**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: **7595 / 2017**

In the matter between:

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| **MINERAL SANDS RESOURCES (PTY) LTD** | First Plaintiff |
| **ZAMILE QUNYA** | Second Plaintiff |
| and | |
| **CHRISTINE REDDELL** | First Defendant |
| **TRACEY DAVIES** | Second Defendant |
| **DAVINE CLOETE** | Third Defendant |

**CASE NO**: **14658 / 2016**

In the matter between:

| | |
|---|---|
| **MINERAL COMMODITIES LIMITED** | First Plaintiff |
| **MARK VICTOR CARUSO** | Second Plaintiff |
| and | |
| **MZAMO DLAMINI** | First Defendant |
| **CORMAC CULLINAN** | Second Defendant |

**CASE NO: 12543 / 2016**

In the matter between:

| | |
|---|---|
| **MINERAL COMMODITIES LIMITED** | First Plaintiff |
| **MARK VICTOR CARUSO** | Second Plaintiff |
| and | |
| **JOHN GERARD INGRAM CLARKE** | Defendant |

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**DEFENDANTS' HEADS OF ARGUMENT**

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## INTRODUCTION

1 Before this court are exceptions arising from three defamation actions.

2 The three defamation actions are as follows:

2.1 In the first,[1] the *Reddell* matter, a mining company and one of its directors sue two environmental attorneys and a community activist for statements made during lectures at UCT's 2017 summer school programme. The mining company seeks damages of R750 000, the director seeks further damages of R500 000.

2.2 In the second,[2] the *Dlamini* matter, a mining company and its CEO sue an environmental attorney and a community activist for various public statements. The mining company seeks damages of R1.5 million and the CEO seeks further damages of R1.5 million.

2.3 In the third,[3] the *Clarke* matter, a mining company and its CEO sue a community activist for various public statements. The mining company and the CEO together seeks damages of R10 million.

3 The mining companies in question are related. The mining company in the *Reddell* matter is Mineral Sands Resources and the mining company

[1] Case No. 7595 / 2017

[2] Case No. 14658 / 2016

[3] Case No. 12543 / 2016

in the other two matters is its Australian parent company, Mineral Commodities.[4]

4 These cases therefore involve the two related mining companies and their directors suing three environmental attorneys and three community activists for damages said to arise from defamation for a total amount of R14,25 million. The mining companies and their directors do so even though, as we demonstrate in what follows, they make no allegation that they have suffered patrimonial loss by virtue of the allegedly defamatory statements.

5 In response to these claims, the various defendants have raised two separate sets of special pleas.

6 In the <u>first</u> set of special pleas:[5]

6.1 The defendants allege that the mining companies'[6] actions are:

> *"brought for the ulterior purpose of*:
> - *discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the plaintiffs; and*
> - *intimidating and silencing members of civil society, the public and the media in relation to public criticism of the plaintiffs*."[7]

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[4] See the First Special Plea in the *Reddell* matter at p 21, para 4

[5] The First Special Plea in the *Reddell* matter appears at p 20. Because the three special pleas are identical, in these heads of argument we only refer to the *Reddell* papers.

[6] In what follows, we refer to the various plaintiffs collectively, including the directors, as "the mining companies".

[7] First Special Plea, *Reddell* matter, p 20, para 3

6.2 The defendants allege that the mining companies' conduct in bringing the actions:[8]

6.2.1 is an abuse of process of court;

6.2.2 amounts to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and

6.2.3 violates the right to freedom of expression entrenched in section 16 of the Constitution.

7 The mining companies contend that these special pleas do not give rise to any defence in our law and have excepted to them. We submit that this Court should dismiss these exceptions.

8 In the second set of special pleas,[9] the defendants contend that the claims of the mining companies are bad in law because a company operating for profit cannot due for defamation (and certainly not for general damages) without alleging and proving that:

8.1 the defamatory statements concerned are false;

8.2 the false defamatory statements were made wilfully; and

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

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[8] First Special Plea, *Reddell* matter, p 22, para 5

[9] The Second Special Plea in the *Reddell* matter appears at p 23

9 The mining companies again contend that these special pleas do not give rise to any defence in our law and have excepted to them. As we explain in what follows, the defendants accept that this Court is bound to uphold these exceptions because of the binding decision of the majority of the SCA in *SA Taxi*.[10] Upholding the exception will allow the defendants to seek to have that decision reconsidered by the Constitutional Court in due course.

10 In these heads of argument, we first deal with the first set of special pleas and exceptions and then with the second set of special pleas and exceptions.

## THE FIRST SET OF SPECIAL PLEAS AND EXCEPTIONS

### *The first set of special pleas*

11 In the first special pleas, the defendants emphasise that the mining companies' claims – running to millions of rand – are brought against individual defendants.

12 The defendants then emphasise that these claims are brought against the individual defendants even though:

12.1 The mining companies do not allege any patrimonial loss;[11]

[10] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA)

[11] First Special Plea, *Reddell* matter, p 20, para 2.1

12.2 The mining companies do not allege that the alleged defamatory statements concerned are false;[12] and

12.3 The mining companies do not honestly believe that they have any prospect of recovering the amount of damages claimed from the defendants.[13]

13 The defendants then plead the following critical allegation:

> *"The plaintiffs' action is brought for the ulterior purpose of:*
>
> *3.1 discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the plaintiffs; and*
>
> *3.2 intimidating and silencing members of civil society, the public and the media in relation to public criticism the plaintiffs."*[14]

14 The defendants plead that the plaintiffs' conduct in this regard "*forms part of a pattern of conduct"* by these mining companies. This "*pattern of conduct*" involves these mining companies bringing "*defamation actions for the ulterior purpose*" of:

14.1 "*discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the plaintiffs*"; and

14.2 "*intimidating and silencing members of civil society, the public and the media in relation to public criticism the plaintiffs*".[15]

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[12] First Special Plea, *Reddell* matter, p 20, para 2.2

[13] First Special Plea, *Reddell* matter, p 20, para 2.3

[14] First Special Plea, *Reddell* matter, p 20, para 3

[15] First Special Plea, *Reddell* matter, p 21, para 4

15 The defendants allege that the bringing of the present actions:[16]

15.1 is an abuse of process of court;

15.2 amounts to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and

15.3 violates the right to freedom of expression entrenched in section 16 of the Constitution.

16 They ask that the actions be dismissed with costs on this basis alone.[17]

17 Insofar it may be held that the existing common law does not allow for the dismissal of an action on this basis, the defendants ask that the common law be developed in terms of sections 8(3) and 39(2) of the Constitution to allow for this.[18]

***The first set of exceptions***

18 The mining companies have excepted to these special pleas.

19 They state that the defendants have not brought an application in terms of the Vexatious Proceedings Act 3 of 1956.[19] That is indeed correct.

[16] First Special Plea, *Reddell* matter, p 22, para 5

[17] First Special Plea, *Reddell* matter, p 23, para 6

[18] First Special Plea, *Reddell* matter, p 23, para 7

[19] First Exception, *Reddell* matter, p 53, para 1.1

20 The mining companies then contend that the defendants have not satisfied the requirements for abuse of process at common law, which they say "*requires that the Court finds that the proceedings are obviously unsustainable as a certainty and not merely on the preponderance of possibility*".[20] That contention is the main debate between the parties.

***Analysis***

21 At the outset, it must be borne in mind that these are exception proceedings. For that reason and for purposes of these proceedings, each of the allegations made by the defendants in the special plea must be accepted as true. This is trite law[21] and the mining companies accept that this is the position.

> *"It is for the excipient to satisfy the court that the conclusion of law pleaded by the appellant cannot be supported by any reasonable interpretation of the [special plea]. For this purpose the facts pleaded in the [special plea] are accepted as correct…."*[22]

22 It must thus be accepted as correct that:

22.1 The mining companies do not honestly believe that they have any prospect of recovering the amount of damages claimed from the defendants;[23]

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[20] First Exception, *Reddell* matter, p 53, para 2

[21] *Charlton v Parliament of the RSA* 2012 (1) SA 472 (SCA) at para 1

[22] *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) at para 4

[23] First Special Plea, *Reddell* matter, p 20, para 2.3

22.2 The mining companies' defamation actions are brought for the purpose of

22.2.1 discouraging, censoring, intimidating and silencing the defendants in relation to public criticism of the mining companies;[24] and

22.2.2 intimidating and silencing members of civil society, the public and the media in relation to public criticism of the mining companies;[25] and

22.3 This forms part of a pattern of conduct by the mining companies in which they seek to bring defamation actions for these purposes.[26]

23 The question then is whether our law allows such a course of conduct by the mining companies to be permitted. We submit not.

***The existing common law***

24 In *Lawyers for Human Rights v Minister in the Presidency*[27] the Constitutional Court reiterated that courts have the power and indeed a duty to prevent the abuse of their process.

[24] First Special Plea, *Reddell* matter, p 20, para 3.1

[25] First Special Plea, *Reddell* matter, p 20, para 3.2

[26] First Special Plea, *Reddell* matter, p 21, para 4

[27] *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) at para 20

24.1 The Court held that "*There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes*".

24.2 It quoted longstanding authority to the effect that "*When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.*"[28]

24.3 The Court also endorsed the view that abuse of process comes in a wide variety of forms:

> *"What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."*[29]

Is the motive or purpose of the litigation relevant to abuse of process?

25 The mining companies are understandably constrained to accept that a court has a power to curb abuse of process and to strike out claims that amount to an abuse of process.[30]

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[28] At para 20, quoting *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F-G (emphasis added)

[29] At para 20, quoting *Beinash v Wixley* at 734D-G

[30] Plaintiffs' heads, para 18

26 However, they contend that the "*motives*" of the litigation is "*are irrelevant to the abuse of process debate*".[31]

27 This argument is unsustainable for two separate reasons.

28 First, it is based on an over-reading of the *Maphanga* decision[32] on which the mining companies rely heavily.

28.1 That was a case in which the MEC sought to obtain an order barring a self-represented litigant from proceeding with any litigation against the Department or any employee of the Public Service, without first obtaining a permission from a Court.[33]

28.2 Having held that the Vexatious Proceedings Act was not available to the Department, the SCA went on to consider whether such an order could be granted under the common law. It was in that context that it held:

> *"It was firmly established in the South African common law, long before the advent of the Constitution, that the Supreme Court had the inherent power to regulate its own process and stop frivolous and vexatious proceedings before it. This power related solely to proceedings in the Supreme Court and not to proceedings in the inferior courts or other courts or tribunals. The following principles crystallised over the ages. It had to be shown that the respondent had 'habitually and persistently instituted vexatious legal proceedings without reasonable*

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[31] Plaintiffs' heads, para 19

[32] *MEC for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2019] ZASCA 147 (15 November 2019)

[33] See prayers 1 and 2 of the relief sought, quoted in para 6 of the judgment

*grounds. Legal proceedings were vexatious and an abuse of the process of court if they were obviously unsustainable as a certainty and not merely on a preponderance of probability. I must point out at this juncture that this definition applied to all litigation that amounted to an abuse of court process. The attempt by the MEC's counsel to distinguish the cases from which the principle derives on their facts was, therefore, mistaken."*[34]

28.3 It is true that this conclusion is couched in broad terms and that makes no reference to the "motive" or "purpose" of the litigation.

28.4 But the question of improper motive does not appear to have been at issue in the *Maphanga* matter. What was at issue there was a contention that Mr Maphanga's claims were obviously unsustainable, including that they had prescribed. It is therefore unsurprising that the Court did not consider or refer to the motive/purpose issue.

29 Second, if *Maphanga* did indeed purport to hold that the motive or purpose of the litigation was irrelevant to debates about abuse of process – despite the fact that the motive/purpose issue is not even mentioned in the judgment – this would have been most surprising.

29.1 It would have been inconsistent with a series of decisions of our courts, including the SCA and Constitutional Court.

[34] At para 25

29.2 Our courts have repeatedly referred to the purpose or motive of the litigation as being relevant to the question of abuse of process.

29.3 For example, in *Phillips v Botha,*[35] the SCA endorsed the following definition of abuse of process from an Australian decision:

> *""The term 'abuse pf process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose."*[36]

29.4 The SCA went on to add that "*Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse.*"[37]

29.5 Similarly, in *Beinash*,[38] the SCA held – in a statement later approved by the Constitutional Court – that "*an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective*".

29.6 Again in *Roering v Mahlangu*, the SCA endorsed the holding in another Australian decision that:

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35 *Phillips v Botha* 1999 (2) SA 555 (SCA)

36 At 565E-F (emphasis added)

37 At 565G-H (emphasis added)

38 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F-G (emphasis added), quoted in *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) at para 20

*"Whether there will be, in a particular case, a use of the process or an abuse of it will depend upon purpose rather than result…."*[39]

29.7 In *Gold Fields v Motley Rice*, Mojapelo DJP held that a matter might amount to an abuse of process where "*the litigation is frivolous, or vexatious or where litigation is being pursued for an ulterior motive*".[40]

29.8 Moreover, in a very recent judgment, the Constitutional Court reiterated that "*Abuse of process concerns are motivated by the need to protect the 'the integrity of the adjudicative functions of courts', doing so ensures that procedures permitted by the rules of the Court are not used for a purpose extraneous to the truth-seeking objective inherent to the judicial process*."[41]

30 In the circumstances, the suggestion by the mining companies that motive or purpose are irrelevant to whether an action is an abuse of process is simply incorrect.

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[39] *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA) at para 37 (emphasis added)

[40] *Gold Fields Ltd and Others v Motley Rice LLC* 2015 (4) SA 299 (GJ) at para 28

[41] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC) at para 40. This passage appears in the judgment of Mhlantla J, which commanded the support of five of the ten judges in the matter. The judgment of Cameron J, which commanded the support of the remaining judges, does not differ on this principle.

Is the purpose of intimidating and silencing criticism a permissible one?

31 That then leads to the next question: Is the purpose of the litigation (as pleaded in the special pleas) a permissible one? In other words, can a plaintiff permissibly bring a defamation action in circumstances where:

31.1 It does not honestly believe that it has any prospect of recovering the amount of damages claimed from the defendants;[42] and

31.2 The defamation action is part of pattern of conduct,[43] whereby the plaintiff seeks to intimidate and silence public criticism of it by not only by the named defendants,[44] but also by civil society, the public and the media.[45]

32 We submit that the answer is obvious. Litigation brought for such a purpose is patently impermissible.

33 Indeed, it is noteworthy that the plaintiffs' heads of argument do not even suggest that such a purpose would be a legitimate one. This is hardly surprising.

34 The importance of free engagement and debate on matters of public importance is confirmed in *Khumalo v Holomisa*, in which the Constitutional Court held that the right to freedom of expression *is "integral to a democratic society for many reasons*", including the reason that the

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42 First Special Plea, *Reddell* matter, p 20, para 2.3

43 First Special Plea, *Reddell* matter, p 21, para 4

44 First Special Plea, *Reddell* matter, p 20, para 3.1

45 First Special Plea, *Reddell* matter, p 20, para 3.2

right is constitutive of the dignity and autonomy of human beings and because, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.[46]

35 In *SANDU v Minister of Defence*[47] the importance of the right was stated as follows:

> *"freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."*

36 For these reasons our highest courts have recognised that an order preventing a person from making allegedly defamatory statements is a "*drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice*".[48] Such an order affects not just the constitutional right of the speaker to express himself, but also the constitutional rights of the public to hear the statements concerned.[49] Such an order is therefore granted only in extremely narrow circumstances, and only after considering the prejudice to the public.

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46 *Khumalo and Others v Holomisa* 2002 (5) 401 (CC) at para 21

47 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7

48 *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para 15; *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 44

49 *Print Media South Africa* (above) at paras 54 and 60

37 In the present case, of course, the mining companies have not sought interdicts against expression directly. This is no doubt because they know they are unable to make out a case for this.

37.1 But instead, as pleaded in the first special plea, the mining companies seek to achieve the same result via the back door – by instituting a series of damages claims, with the purpose of intimidating and silencing public criticism of them by the named defendants,[50] civil society, the public and the media.[51]

37.2 The mining companies thus seek to achieve the effect of an interdict against the defendants and public at large, but without meeting the requirements for such an interdict. This is impermissible.

38 Moreover, the environmental context in which this occurs is especially concerning.

38.1 The SCA has explained it aptly in *ArcelorMittal*:

> *"… First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance…."*[52]

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[50] First Special Plea, *Reddell* matter, p 20, para 3.1

[51] First Special Plea, *Reddell* matter, p 20, para 3.2

[52] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) at para 1

38.2 The SCA went on to emphasise the critical role played by the public in environmental debates:

> *"It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment…"*[53]

38.3 It concluded that:

> *"Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced."*[54]

39 The present matter arises in the context of debates about whether the mining companies have complied with their legal obligations and whether they have caused environmental damage.[55] Matters such as this self-evidently require public engagement and public debate.

40 The social and economic power of large trading corporations make it critically important that they be open to public scrutiny without the inhibiting risk of crippling liability for defamation. As recognised by Baroness Hale in *Jameel (Mohamed) v Wall Street Journal Europe Sprl*:[56]

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[53] At para 71

[54] At para 82

[55] See for example, POC, *Reddell* matter, p 8, para 10; p 10, para 16; and p 11, para 22

[56] *Jameel (Mohamed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) at paragraph 158

> *"The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government."*

41 In this context, it is quite impermissible for the mining companies to bring these proceedings in circumstances where they know they will never have any realistic prospect of recovering the damages they seek and where their purpose is to intimidate and silence public criticism by the named defendants, civil society, the public and the media.

42 This Court ought not and cannot allow its processes to be used for this ulterior purpose. That is what the first set of special pleas seeks to achieve.

43 Under the existing common law, therefore, the first set of special pleas are good in law. Whether they are established on the facts is a matter for the trial court in due course. But the notion that the special pleas can be rejected at this stage, before evidence on them is even led, is not correct.

***The development of the common law***

44 We have explained above that the special pleas are sustainable even under the existing common law.

45 But if we are wrong for any reason on that score, then the existing common law falls to be developed, as is also pleaded in the special pleas.[57]

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[57] First Special Plea, *Reddell* matter, p 23 para 7

46 The Constitutional Court has explained in *DZ*[58] that the development of the common law does not necessarily entail the changing of a common-law rule altogether, neither does it necessarily entail the introduction of a new rule. It may also occur, as in the present matter, in the situation where a court must determine whether a new set of facts falls within or beyond the scope of an existing rule.

47 The courts may approach the development through the lens of either section 39(2) or section 173. While they have a different threshold enquiries,[59] in both instances, the court must (1) determine what the existing common law position is; (2) consider its underlying rationale; (3) consider if it offends s39(2), or if the wider interests of justice necessitate development, the court must consider how the development ought to take place; and (4) consider the wider consequences of the proposed change on the relevant area of law.[60]

48 This approach does not ignore that the principal engine for law reform is the legislature but rather requires a court to take into account factors such as whether the common law rule is a judge-made rule; the extent of the development required; and the legislature's ability to amend or abolish the law.[61] Ultimately, whether a common-law rule offends section 39(2) or

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[58] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC)

[59] *DZ* (above) par 32 in which the court described enquiry under section 39(2) as whether the existing common law rule offends s39(2). In other words, is it at odds with the normative framework of the Constitution and the Bill of Rights? Under s173, the enquiry is wider and the question is whether, even if the common law is constitutionally compliant, there are wider interests of justice that necessitate its development.

[60] *DZ* (above) par 31

[61] *DZ* (above) par 34

whether the wider interests of justice necessitate development under section 173, the context of the inquiry, being the factual matrix that is placed before the court, is important.

49 This injunction was reiterated in *K*:[62]

> *"The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue."*

50 In the present case, no more than incremental development is warranted. The common-law doctrine of abuse of process would be developed by judicial pronouncement regarding a situation previously not dealt with – the impermissibility of litigation instituted with the aim of silencing public criticism regarding environmental issues.

51 We emphasise two considerations in this regard.

52 First, such a development would give proper protection to the right to freedom of expression in the context of environmental debates. This is plainly necessary and even appropriate. Even if (at best for the mining

[62] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 17

companies), the law does not preclude actions being brought for ulterior purposes generally, the law must at the very least preclude actions being brought in an attempt to intimidate people into not making use of their fundamental constitutional rights.

53 Second, such a development would be in line with the thinking of other jurisdictions, which have put in place protections against what are known as "SLAPP suits".

53.1 A SLAPP suit – or Strategic Litigation Against Public Participation is a form of litigation that is instituted to discourage a defendant party from exercising or vindicating their rights, usually with the aim not to win the litigation but rather to intimidate and waste the resources and time of the defendant party. It is most frequently brought in the form of defamation claims, abuse of process claims, interdicts or delictual liability cases.[63]

53.2 The concept of a SLAPP suit originates in the United States and has been adopted in different forms in a number of comparative jurisdictions. There are 29 States in the United States,[64] certain provinces in Canada,[65] and territories in Australia[66] that have

[63] Murombo & Valentine, SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa 2011 27 *SAJHR* 82 at 84

[64] See for example the following four States: California, Section 425.16 of the Code of Civil Procedure; Georgia, Ga. Code Ann. section 9-11-11.1 of the Civil Procedure Act; Massachusetts, section 59H off the Massachusetts General Laws Chapter 231; New York, N.Y. Civ. Rights Law section 70-a, 76-a and N.Y. C.P.L.R. section 3211(g), 3212(h)

[65] See for example, the following 3 provinces: Quebec, Article 54 of the Code of Civil Procedure; Ontario, Protection of Public Participation Act 2015; British Columbia, Protection of Public Participation Act 2019

[66] Australian Uniform National Defamation Laws, 2006 read with Australian Capital Territory's state legislation, the Protection of Public Participation Act 2008

some form of legislation to counter the prevalence of SLAPP-suit litigation. Other jurisdictions without anti-SLAPP suit legislation, like India, have embraced the concerns at issue in their common law.

53.3 For example, in the United States there is variation between the 29 States that have adopted SLAPP-suit legislation. By way of the example, the description of a SLAPP suit is described as follows in California:

> *"a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."*[67]

53.4 And in the State of Georgia the purpose of the Code is stated as:

> *"The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process. To accomplish the declarations provided for under this subsection, this Code section shall be construed broadly."*[68]

[67] Section 425.16(b)(1) of the Code of Civil Procedure

[68] Section 9-11-11.1(a) of the Civil Procedure Act

53.5 Canada too does not have federal anti-SLAPP legislation. But in Quebec, article 54.1 of the Code of Civil Procedure describes the nature of a SLAPP as:

> *"…the procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."*

53.6 In the case of *Klepper v Lulham*,[69] the Quebec Court of Appeal noted that the declaration that proceedings are a SLAPP has serious consequences in that it can lead to the dismissal of an action even if it has a basis in law and, therefore, ought not to be made lightly.[70] The Court described the basic characteristics of a SLAPP to be that it is (1) a lawsuit (2) against organisations or individuals (3) engaged in the public sphere involving debates relating to collective issues (4) aiming at limiting the freedom of speech of those organisations or individuals and to counteract their actions (5) by using the courts to intimidate or impoverish them and to divert them from their political actions.[71] The Court identified two important components of any SLAPP:

[69] *Klepper v Lulham* 2017 QCCA 2069

[70] *Klepper* (above) par 25

[71] *Klepper* (above) par 26

53.6.1 First, that a SLAPP seeks to manipulate the judicial process to the benefit of particular political, social or commercial interests.

53.6.2 Second, the disparity of financial resources between parties is also a typical component of a SLAPP. The Court stated that "The plaintiffs to a SLAPP intimidate the respondents – in purpose or effect – by forcing them to engage important material and financial resources in litigation which they can often ill afford, thus silencing them on the political, social or commercial issue at stake or impeding their actions on that issue".[72]

53.7 In Ontario, the Protection Public Participation Act, 2015 establishes a two-prong test in the determination of a SLAPP suite. First, the defendant must satisfy the judge that the proceedings arise from an expression made by the defendant that relates to a matter of public interest. Once the threshold requirement is met, the litigation must be dismissed unless the plaintiff can show (a) there are grounds to believe that the proceeding has substantial merit, and the moving party has no valid defence in the proceeding and (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the

[72] *Klepper* (above) par 27-28

public interest in protecting that expression.[73] This two-prong test is similar to that adopted in British Columbia in section 4 of Protection of Public Participation Act, 2019.

53.8 In *Pointes Protection Association*[74] the Court of Appeal for Ontario heard six dismissal applications together and handed down a single judgment. Of relevance in the present matter are the following remarks of the Court. First, that the legislation is "intended to promote free expression on matters of public interest by 'discouraging' and 'reducing the risk' that litigation would be used to 'unduly' limit such expression".[75] Second, that the purpose of the applicable section is:

> *"Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage."*

53.9 In India, there is no anti-SLAPP suit legislation. However, in *Crop Care Federation of India v Rajasthan Patrika (Pvt)* Ltd *& Others,*[76] the Dehli High Court made specific reference to the concept of a SLAPP suit. The plaintiff was a company whose members and shareholders were insecticide manufacturers. The defendants were an Indian newspaper and journalists employed by the

[73] Sections 137.1(3) and (4)

[74] *1704604 Ontario Ltd v Pointes Protection Association et al* 2018 ONCA 685

[75] *Pointes Protection Association* (above) par 37

[76] A decision of the High Court of Dehli on 27 November 2009

newspaper. The court rejected the defamation claim as the offending statements the alleged defamatory statements did not refer to a determinate or definite class or group of persons, but went on to add the following:

> *"The present suit contains all the ingredients of a "Slap suit". A strategic lawsuit against public participation (SLAPP) is a lawsuit intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. Winning the lawsuit is not necessarily the intent of the person filing the SLAPP. In such instances the plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs or simple exhaustion and abandons the criticism. A SLAPP may also intimidate others from participating in the debate….*
>
> *… One New York Supreme Court Judge J. Nicholas Colabella, described such civil suits graphically as "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."*
>
> *A number of jurisdictions have made such suits illegal. The plaintiff's attempt, in the opinion of the Court, by filing the suit here in Delhi, in relation to publications in Rajasthan, on what were matters of public concern, but called for debate, was to muffle the airing of such views. The suit was not brought by a company really aggrieved, as a manufacturer, who alone could have claimed a cause of action, but virtually a trade body, though created as a company limited by guarantee. The attempt was plainly to stifle debate about the use of pesticides and insecticides. Whether such use, or overuse of pesticides over a period of time, affects life, plant or human, could be a matter of discourse, but certainly not one which could be stifled through intimidatory SLAPP litigation."*

54 We do not suggest, of course, that this Court can or should create an entire anti-SLAPP suit regime via the development of the common law.

54.1 But the anti-SLAPP suit legislation in other countries just highlighted makes clear that the concerns raised by the defendants in the present matter are real and pressing. These concerns must be taken into account in determining whether and

how the existing common law principles of abuse of process are developed.

54.2 Moreover, the fact that many other countries have dealt with this comprehensively via legislation is not a bar to this Court doing so incrementally via the development of the common law.

54.3 A good example is how class actions have developed in South Africa. While virtually all other countries developed class action procedures via legislation, in the absence of legislation the South African courts developed the procedural rules and common law to allow for them.[77] As the SCA explained:

> *"We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice. This may on some occasions involve us, and courts that will follow the guidance we give, in having to devise ad hoc solutions to procedural complexities on a case-by-case basis — a possibility referred to by the Supreme Court of Canada — but the failure to pass appropriate legislation dealing with this topic leaves us little alternative in the face of the constitutional endorsement of class actions."*[78]

[77] See: *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) and *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

[78] *Children's Resource Centre Trust (*above) at para 15

***Conclusion***

55 We therefore submit that the first set of special pleas fall to be dismissed, either on the basis of the existing common law or the common law as developed.

**THE SECOND SET OF SPECIAL PLEAS AND EXCEPTIONS**

56 The second set of special pleas and exceptions concern a different issue – whether a corporate entity trading for profit has a claim for defamation at all and, if so, the requirements that must be met in this regard and the remedies that can be granted.

57 In the second set of special pleas:[79]

57.1 The defendants contend that the claim by the mining companies is bad in law in that a trading corporation has no remedy available to it in relation to defamation without alleging and proving that:

57.1.1 the defamatory statements concerned are false;

57.1.2 the false defamatory statements were made wilfully; and

57.1.3 it suffered patrimonial loss arising from the defamatory statements concerned;

[79] Second Special Plea, *Reddell* matter: p 23 para 10

57.2 Alternatively, the defendants contend that in the event that a trading corporation has defamation remedies available to it without alleging and proving these elements, these remedies exclude a claim for general damages.[80]

58 The mining companies contend[81] that the second special pleas are wrong as a matter of law in light of the decision of the majority of the SCA in *SA Taxi*.[82]

59 We are constrained to accept that the second set of special pleas are, under the current common law, not sustainable as a matter of law in light of the majority decision in *SA Taxi.*

60 The defendants' intention is, however, to seek to have the Constitutional Court consider the correctness of *SA Taxi*. That there are reasonable prospects of this occurring is demonstrated by *SA Taxi* itself – where the court split 3 – 2 on the very issues raised by the present matter.

61 For present purposes, given that this Court is bound by *SA Taxi,* there seems little purpose in debating its correctness in detail. It suffices to state, by way of brief summary, that the defendants will seek to argue in due course before the Constitutional Court that:

[80] Second Special Plea, *Reddell* matter: p 24 para 14.1

[81] Exception, *Reddell* matter: p 23 par 10

[82] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA)

61.1 The reputation of trading corporations is adequately protected by the common law, outside of the realm of defamation law. This includes the delict of injurious falsehood.

61.2 Allowing trading corporations to claim under the law of defamation is unconstitutional.

61.2.1 Central to the Constitutional Court's decision in *Khumalo v Holomisa*[83] is that the fundamental purpose of the law of defamation is to protect the public aspect of the inherent dignity of every human being. It is this purpose which has informed and shaped the law of defamation.

61.2.2 But trading corporations are not the bearers of human dignity.[84] Rather a trading corporation's interest in its reputation is purely financial – the only impact of an impairment of its reputation is that it may suffer financial loss as a consequence. Put differently, a trading corporation feels the impact of a defamatory statement in its pocket and not in its person.

61.2.3 Allowing corporations to claim under the law of defamation is therefore unconstitutional insofar as it affords greater protection of their reputation than the law of injurious falsehood.

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[83] 2002 (5) 401 (CC)

[84] *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) at para 18

61.3 Should it be found that it is constitutionally permissible trading corporations to claim under the law of defamation, they should be required to allege and prove falsity and wilfulness. Put differently, we submit that in such circumstances the law of defamation – insofar as it applies to trading corporations – should be developed such that –

61.3.1 The plaintiff bears the onus of proving that the defamatory statement was false; and

61.3.2 The publication of a defamatory statement does not give rise to any presumption of *animus injuriandi*, with the plaintiff bearing the onus of proving that the defendant had the requisite intent.

61.4 This would ensure that the law of defamation affords no greater protection to the reputation of trading corporations than does the law of injurious falsehood.

61.5 In addition, should it be confirmed that it is constitutionally permissible to apply the law of defamation to trading corporations, we submit that they should not be allowed to claim general damages.

61.5.1 The remedy of general damages is both ineffective in its protection of reputation and unduly restrictive of freedom of expression.

61.5.2 Instead of damages, there is an array of other remedies by which reputation may be protected more effectively whilst at the same time imposing less restriction on freedom of expression. These include a declaration of falsity; a correction of the defamatory statement; and an apology.

**CONCLUSION**

62 In the circumstances:

62.1 In respect of the first set of exceptions, we submit that they should be dismissed, either on the basis of the existing common law or the common law as developed; and

62.2 In respect of the second set of exceptions, we accept that they have to be upheld, on the basis of the binding majority decision in *SA Taxi*. This will allow the defendants to seek to have the correctness of *SA Taxi* considered by the Constitutional Court.

63 In relation to costs, we submit that:

63.1 Insofar as the exceptions are dismissed, the mining companies ought to bear the costs as they would have been unsuccessful; and

63.2 Insofar as the exceptions are upheld, there should be no order as to costs having regard to the fact that the defendants are seeking

to raise important constitutional issues of principle, in good faith, which will benefit many other parties.[85]

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26 May 2020

[85] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 90

DEFENDANTS' LIST OF CASE AUTHORITIES

1. *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC)
2. *Barkhuizen v Napier* 2007 (5) SA 323 (CC)
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4. *Charlton v Parliament of the RSA* 2012 (1) SA 472 (SCA)
5. *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA)
6. *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA)
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9. *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)
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13. *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC)
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15. *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA)

16. *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC)

17. *Phillips v Botha* 1999 (2) SA 555 (SCA)

18. *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC)

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26. Murombo & Valentine, SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa 2011 27 *SAJHR* 82