the Constitution, 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 is a different matter.

[183] The first judgment holds that general damages sought by a trading corporation pose some special danger to freedom of speech that other remedies do not. That danger

does not arise, as I have pointed out, from any distinctive deterrence of defamatory speech to which general damages give rise. But it does not follow that an award of general damages to a defamed trading corporation is therefore gratuitous, and for this reason constitutionally objectionable, as the first judgment posits. Our law provides remedies for civil wrongs primarily to right these wrongs. That means, to make good, as best the law can, the harm done to, and reasonably apprehended by, the person harmed. There is agreement that an award of general damages to a defamed trading corporation is compensation for its reputational harm. Such an award is in no sense gratuitous. A consequence of such an award or the threat of such an award is that it may deter defamatory speech. Such an effect may warrant consideration in an analysis under section 36. The effect may be modest or indistinguishable from the effects caused by other remedies. But this does not mean that an award of general damages is pointless.

[184] The first judgment engages my observation that the threat of litigation may do much of the work to deter defamatory speech, rather than the remedy that is ultimately given by the courts. The first judgment queries the empirical basis of this observation. It goes on to say that since general damages have been demonstrated to limit freedom of expression and cannot be justified, "the limitation imposed by the threat of litigation itself, irrespective of its degree, matters little".[198] The threat of litigation is simply, on this view, an additional danger to freedom of speech, that is to say, in addition to the danger posed by an award of general damages.

[185] This engagement is a distraction. The issue is not what evidence best confirms what it is that deters free speech, whether it be the threat of litigation or its resulting remedy. The issue is rather 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. The first judgment does not and cannot demonstrate this danger, and hence cannot justify why general damages sought by a trading corporation warrant

[198] See [126] of the first judgment.

constitutional condemnation when other remedies are constitutionally permissible. This is not simply a failure of consistency. It is a pointer, as I shall endeavour to explain, to the conclusion that the source of constitutional difficulty in this case is 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. That is to say, the true issue is not about remedy but about the right to a substantive defence of public debate: the very terrain that the applicants declined to pursue before us.

[186] The first judgment thus proceeds from the unsubstantiated premise that the claim of a trading corporation to an award of general damages poses some special risk to freedom of expression that its claim to other remedies does not. It further assumes, but does not explain, that a trading corporation invariably poses a greater risk to freedom of expression that natural persons do not.

[187] The holding of the first judgment also gives rise to considerable anomaly. The legal form of a business is often a matter of convenience. There is a diversity of legal forms in which commerce takes place: incorporated small businesses; unincorporated but very large partnerships; incorporated professional partnerships; sole traders; commercial trusts and large public listed companies. The reputational harm that is visited upon a business by a defamatory statement is not determined by the legal form in which the business is conducted. Yet 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 engaged upon public discourse for a legitimate purpose, but not to an unincorporated business.[199] I shall refer to this principle as the principle of presumptive exclusion. The principle of presumptive exclusion would thus 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. Indeed, the principle of presumptive exclusion, favoured by

[199] See [99] of the first judgment.

the first judgment, gives rise to arbitrariness and, in no small measure, the principle fails to accord to everyone the right to equal protection and benefit of the law, as section 9(1) of the Constitution requires.

[188] It is difficult to discern whether the constitutional danger to freedom of speech that the first judgment apprehends arises because the plaintiff is incorporated or because the plaintiff is engaged upon commercial trade. If the latter, the law should require that all whose businesses are defamed, no matter the size of the enterprise, incorporated or not, would have their claims determined on a discretionary basis under the principle of presumptive exclusion. The breadth of such a position is untenable. Why should a small family business unlawfully defamed pose any such danger? If the issue is one of incorporation, what then of incorporated non-trading entities? Would a not-for-profit company that does charitable work and suffers reputational harm have no claim for general damages? This would visit a substantial hardship given that it has no claim for lost profits. Or would we allow a charitable trust that is similarly harmed to claim such damages? These questions are not answered in the first judgment because it does not ultimately explain under what compelling principle the claim of a trading corporation to general damages holds some special risk for freedom of speech that other persons do not.

[189] The first judgment recognises that to distinguish between different types of entities in awarding general damages would be arbitrary but holds to the position that there remains a defensible basis to treat natural persons differently from "all corporate entities, incorporated or not, both trading and non-trading, for profit and not".[200] This distinction is unclear. It would appear to bring under the principle of presumptive exclusion natural persons who run businesses, but otherwise exclude natural persons who do not. It would exclude natural persons who undertake charitable work, but include a trust or not-for-profit company that does the same work. It treats donations lost to a not-for-profit company as a species of goodwill diminution resulting in

[200] See [98] of the first judgment.

patrimonial loss that could be claimed (a notion of no small conceptual difficulty), but would render damage to the not-for-profit company's other reputational interests presumptively suspect. The distinction relied upon in the first judgment gives rise to incurable anomaly.

[190] An award of general damages to a trading corporation is a remedy that a court may only consider once it has determined that the trading corporation has been unlawfully defamed. The defendant has thus failed to establish a defence, including truth in the public interest. That does not necessarily mean that it is proven that the defamation is false. However, in many cases the speech at issue will have little or no claim to protection on the basis of freedom of speech. In *Khumalo*,[201] this Court observed that the publisher of false speech does not have a strong constitutional speech interest in the publication of false material. Once that is so, there is no basis, *a priori*, to rule that the unlawful defamation of a trading corporation presumptively excludes a claim by it for general damages on the basis that this remedy infringes freedom of expression. If the speech in issue does not substantially engage the speech interests that freedom of expression protects, then an award of general damages is doing no incremental harm to that freedom. That is so because the speech in question forms no part, or scarcely any part, of the freedom that is constitutionally protected. We are inevitably driven back to the difficult question that we were ultimately not asked to answer, that is: when is defamatory speech that engages an important question of public debate lawful? This is not an issue of remedy but of rights.

[191] The first judgment confirms the decisions of this Court, that section 16 does not only protect information or ideas that are favourably regarded or innocuous.[202] That is undoubtedly so. The first judgment considers that this jurisprudence entails adherence to the proposition that a remedy cannot escape constitutional scrutiny on the basis that the speech is defamatory.[203] This proposition is an oversimplification. Where

[201] *Khumalo* above n 13 at para 42.

[202] See [128] of the first judgment.

[203] Id at [130].

defamatory speech substantially fails to engage the speech interests that freedom of expression protects, a category of speech that extends beyond speech identified in section 16(2), the remedy of general damages can do no harm to that which is not protectable. And hence there is no presumptive basis to hold that general damages sought at the instance of a trading corporation in respect of all defamatory speech is unconstitutional.

[192] The first judgment, in my view, does not establish a compelling basis to find that the claim of a trading corporation, unlawfully defamed, to seek general damages is presumptively constitutionally suspect.

[193] Nor, in my respectful view, does the limitation analysis undertaken in the first judgment yield the unequivocal conclusions reached. The first judgment's limitation analysis rests heavily on the proposition that the right to freedom of expression is a constitutional right that secures our democratic order and the moral value of persons, whereas the common law right of a trading corporation to its reputation is a lesser order of right. A remedy that harms freedom of speech, and redeems a lesser right, is hard to justify. And, in particular, where freedom of speech is exercised to engage public discourse on issues of legitimate debate, that is ever more so.

[194] The importance of freedom of speech as the bedrock of a flourishing democracy cannot be doubted. But the ritual incantation of this proposition should not avoid another truth. False speech (and sometimes also hateful speech) that harms another's reputation will often have little or no value. Such speech counts for little in the recognition that is due to freedom of expression. It is sometimes not protected speech to which a person may claim an unqualified right to freedom of expression.

[195] Freedom of speech must be understood not only in an idealised world where virtuous citizens engage each other in public discourse to debate the issues of the day, and where an error of falsity is a frailty of editorial oversight, an unguarded excess of legitimate debate, or a needless exaggeration. The real world of speech today is

dominated by social media platforms. These platforms are used by billions of people. Content is published to millions in an instant. The platforms assume little responsibility for the content that is posted. They remove content or access in very limited circumstances and they deny that they are media owners burdened with duties for the material that appears on their sites. Social media platforms are at once the greatest means by which freedom of speech may be exercised, and the greatest engine for falsity. They enhance democratic participation and threaten its foundations.

[196] The law and the Constitution must thread its way through these contradictions. That is a matter of no small difficulty.

[197] The law of defamation tests truth as a defence, and the failure of a defendant to make out this defence may mean that not all defamation is assuredly false. But the incidence of the onus at common law cannot avoid the larger point of principle that many species of defamatory speech are false (and sometimes also hateful). They can be extremely harmful to the reputation of persons, and it is difficult in these circumstances to understand what freedom is being justifiably exercised in publishing such speech. This is no less true when a trading corporation is defamed. In sum, it is not the case that the publication of defamatory speech is invariably a legitimate exercise of freedom of speech. In some instances, it is not.

[198] On the other hand, the right of persons to protect their reputation matters. That is no less so for a trading corporation. As the first judgment makes plain, the reputation of a trading corporation is not simply an asset that is used to generate profit.[204] Trading corporations are firms of great diversity, from large and powerful companies to small businesses that support a meagre income for a person or a family. Yet for all their diversity, these firms cannot simply be reduced to their function of making private profits. They have social responsibilities beyond this. The reputation of a trading corporation is part of its social capital. This constitutes a valuable part of what

[204] Id at [49].

a trading corporation requires to discharge its social responsibilities. In a world where social media permits the exchange of information in a largely unregulated way to millions of people in an instant, we should not want to discount the risk thus posed to reputation and abdicate the law's response. The right of a trading corporation to protect its reputation matters, and the common law's protection of that right must be carefully weighed.

[199] Of course, between the polarities I have described of false, worthless speech and the valuable reputational interests of trading corporations, there are many gradations. So, for example, there is speech that turns out to be false but was published with reasonable care in the public interest. There are claims to reputational protection from scoundrels or corporations that engage in exploitative, wrongful or irresponsible conduct and use the law of defamation to hide their misdeeds. There is speech which may be controversial, even hurtful, that is the lifeblood of a free and democratic society and should not be supressed. Navigating these differences is what the common law of defamation has sought to do. Whether it has done so properly to balance the rights of persons to reputation and freedom of speech under the discipline of the Constitution, is a matter of the greatest importance.

[200] I recognise that the first judgment has drawn a particular line to demarcate where the right of a trading corporation to its reputation by way of a claim for general damages cannot justify a limitation of free speech. It holds that speech that engages public discourse on issues of legitimate debate should presumptively be free of the burden of liability to pay general damages to trading corporations defamed by that speech.[205] I will call such speech "public speech".

[201] This delineation runs into the following difficulties. As I have sought to explain, the correct position is not determined by casting freedom of expression as a higher order right. Its status as a constitutional right does not avoid the many complexities as to

[205] See [115] of the first judgment.

when the right is engaged and how strongly it counts. Not all speech enjoys the same protection, nor does it trump every claim of a trading corporation to the full protection of its reputational rights.

[202] The first judgment implicitly recognises this, and hence its adoption of public speech as the basis upon which a trading corporation may be required to forego general damages. But the very concepts that constitute public speech fail to define speech that may warrantably free those responsible for it from the claims of defamed trading corporations seeking general damages. Public discourse is speech that takes place in public. Social media is the town square writ large. It is pre-eminently the platform of public discourse. Issues of legitimate debate is a concept of bountiful elasticity. But a subject may be one of legitimate debate and yet what is said may be false, even hateful, and reputationally ruinous. So, for example, if on social media persons are posting about whether an election was fraudulently stolen, that is public discourse on an issue of legitimate debate. Say a post appears that states that particular trading corporations funded the campaign of the successful party using the proceeds of child prostitution. The post is false. Is the author of the post free of liability to pay general damages?

[203] The first judgment would say so, unless it is found that the falsity of the statement removed it from constitutional protection. But if that is so, it is the falsity or truth of the statement and its reputational repercussions that is doing the work to decide whether to exclude the payment of general damages, and not the concept of public speech.

[204] This example illustrates the fundamental difficulty at the heart of the first judgment. The issue to be determined is whether a trading corporation that has been unlawfully defamed is entitled to general damages. But in deciding whether this remedy is constitutionally permissible, the analysis must proceed from the fact that the trading corporation has been unlawfully defamed.

[205] That gives rise to four interconnected difficulties that I have traversed. First, it is inexplicable why general damages cause some special harm to freedom of speech that other remedies enjoyed by the trading corporation do not. Second, there is no reason why the threat of general damages by a trading corporation holds some risk to free speech that other plaintiffs do not. Third, the right to freedom of speech must take account of what speech is used, how it is used, and with what consequences. The right does not have abstract primacy over reputational rights simply because it is a constitutional right, and the right to reputation of a trading corporation is, according to the first judgment, a mere common law right. If the unlawful defamation is a blatant falsehood that does great reputational harm, the right to freedom of speech has no primacy. Fourth, the presumption the first judgment crafts in favour of public speech cannot do the constitutional work required of it, not only by reason of its vague elasticity, but also because it cannot define the protection it would offer in the face of falsehood of reputational consequence.

[206] For these reasons, I find no case has been made out to show that the claim of an unlawfully defamed trading corporation to an award of general damages is constitutionally excluded, whether presumptively or otherwise. I also do not consider that even if such a case could have been made, the limitation analysis would fail to justify the recognition of such a claim. There are many circumstances in which unlawful defamatory speech is not speech warranting constitutional protection or at least not protection of a kind that would immunise it from the claim of a defamed trading corporation to general damages. That claim is specific. It seeks compensation for a particular species of loss. There is no evident reason why a trading corporation should forego that claim for compensation simply because other remedies are available to it. The obligation to pay compensation arises from unlawful speech that has caused reputational harm. The extent of the limitation upon speech that comes about by reason of the liability to pay general damages is bounded by the starting premise that the speech is unlawful. That is itself a justified limitation.

[207] I should add that I have much sympathy, indeed admiration, for the efforts of the first judgment to find a *via media* so as to redeem the value of free speech in a free and democratic society. Free speech is an essential right. Those who wish to pursue a cause should be heard and their speech may be robust. The difficulty in this case is that the applicants abandoned their defence on the grounds of legality, and left this Court to decide upon the constitutionality of a particular remedy. That left the applicants having to show that the trading corporation's claim for general damages was unconstitutional in the face of the inevitable premise that the applicants must be taken to have unlawfully defamed the mining companies with everything that premise entails. A constitutional challenge that would seek to expunge a compensatory remedy that makes good reputational harm caused by an unlawful defamation, and then to single out trading corporations alone for such expungement, is a bridge too far.

[208] However, there are issues of great importance that this case did not ultimately need to resolve, but which will require consideration in a proper case. I reference the analysis with which *Khumalo* ended. In *Khumalo,* this Court pointed out the following constitutional difficulty: while a person cannot claim a strong constitutional interest in protecting their reputation against the publication of truthful but damaging statements, neither do publishers have a strong constitutional speech interest in the publication of false material.[206] *Khumalo* went on to observe that burdening either plaintiffs or defendants with the onus of proving a statement to be true or false was a "zero-sum game"[207] which, in that matter, this Court was saved from having to resolve because *Bogoshi*[208] had introduced a defence of reasonable publication.

[209] *Bogoshi* could not have anticipated the revolution that ubiquitous social media has wrought upon the world. *Bogoshi* looks back to a time when conventional media, and in particular the press, was the principal means by which freedom of expression was enjoyed on a large scale. That world has been overtaken. What may now be

[206] *Khumalo* above n 13 at para 42.

[207] Id.

[208] *Bogoshi* above n 16 at 1212F-G.

considered the media, and to whom a defence of reasonable publication should apply are matters of great importance. More generally, whether the constitutional right to freedom of expression permits certain types of speech to be used, by certain actors, for determined objects, even though that speech may be false and defamatory is a question of legality that the applicants, as activists, may have raised, but ultimately did not pursue. Their challenge was limited to the availability of a remedy, namely general damages to trading corporations. That challenge must fail.

[210] In the result, I would dismiss the appeal with costs, including costs of two counsel.

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