

Corporate & Commercial ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Defamation and the rights of companies to claim general damages: A discussion of the Constitutional Court's judgment in *Reddell and Others v Mineral Sands Resources*

In terms of South African law, "defamation" is the intentional, wrongful publication of a defamatory statement concerning a person. A defamatory statement is generally considered to be a statement which objectively has the effect of injuring a person by lowering the reputation of the person in the estimation of right-thinking members of society.



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Defamation and the rights of companies to claim general damages: A discussion of the Constitutional Court's judgment in *Reddell and Others v Mineral Sands Resources*

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Defamation proceedings are aimed at protecting the right to a good name, unimpaired reputation and esteem, which are vindicated by way of compensation for the damage done in the form of general damages.

The issue that the court in *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* [2022] ZACC 38 was faced with was whether a trading corporation ought to be able to sue for general damages in a defamation suit.

The issue is of considerable importance both to the parties in the matter and to the broader public because it required the court to strike a balance between two fundamental constitutional values: the protection of reputation or good name of a trading corporation and the right to freedom of expression.

Background

The constitutional dispute in *Reddell* arose after the High Court of South Africa, Western Cape Division (High Court) handed down

judgment regarding the alleged defamation of two mining companies and their office bearers, by a group of environmental activists and lawyers. The claims were based on the activists' critique of the mining companies' operations and activities with the mining companies claiming general damages, in the sum of R14 million.

In the High Court, the activists raised two special pleas. The first was the Strategic Litigation Against Public Participation (SLAPP) suit special plea and the second was the corporate defamation special plea. The mining companies raised exceptions to both special pleas on the ground that they did not disclose a proper defence in law.

When the matter came before the constitutional court, the activists had abandoned both the SLAPP suit special plea and the corporate defamation special plea. The corporate defamation special plea was abandoned as the South African Supreme Court of



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Appeal (SCA) had, in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] (5) SA 329 (SCA) already affirmed that in common law, a trading corporation has a right to the protection of its reputation. What divided the appeal court in *SA Taxi* was that 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, whereas the minority found an award of patrimonial damages, in these circumstances, to be punitive damages and "constitutionally objectionable" for this reason.

In the constitutional court, the activists persisted with their alternative claim on the constitutionality of awarding general damages to trading corporations in defamation cases. The activists submitted that the SCA's decision in *SA Taxi* was

incorrectly decided and that the common law needs to be developed to resolve the violation of the right to freedom of expression resulting from this decision.

Arguments before the Constitutional Court

The activists submitted that allowing defamation claims for general damages imposes significant restrictions on the right to freedom of expression as trading corporations should not be equated with natural persons who are bearers of the constitutional right to human dignity and that the interest of trading corporations in their reputation is not personal, but purely financial.

In response, the mining companies argued that reputation as well as dignity justifies the limitation of the right to freedom of expression. Thus, the activist's acceptance of the fact that for-profit companies have a reputation worthy of protection

means that it should be able to claim general damages under a defamation claim. Responding to the argument that trading corporations have recourse through a claim for special damages, the mining companies submitted that the impact a company's reputation has on its bottom line may be intangible and is not always easily quantifiable. Thus, to permit companies to sue to vindicate their reputations only where they can prove financial loss will, in some instances, rob them of a remedy altogether.

The court agreed that this matter was indisputably a matter of general public importance as awarding general damages to trading corporations for defamation may potentially shackle public participation, particularly in environmental matters, where meaningful public participation is required.

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Majority judgment

The majority judgment began by setting out the right of a trading corporation to sue for defamation. The court noted that the view historically taken was that juristic persons have no personality rights, including the right to a good name and thus could not sue for defamation. However, corporations play a vital role in communities and in the affairs of the economy and politics and, as such, 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. Ultimately the position that juristic persons could not sue for defamation changed and it was decided in *Dhlomo N.O. v Natal Newspapers (Pty) Ltd* [1989] (1) SA 945 (A) that a trading corporation should be entitled to sue for defamation.

Having set out the importance of a trading corporation's right to reputation, the majority proceeded to evaluate the source of this right. The court accepted the fact that there are numerous facets to human dignity which simply cannot be of application to trading corporations. As such, upon a contextual and purposive reading of the Bill of Rights, the conclusion reached in *SA Taxi* that trading corporations have a claim for general damages in defamation based on the right to dignity is incorrect. Notwithstanding this position, the court held that although a trading corporation has no feelings, dignity or sense of self-worth which can be harmed, it has an objective external interest, in its right to reputation and a good name worthy of protection.

Public interest and general damages

In deciding whether a trading corporation should be entitled to claim general damages, the court was faced with opposing views regarding the infringement of personality rights. On the one hand, there is the view that juristic persons do not have personality rights and thus cannot experience personal suffering. On the other hand, there is the view that juristic persons can objectively suffer personality harm without experiencing subjective injured feelings, thus entitling it to lay claim to personality rights. The court sided with the latter and concluded that a trading corporation can suffer non-patrimonial harm as it has an objective external interest in its right to reputation and a good name.

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Thereafter, the court had to consider whether awarding general damages to trading corporations would unjustly limit the right to freedom of expression. The court began its assessment by holding that the awarding of general damages would in fact limit the right to freedom of expression. Notwithstanding this position, the court proceeded to assess whether the limitation was justified or not. The court pointed out that the importance of the purpose of the limitation is low in light of the fact that a trading corporation's reputation rights are not sourced in the Constitution and are, at best, only enjoyed objectively. Furthermore, awards of general damages in contrast to alternative remedies like patrimonial damages tend to have a chilling effect on free speech. In light of this chilling effect, the court noted that there are 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.

In light of these considerations, the court found that the awarding of general damages must have regard to whether the defamation forms part of public discourse on issues of public interest. This is a pertinent factor that must bear consideration. Where the defamatory statements are made during public discourse on issues of legitimate public interest, general damages may not be considered. As the court stated: "*There is speech which may be controversial, even hurtful, that is the lifeblood of a free*

and democratic society and should not be suppressed." However, where the defamation does not fit within this category, the extent of general damages would be determined on a fact-based approach from case to case. This allows awarding of general damages to be discretionary and thus considerate of all rights involved.

The court thus concluded that extreme defamation of a trading corporation regarding a matter of no public interest would generally justify compensation for non-patrimonial harm. However, where there are issues of public interest the award is not warranted because of the potential suppression of important public debate in matters of public interest.

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The importance of debate v the right to reputation

In conclusion, the court held that trading corporations are not constitutionally excluded from seeking general damages. However, in instances where speech forms part of public discourse on issues of public interest, the court would have the discretion to find that such an award is not warranted.

The judgment is an important development in our law, as it confirmed the narrowing of the gap between the potential remedies available to natural persons vs. juristic persons for defamation, particularly compared to other jurisdictions such as England (where the right to sue is dependent on the company's ability

to adduce evidence as to financial loss to succeed in defamation suits) and New Zealand (which 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).

However, the constitutional court's judgment was carefully crafted to ensure that this legal principle could not be used to curb or restrain debate on issues of public interest, which is vital for South Africa's democracy, as the courts will retain the discretion to determine, on the facts, whether such remedy is warranted.

[Vivien Chaplin and Oliver Marshall](#)

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The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

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