THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 437/2010

In the matter between:

MEDIA 24 LIMITED	**FIRST APPELLANT**
KATHU MAMAILA	**SECOND APPELLANT**
JACKIE MAPILOKO	**THIRD APPELLANT**

v

SA TAXI SECURITISATION (PTY) LTD	**RESPONDENT**

AND

AVUSA MEDIA LTD	**FIRST AMICUS CURIAE**
BDFM PUBLISHERS (PTY) LTD	**SECOND AMICUS CURIAE**
INDEPENDENT NEWSPAPERS (PTY) LTD	**THIRD AMICUS CURIAE**
FREEDOM OF EXPRESSION INSTITUTE	**FOURTH AMICUS CURIAE**

Neutral citation: *Media 24 v SA Taxi Securitisation* (437/2010) [2011] ZASCA 117 (5 July 2011)

Coram: Brand, Nugent, Maya, Snyders and Theron JJA

Heard: **5 May 2011**

Delivered: **5 July 2011**

Summary: **Defamation action by corporation – claim for general damages considered – claim for special damages to be brought under the *actio legis Aquiliae*.**

ORDER

On appeal from: On appeal from South Gauteng High Court, Johannesburg (Mathopo J sitting as court of first instance):

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court a quo is set aside and replaced with the following:

'(a) The defendants' special plea with reference to the plaintiff's claim for general damages, referred to in para 16 and prayer 1 of its particulars of claim, is dismissed.

(b) Save for para (a) above, the defendants' special plea is upheld.

(c) The plaintiff's claim for special damages referred to in para 17 and prayer 2 of the particulars of claim, is dismissed.

(d) The plaintiff is ordered to pay the costs of these preliminary proceedings, including the costs of two counsel.'

JUDGMENT

BRAND JA (MAYA, SNYDERS AND THERON JJA CONCURRING):

[1] This appeal has its origin in a defamation action instituted by the respondent against the three appellants in the South Gauteng High Court, Johannesburg. The respondent is a finance company that provides financial

assistance to purchasers and lessees of taxis. The first appellant publishes a newspaper, City Press, which is distributed countrywide in South Africa. The second appellant is the editor of City Press. The action derived from an article which was published in City Press in June 2008 under the title 'Taxi owners taken for a ride by finance body'. It was written by the third appellant.

[2] For reasons that will shortly become apparent, the appeal does not turn on the exact content of the article. Suffice it therefore to capture it in broad outline. As can be inferred from the title, the article is highly critical of the way in which the finance body referred to in the article conducts its business. The respondent's case is that the finance body referred to would be understood by the readers of the article as relating to it. This is denied by the appellants in their plea. But because of the procedure adopted by the parties, the allegation must for present purposes be assumed to be true. Among other things the article accused the respondent of 'cheating on taxi operators'; of conducting its business in a way that is illegal and criminal; of arbitrarily repossessing taxis; and of taking away the means of taxi owners to feed their families.

[3] In its particulars of claim the respondent contended that the article was defamatory of it and that it was published with the intention to defame and to injure it in its business reputation. On these grounds it claimed general damages in an amount of R250 000 as well as special damages in the form of lost profits, that it allegedly suffered as a result of the defamation, in an amount exceeding R20 million.

[4] The appellants' first response was an exception that the particulars of claim were vague and embarrassing, alternatively that it failed to disclose a cause of action. In due course, the exception was dismissed in the high court with costs. We are not required to revisit that dismissal and no more needs to be said about the exception. The appellants' next step was to file a document which contained both a special plea and a plea on the merits. The special plea

challenged the respondent's right to obtain either general or special damages under the law of defamation. For general damages, so the appellants contended, the respondent has no claim at all in defamation, while its claim for special damages is not available under the *actio iniuriarum*, from which the action for defamation derives, but only under the *actio legis Aquiliae.*

[5] Eventually the matter came before Mathopo J. By agreement between the parties, he was asked to determine only those issues arising from the appellants' special plea while all other issues stood over for later determination. During the preliminary proceedings that followed no evidence was led by either parties and the matter was argued on the pleadings. At the end of these proceedings Mathopo J dismissed the special plea with costs. The appeal against that judgment to this court is with his leave. The four *amici curiae* only became involved on appeal. They all have as their object the protection of the right to freedom of expression, in general, and freedom of the press in particular. At their behest, they were allowed by this court to present argument, both written and oral, as part of the appeal proceedings.

[6] On appeal the respondent raised, as it were, a point *in limine* that the judgment of the court a quo is not appealable, because it amounted in the circumstances to the dismissal of an exception. As authority for the proposition that the dismissal of an exception is in principle not appealable, the respondent relied on the decision of this court in *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) which confirmed a long line of earlier decisions to that effect. The way in which the special plea was formulated, is certainly reminiscent of an exception rather than a special plea. In essence it is aimed at alleged defects in the respondent's case that appears from its particulars of claim while a special plea generally requires the introduction of new facts from outside the plaintiff's pleadings. Yet it appears to me that because the matter was in fact not raised by way of exception but by special plea, that part of the case circumscribed for separate adjudication by the court a quo had been finally decided, which renders

it subject to appeal. But be that as it may. At the hearing, counsel for the respondent formally abandoned the point *in limine*. It therefore requires no further discussion at this stage. In dealing with the merits, I turn first to the issues surrounding special damages.

Special Damages

[7] The appellants' case is not that the respondent has no claim for special damages in the form of the profits it allegedly lost as a result of the defamatory statements. What they contended was that a claim for special damages is not available under an action for defamation, which derives from the *actio injuriarum*, but only under the *lex Aquilia*. They were supported in this contention by the *amici curiae*. The question whether the contention is well-founded, was left open by Corbett CJ in *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 560I-561A when he said:

'. . . [I]t is common cause that such a corporation may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation. It is not necessary in this case to decide whether this latter claim falls under the *actio injuriarum* or is rather to be classified as Aquilian.'

[8] Despite the absence of any pertinent decision by this court in favour of the appellants, the respondent conceded that its claim for special damages can only succeed if it satisfies the requirements of the *actio legis Aquiliae*. I believe the concession was rightly made. As was explained by De Villiers JA in *Matthews v Young* 1922 AD 492 at 503-505, the rule of our law, in principle, is that patrimonial damages must be claimed under the *actio legis Aquiliae*, while the *actio iniuriarum* and its derivative actions, including the action for defamation, are only available for sentimental damages. In theory, the person injured by a defamatory publication would therefore have to institute two actions: a defamation action for general damages and the *actio legis Aquiliae* for special damages. But, as further explained by De Villiers JA, even at the time when *Matthews* was decided, two actions were no longer required by our practice. Accordingly, so De Villiers JA held,

if one suffers an injury to your reputation, you can claim both kinds of redress in the same action, provided, of course, that the requirements of both actions are satisfied.

[9] The decision in *Matthews* was followed in a number of older provincial judgments (see eg *Bredell v Pienaar* 1924 CPD 203 at 213; *Van Zyl v African Theatres Ltd* 1931 CPD 61 at 64-65). These decisions have been supported by most of our academic writers on the subject (see eg Burchell *The Law of Defamation in South Africa* (1984) 40-41; Neethling, Potgieter and Visser *Law of Delict* 5 ed (2006) 298 and the authorities there cited). More recently, Magid J considered – in *Minister of Finance v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) at 325G – whether the fundamental legal position had changed since *Matthews*. The conclusion he arrived at is that it had. I find no reason to disagree with that conclusion. What this means, of course, is that a plaintiff who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the *Aquilian* action. And, I may add, it matters not in this regard whether the plaintiff is a corporation or a natural person.

[10] The respondent's contention was that, although its claims for both special and general damages were couched in the form of a defamation action, its claim for special damages contains the four well-known elements of an *Aquilian* action, namely, (a) a wrongful act or omission, (b) fault (in the form of either *dolus* or *culpa*), (c) causation and (d) patrimonial loss. In support of this contention, which found favour with the court a quo, the respondent referred to allegations in its particulars of claim that the publication of the professed defamatory article was intentional and wrongful and that the respondent suffered the damages claimed as the result of that publication.

[11] However, unlike the court a quo, I agree with the appellants' contention that the respondent's argument is flawed and that the flaw lies with the allegation of 'wrongfulness'. Since we are dealing with a claim for pure economic loss, it has by

now become settled law that wrongfulness depends on the existence of a legal duty and that the imposition of that duty is a matter for judicial determination involving criteria of public and legal policy. In the result, conduct causing pure economic loss will only be regarded as wrongful – and therefore actionable – if public or legal policy considerations require that such conduct should attract legal liability for the resulting damages (see eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) paras 12 and 22; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 12). As a matter of pleading, a plaintiff claiming for pure economic loss must allege wrongfulness and plead the facts in support of that allegation (see eg *Telematrix (Pty) Ltd t/a Matrix Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 2). It does not follow that because a defamatory publication is wrongful for purposes of a defamation action, that policy considerations will automatically indicate the imposition of liability for pure economic loss resulting from that publication. Consequently, the respondent's allegation in its particulars of claim that the statement was 'wrongful' for purposes of its defamation action may not be adequate in the present context. Whether it is adequate or not will depend on judicial determination as to what is wrongful in the context of a claim for actual loss resulting from a defamatory publication.

[12] Public and legal policy sometime require that a plaintiff be compensated for pure economic loss in some cases, only in the event of an intentional wrong. In that event, fault in the form of negligence on the part of the defendant will not suffice. Intent will then be an integral part of the element of wrongfulness (see eg *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 86; *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) para 4). The appellants contended that this is such a case. They found support for their argument in a species of Aquilian liability recognised in the sphere of unlawful competition as '*injurious falsehood*'. It originated from the policy consideration that fair and honest competition is open to anyone, even if it involves interference with the trade of others, but that no one is permitted to carry on trade by fraudulent misstatement,

either in respect of its own business or with reference to the business of its competitor (see eg *Combrinck v De Kock* (1887-1888) 5 SC 405 at 415; *Schultz v Butt* 1986 (3) SA 667 (A) at 678F-J).

[13] In order to succeed with a claim for injurious falsehood, the plaintiff has to allege and prove that the defendant has, by word or conduct or both, made a false representation; that it knew the representation to be false; that the plaintiff has lost or will lose customers; that the false representation is the cause of the loss; and that the defendant intended to cause the plaintiff that loss by the false representation (see eg *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441C-D). Departing from the analogy of injurious falsehood, the appellants contended that liability for pure economic loss resulting from a defamatory publication should only be regarded as wrongful – and thus result in the imposition of liability – if the publication was false and the defendant knew it to be so.

[14] I find the appellants' contention an attractive one. I can think of at least two considerations of policy why it should be accepted. First, there appears to be no reason why the press should be worse off than a competitor of the plaintiff when it comes to liability for injurious statements. After all, the right to freedom of expression should at least rank equal to the competitor's right to do business. Secondly, the suggested limitation will serve to curb the excessive claims for loss of profits by major corporations which intimidate newspapers by their sheer magnitude.

[15] But, after due consideration, I do not believe it is necessary 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. During the course of argument, counsel for the respondent had to concede that, in order to found a claim for special damages, the statement injurious to the plaintiff's reputation must at least be proved to be false. I believe this concession

was rightly made. If the statement is true, the corollary is that the plaintiff's reputation was based on a false premise and thus undeserved. I believe the gist of this consideration can be illustrated with reference to the facts of this case. Say it should transpire to be true that the respondent has indeed conducted its business in a way which was dishonest and illegal. In that event, any reputation it may have as an honest business enterprise would be built on a masquerade, which plainly deserves no protection. So, in the present context, falsehood is an integral part of wrongfulness which the plaintiff must allege and prove.

[16] This being so, I can see no reason why the law of delict should extend its protection to a reputation which is undeserved. To complete the picture; under the defamation action truth of the defamatory statement can be raised by the defendant, as part of the defence that relies on the truth and public benefit, the onus is on the defendant. With regard to the Aquilian action based on injurious statements it is the plaintiff who bears the onus to allege and prove that the statement is false. Thus understood, it is plain that the respondent's case as formulated in its particulars of claim, lacks an essential averment, namely that the defamatory statements relied upon were false. To that extent the special plea should therefore succeed.

General Damages

[17] This brings me to the objections relating to the respondent's claim for general damages. The nature of these objections will be better understood against the background of what follows. Our action for defamation is derived ultimately from the Roman *actio iniuriarum* which rested on wounded feelings rather than patrimonial loss. Since corporations and other legal personae have no feelings, simple logic seems to dictate that they should have no claim for defamation. Yet it was held by Innes CJ in *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 at 5-6:

'That the remedy by way of action for libel is open to a trading company admits of no doubt. Such a body is a juridical *persona,* a distinct and separate legal entity duly

constituted for trading purposes. It has a business *status* and reputation to maintain. And if defamatory statements are made reflecting upon that status or reputation, an action for the *iniuria* will lie . . . In the present case no special damages were proved; but that circumstance does not really affect the position. Where words are defamatory of the business *status* and reputation of a trading company, I am not aware of any principle of our law which would make the right of action depend on proof of special damages.'

[18] The alleged defamation relied on in *Fichardt* was the statement in the Friend newspaper that the appellant was a German company. This allegation must be understood against the background that the publication took place during the First World War, shortly after the sinking of the Lusitania, when anti-German feelings ran high. Nonetheless, this court held that even in those circumstances, the statement complained of was not defamatory. In consequence, the exposition of the law by Innes CJ was *obiter.* So was the following equally strong statement by Solomon JA in the same case (at 8):

'It has been settled by a series of decisions, both in England and in South Africa, that an action will lie at the suit of a trading company for statements defaming it in its business character or reputation. For example it is actionable to write or say of such a company that it conducts its business dishonestly or that it is insolvent. And for defamatory statements of that nature general damages may be given, just as when an individual is defamed, nor is it necessary to prove that actual loss had been sustained. The law on this subject is now well settled, and it is unnecessary, therefore, to discuss the authorities dealing with it.'

[19] Thirty years later the law was stated with virtually the same degree of certainty in *Die Spoorbond v South African Railways; Van Heerden v South African Railways* 1946 AD 999 by both Watermeyer CJ (at 1007) and Schreiner JA (at 1010-1011). But again these statements were *obiter* because the trading company involved, the South African Railways, was held to be part of the Government. For that reason, so this court held, it should, for considerations of public and legal policy, not be afforded an action for damages on the basis of defamation. (Cf *Derbyshire County Council v Times News Papers Ltd* [1993] AC

534 (HL) where the same decision was taken for essentially the same policy considerations in English law.)

[20] Because the statements in *Fichardt* and *Spoorbond* were *obiter*, it left room for a debate which went on for a number of years thereafter as to whether a juristic person should indeed be afforded the right to sue for defamation. On the one hand, various judgments reflected the view that in contrast to a natural person, a juristic person has no personality rights, including the right to privacy and the right to a good name or reputation (see eg *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387 and *Church of Scientology in SA (Incorporated Association not for Gain) v Reader's Digest Association SA (Pty) Ltd* 1980 (4) SA 313 (C) at 317F-H).

[21] As appears from these judgments, the underlying reasoning went along the following lines: defamation derives from the *actio iniuriarum.* This Roman remedy was available, not to recover economic loss, but for the protection of personality rights consisting of physical integrity (*corpus*), dignity (*dignitas*) or reputation (*fama*). In the same way as a corporation has no *corpus*, it can have no *dignitas* nor *fama* in the sense of a personality right. What it can have is a reputation in the sense of 'goodwill'. But that reputation is not a personality right. It is an integral part of the corporation's patrimony. Damage done to the reputation could therefore constitute a patrimonial loss for which compensation could be claimed under the *actio legis Aquiliae* and not the *actio iniuriarum.*

[22] On the other hand it was accepted in several cases that, as far as trading corporations were concerned, the law had been clearly stated by way of considered pronouncements in *Fichardt* and *Spoorbond*, albeit that the pronouncements were *obiter*. (See eg *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 (3) SA 164 (D) at 166B-168A; *A Neuman CC v Beauty Without Cruelty International* 1986 (4) SA 675 (C) at 688B-C.) According to these authorities, the only uncertainty that remained was whether a defamation action

was also available to non-trading corporations (see eg *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 458A; Burchell *The Law of Defamation in South Africa* 43-46; J Neethling & J M Potgieter 'Persoonlikheidsregte van 'n Regspersoon' 1991 *THRHR* 120 at 121).

[23] As far as this court is concerned, the debate eventually came to a head in *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A). The appellant, Dr Oscar Dhlomo, sued for defamation on behalf of a non-trading legal person. In the course of his judgment Rabie ACJ formulated the three questions to be decided as follows (at 948F-G):

'*(a)* whether a trading corporation can in our law claim damages for defamation, and *(b)*, if it can, whether a non-trading corporation can also do so, or *(c)*, if it has not yet been decided that a non-trading corporation can do so, whether the right to do so should be accorded to it.'

[24] In considering the first question, Rabie ACJ referred to the *obiter dicta* by this court in *Fichardt* and *Spoorbond* to the effect that a trading corporation can claim damages for defamation. He then referred (at 952) to the contrary view expressed by the high courts in *Universiteit van Pretoria* and in *Church of Scientology*, on the basis that a legal person can have no rights of personality and that the protection of its reputation, in the sense of goodwill, therefore lies, not in a claim for defamation but in a claim for actual damages under the Aquilian action.

[25] After thus formulating the conflicting points of view, the learned Acting Chief Justice proceeded to answer the first question (at 952E-J). I propose to quote that answer in full. I make no excuse for doing so because, as I see it, it contains the kernel of the answer of the appellants' argument under the present rubric. It reads:

'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.’

[26] As to the second question, namely whether the right to sue for defamation should be restricted to trading corporations, Rabie ACJ gave the following answer (at 954A-B):

‘It seems to me, however, that once one accepts - as one must, in my view - that a trading corporation can sue for an injury to its business reputation, there is little justification for saying that a non-trading corporation should not, in appropriate circumstances, be accorded the right to sue for an injury to its reputation if the defamatory matter is calculated to cause financial prejudice (whether or not actual financial prejudice results).’

[27] The case that followed upon *Dhlomo* in this court was *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A). In *Caxton* the respondents, who were the plaintiffs in the court below, were trading companies. As in this case, they claimed damages for defamation in the form of both general damages and special damages. Rather unsurprisingly in the light of the clear statements by this court in *Dhlomo*, Corbett CJ could succinctly formulate the legal position as follows (at 560H-561A):

‘It is respondents’ case that the article not only injured generally their respective

business reputations and goodwill, but also actually caused them special patrimonial loss in the form of reduced profits. A trading corporation has a right to sue for damages in respect of a defamatory statement which is calculated to injure its business reputation . . . and it is common cause that such a corporation may also claim damages to compensate it for any actual loss sustained by it by reason of the defamation. It is not necessary in this case to decide whether this latter claim falls under the *actio injuriarum* or rather to be classed as Aquilian.'

[28] In *Caxton* the right of a trading corporation to sue for general damages was therefore not in dispute. Yet, it is clear from the judgment of Corbett CJ that he was not unaware of the problems arising from the adherence to strict mathematical reasoning, which departs from the premise that a claim for damages is aimed at compensation for wounded feelings and arrives at the conclusion that it should therefore not be available to a corporation. Nor was he unaware that part of the corporation's reputation will be compensated for by a claim for special damages. This appears from his statement (at 561B-C) that:

'The question as to whether and to what extent the article in all its facets was calculated to injure respondents in their respective business reputations is one to be decided by reference to the nature of the defamation, the character of the businesses conducted by them and the likely impact thereon of the defamation; and the damages must be assessed in accordance with the principles relating to claims for defamation, bearing in mind that a corporation has "no feelings to outrage or offend" (*per* Schreiner JA in *Die Spoorbond* case *supra* at 1011).'

[29] And (at 574I-575B):

'The injury to trade reputation would normally be reflected to a large extent in a reduced volume of business and lower profits. But injury by way of loss of profits is catered for by an award of special damages. I recognise that there is room in a case such as this for claims for both special and general damages . . . but it cannot be denied that notionally there is a measure of overlapping between the two claims; and I consider that this is a factor which must be taken into account in computing the general damages in this case.'

[30] After *Dhlomo* and *Caxton* it has consistently been accepted by our courts,

including this court, 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 defamation, including a claim for damages (see eg *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 460G-I; *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA); *Treatment Action Campaign v Rath* 2007 (4) SA 563 (C) at 568).

[31] The appellants' arguments as to why we should deviate from this powerful authority were essentially three-fold:

(a) As far as trading corporations are concerned, the decisions by this court – *Fichardt*, *Spoorbond*, *Dhlomo*, *Caxton* and *Financial Mail* – were either *obiter* or based on assumptions as to the legal position.

(b) That all these cases were wrongly decided.

(c) That the extension of the law defamation to trading companies is unconstitutional.

I propose to deal with these three arguments in turn.

[32] As to the argument based on the *obiter* nature of the prior decisions of this court, the statements in *Fichardt* and *Spoorbond*, plainly fall into that category. The same can be said about the statement of the law by Corbett CJ in *Financial Mail*, because the issue in that case was whether a corporate body has a right to privacy. But the statements in *Dhlomo* were not *obiter*. Though the ultimate issue related to non-trading companies, the first question that this court posed itself was whether trading corporations have a claim for damages based on defamation. After it had answered that question in the affirmative, it proceeded to the next question as to whether that right should be extended to non-trading corporations. Thus understood, the first mentioned decision was clearly part of the rationale or basis for the decision, that is, in the parlance of the doctrine of precedent, the *ratio decidendi*.

[33] As to the decision in *Caxton*, it is true to say that the issue under present

consideration was not fully discussed. It simply accepted that in the light of *Dhlomo*, a trading company can sue for damages in respect of a defamatory statement. That, however, does not render the decision less binding than one which had been fully discussed. In accordance with the doctrine of precedent, also expressed in the principle of *stare decisis*, this court is therefore bound to the decisions in *Dhlomo* and *Caxton* – which constituted part of the *ratio decidendi* in both cases – unless we are satisfied that those decisions were clearly wrong.

[34] Considerations underlying the principle of *stare decisis* were formulated extensively by Hahlo and Kahn *The South African Legal System and its Background* 1968 (at 214-5) in a passage which had been quoted with approval by the Constitutional Court in *Ex Parte Minister for Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 57. What it boils down to, according to the authors, is: 'Certainty, predictability, reliability, equality, uniformity, convenience: these are the principle advantages to be gained by a legal system from the principle of *stare decisis*'. Moreover, as has been underscored by the Constitutional Court in *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (2) BCLR 121 (CC) para 28, the principle of *stare decisis* is a manifestation of the rule of law itself which in turn is a founding value of our Constitution. I say all this to accentuate why mere lip service to the doctrine of precedent is not enough; why deviation from previous decisions should not be undertaken lightly.

[35] Apart from constitutional arguments, which I propose to consider separately, it appears to me that the arguments raised by the appellants and the *amici curiae* as to why the cases I referred to had been wrongly decided, were not essentially different in content from those presented to this court in *Dhlomo*. What should also be borne in mind is that the decision of this court in *Dhlomo* was essentially one of policy which could not be described as 'right' or 'wrong' in absolute terms, either way. What this court therefore did was to weigh these arguments, which were

plainly not without substance, against equally weighty arguments to the contrary. Ultimately it took the policy decision that it did. As explained in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status a quo.

[36] Broadly stated the arguments as to why *Dhlomo* and *Caxton* were wrongly decided, went as follows:

(a) Our action for defamation derives from the *actio injuriarum*, which in Roman and Roman-Dutch law was confined to the protection of personality rights. It provided a *solatium* for wounded feelings and was not available for the recovery of patrimonial damages.

(b) Patrimonial damages could only be recovered by means of the *actio legis Aquiliae*.

(c) A corporation has no personality rights to protect. Nor can it have any feelings of hurt or shame for which it can be compensated under the *actio injuriarum*.

(d) The reputation of a trading corporation affects its goodwill, that is, its capacity to attract custom and make profits.

(e) If its reputation is damaged, that damage ordinarily diminishes its capacity to attract customers and make profit. This damage is then reflected in and can be measured by the diminished profits of the business and the resultant reduction in the value of its goodwill.

(f) The common law protects the capacity of trading corporations to attract custom by their name and reputation. It does so by means of the *actio legis Aquiliae*.

[37] As to the historical argument based on the original scope and purpose of the

actio iniuriarum it was pointed out by Schreiner JA in *Spoorbond* how the law had since changed, when he said (at 1010):

'Even in the early days of recorded Roman law mention was specifically made, in this connection, of *public* insults, but the gist of the action was the intentional and unjustified hurting of another's feelings and not the damage to his reputation considered as something that belonged to him. In our modern law, as often happens, the wide old delict of *injuria* has split up into different delicts, each with its own name, leaving a slight residue to bear the ancient title. The particular delict now known as defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused to the plaintiff. Although the remnant of the old delict of *injuria* still covers insults administered privately by the defendant to the plaintiff, the delict of defamation has come to be limited to the harming of the plaintiff by statements which damage his good name. The opinion of other persons is of value to him and . . . it has become in some degree assimilated to wrongs done to property.'

[38] Though traditionally the function of the *actio iniuriarum* was to provide *a solatium* or solace money (satisfaction or '*genoegdoening*' in Afrikaans) for injured feelings, the position has become more nuanced in modern law. A natural person is not required to show sentimental loss. He or she will receive damages for defamation even in the absence of injured feelings. A medical doctor defamed by allegations of malpractice will receive non-patrimonial damages for injury to his or her professional reputation, despite the absence of any feelings of hurt or shame and the same will apply to the damaged credit reputation of a business man. It will be no defence for the defendant to show that the statement did not in fact cause the plaintiff any personal distress. As was said in *Boka Enterprises (Pvt) Ltd v Manatse & another NO* 1990 (3) SA 626 (ZHC) at 631J-632A:

'Hurt feelings, *per se*, matter to a decreasing extent in a crowded, materialistic society. The reality, I perceive, is that actions for defamation are used to an ever increasing extent to protect what was referred to . . . as "*the external dignity*" of the *persona*.'

[39] On the other hand, it is recognised – and in my view, rightly so – that juristic persons have an interest in their external dignity or reputation, akin to that of its

natural counterpart, which is worthy of legal protection, despite the fact that it cannot be translated into a quantifiable monetary loss. Why I say 'rightly so' is that I can see no reason why, for example, the corporate trader would not have a protectable interest in the pride of its employees to work for that company. Or in the fact that because of the defamatory allegations people would be less inclined to deal with the company. Or as Lord Bingham put it in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) para 26:

'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.'

[40] According to the appellants' argument damage to the reputation of trading corporations will ultimately be measurable by its loss of profits which can be recovered under the *lex Aquilia*. Though the argument has its superficial attraction, it gives rise to several difficulties. I propose to name some of these, though the list is plainly not exhaustive.

40.1 If reputation of a trading corporation can only be recovered by a claim for loss of profits, what about a non-trading corporation? As a matter of course, they will not be able to show any loss of profits. Generally they will not even be able to show a financial loss. Does that mean that non-trading corporations have no reputation worthy of protection, even though they may be dependent on that very reputation for their future existence? If, on the other hand, a non-trading corporation has a claim for general damages under the law of defamation, what is the difference between it and a trading corporation? Just like the latter, the former can have no feelings of hurt or shame.

40.2 It is simply not true that injury to reputation of a trading company will always be measurable in terms of lost profits. In answer to this problem, the *amici* relied on the principle that even where patrimonial damages are not exactly quantifiable – as in the case of future loss of income – the court is obliged to base its award on what

has been described as no more than 'an informed guess' (see eg *Griffiths v Mutual & Federal Insurance CO Ltd* 1994 (1) SA 535 (A) at 546G). But it is clear from the decisions relied on that the plaintiff must at least show some patrimonial loss. So what if the corporation can show no loss of profit at all because, for example, it made the same profit or an even greater profit during the year following the defamation? And what about those harmful consequences of the injury to reputation that cannot be translated into money terms at all, such as the lost pride of employees and representatives? Eventually, the rhetorical question arises whether a company that can show no actual loss, may be defamed with impunity. Sight should not be lost of the fact that, although the defamation action has lost its penal character, the award of general damages still serves a deterrent function. This is illustrated by the following statement in *Buthelezi v Poorter & others* 1975 (4) SA 608 (W) at 617E-F:

'In my view the appropriate way of impressing upon all concerned that attacks of the kind to be found in this case are not to be lightly made is by awarding substantial damages.'

(See also eg *Young v Shaikh* 2004 (3) SA 46 (C) at 57E-F; Visser & Potgieter *Skadevergoedingsreg* 2 ed (2003) para 15.3.2.4 and the authorities there cited.)

40.3 Apart from not having to show any general damages, the defamation action affords the plaintiff several further advantages. All that he, she or it has to prove is publication of a defamatory statement. This gives rise to rebuttable presumptions of both wrongfulness and *animus iniuriandi* (see eg *Le Roux v Dey* [2011] ZACC 4 paras 85 and 171). If, under the rubric of justification, the defendant pleads the defence of truth and public benefit, it has to prove both these elements. By excluding trading corporations from claims for defamation, they will be deprived of these benefits. That will constitute discrimination against corporations which cannot, in my view, be justified and which may even amount to an infringement of the right to equality under s 9 of the Constitution.

[41] In the end I find the arguments proffered by appellants and the *amici* in support of the abolition of a defamation action for corporations no different from those that informed the decisions of the high court preceding *Dhlomo*, ie in

University of Pretoria and *Church of Scientology*. These were also the same arguments considered in *Dhlomo*. Yet, as I have said, although this court found these arguments weighty and of substance, it decided, for reasons of policy, to go the other way. Particularly in the absence of new arguments, I am not persuaded that our policy should change. Of course, the position would be different if our common law, in this context, were found to be in conflict with constitutional principles. In that event, s 39(2) of the Constitution would exact development of the common law to remove the conflict. That leads me to the further contention by the appellants and the *amici*, that the extension of the law of defamation to trading corporations is unconstitutional.

Extension of the law of defamation to trading corporations - unconstitutional

[42] Broadly stated, the argument in support of this contention went as follows:

42.1 The law of defamation 'lies at the intersection of the freedom of speech and the protection of reputation or good name' (per O'Regan J in *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 26). Both these rights are now constitutionally entrenched – freedom of expression in s 16 and reputation as an element of dignity in s 10 of the Constitution. The law of defamation limits the one for the protection of the other. It is a balance struck by law.

42.2 Both this court and the Constitutional Court have emphasized the fundamental importance of freedom of expression in an open and democratic society. The common law of defamation limits that right. The limitation is constitutionally permissible only if it is justified in terms of s 36(1) of the Constitution. The basis upon which the common law of defamation has been held to be a justified limitation of freedom of expression, is that it protects dignity – a fundamental right equal in status to freedom of expression (see *Khumalo* para 41).

42.3 The right to dignity which justifies the limitation of freedom of expression through the law of defamation is a right of personality which inures only to natural persons. This substratum is therefore entirely absent in the case of corporations. They are not the holders of the human dignity. Their interest in their reputation is

limited to the capacity to attract custom and make a profit. It is a purely financial interest with little or no constitutional recognition.

42.4 The extension of the law of defamation to trading corporations is not only unjustified but brings about a significantly greater limitation of freedom of expression. That is because the potential claims for loss of profits of trading corporations tend to be considerably higher than those of natural persons. The claim in this case, eg, is R20m. The sheer magnitude of claims of this kind has a particularly chilling effect on freedom of expression. In fact, they put the media at risk of insolvency.

42.5 These considerations motivated the Australian States and Territories to enact legislation which prevents all but the smallest corporations from suing for defamation. Their general rule is that corporations may not claim damages for defamation. The only exception to this rule is corporations established for charitable purposes and those which have fewer than ten employees. (See eg Megan Ashford 'Legislation Note: Defamation Act 2005 (WA)' (2006) 13 *eLaw Journal* (2006) 14.) In the same vein it was noted by Baroness Hale in *Jameel* (para 158) that:

'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.'

[43] Though these are obviously forceful arguments, 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 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. (See eg J H Neethling ''n Vergelyking Tussen die Individuele en Korporatiewe Persoonlikheidsreg op Identiteit' 2011 *TSAR* 62.)

[44] 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 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. (See eg *Khumalo* para 27; *Le Roux v Dey* para 138.) It is plain therefore that the protection of 'dignity' in s 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 eg the right to privacy.

[45] Our common law recognises the personality right of a non-natural person to privacy. The inferential reasoning that led to this recognition appears from the following statement by Corbett CJ in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 460G-461H:

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

[46] In *Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) the Constitutional Court accepted, on the basis of *Financial Mail*, that corporations have a right to privacy which is protected by common law. It then decided that the same protection is recognised by the Constitution. This appears from the following statement by Langa DP (paras 17 and 18):

'The protection of the right to privacy may be claimed by any person . . .. Neither counsel

addressed arguments 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.'

[47] 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 s 10 of the Constitution.

[48] 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 (eg *Khumalo* para 25). Nor does it enjoy superior status in our law (eg *S v Mamabola (ETV & others intervening)* 2001 (3) SA 409 (CC) para 41). Accordingly, limitations of the right to freedom of expression has been admitted in the past for purposes not grounded on fundamental rights (see eg integrity of the courts in *S v Mamabola* para 48).

[49] 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 s 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 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.

[50] I am fortified in my views that the recognition of a corporation's entitlement to general damages does not constitute an unjustified limitation to freedom of expression by the decisions of the House of Lords (as it then was) in *Jameel* and the European Court of Human Rights in *Steel and Morris v United Kingdom* (2005) 41 EHRR 403. Both cases involved a challenge to the rule of English law affording a defamation action to corporate entities, on the basis that it constitutes an infringement of Article 10 of the European Convention. Article 10 is the counterpart of s 16 of our Constitution, in that it guarantees everyone's right to freedom of expression. In both instances the rule in English law, which is conceptually no different from our rule, was held not to be inconsistent with Article 10. In the main, the ratio of these decisions was that the English law of defamation, which shows a marked resemblance to ours, strikes a proper balance between the right enshrined by Article 10 and the right of corporations to their reputation.

[51] This brings me to the argument based on the chilling effect of excessive awards of damages. Though I agree with the underlying sentiment, I find the argument flawed. The excessive awards referred to would, in the South African context constitute special damages which, as we now know, are not recoverable by a defamation action. Traditionally awards for special damages by our courts are relatively low. So, ie, the amount awarded for a serious defamation in *Caxton* was around R150 000 while the amount claimed in this case is only R250 000. Reference to excessive amounts claimed for special damages, therefore only serves to confuse the issue.

[52] There is no formula for the determination of general damages. It flows from the infinite number of varying factors that may come into play. So, ie, the court will have regard to the character of the corporations' business, the significance of its reputation, the seriousness of the allegations, the likely impact of those allegations on the corporations' reputation, and so forth. But, as was pointed out by Corbett CJ

in *Caxton*, the court will also have regard to the fact that the company has no feelings that can be consoled. At the other end, the court will consider that part of the loss could have been recovered as special damages. Finally, the court will have to perform the balancing act between the different interests involved, including the chilling effect of excessive awards on freedom of expression.

[53] I am mindful of the criticism based on mathematical logic, that an award of damages for defamation to a corporation is inappropriate, because it cannot serve to compensate the wounded feelings of an entity which has none. But the impropriety of damages as a remedy for defamation has also been cogently raised in cases outside the ambit of corporations (see eg *Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk* 1981 (2) SA 373 (O) at 389G-H; *Mineworkers Investment CO (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) paras 16-30; Burchell *The Law of Defamation in South Africa* 315-319). Yet, despite this criticism, the Constitutional Court stated in *Le Roux v Dey* [2011] ZA CC 4 at para 195, albeit with clear reluctance, that:

'The 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 [or reputation]. 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.'

[54] As long as this position prevails, it is not open to us to say that a corporation has a reputation worthy of protection under the law of defamation, but that the remedy should be something other than damages. Leaving aside the restraining of publication by means of an interdict, which finds no application in a case such as this, there is simply no alternative. The only remedy available at present that can serve to protect the reputation worthy of protection, is damages. A legal system which acknowledges an interest worthy of protection, but provides no remedy to

afford that protection fails in the performance of its function. And, as I see it, the same must be said about a legal system that says to a plaintiff in the position of the present respondent that, although it should have a remedy, the nature of that remedy is unclear; that although an award of damages has been regarded as the only appropriate remedy for nearly a century, we now hold that it is no longer the case, without offering a firm alternative; and that because the respondent is seeking a remedy which we now decide to exclude, its claim based on the protection of its reputation is dismissed with costs. All I can say is that I find myself unable to subscribe to this conclusion.

[55] Despite the arguments to the contrary I can therefore find no legitimate reason why we should deviate from the rule of our common law, which had been endorsed by our courts for nearly a century, that a corporation has a claim for general damages in defamation. To that extent, the court a quo was therefore right in its dismissal of the appellants' special plea.

Remedy

[56] What remains to be considered is the remedy. With regard to special damages, I have recorded the finding that the respondent's claim under this heading lacks an essential averment, that the defamatory statements relied upon as the basis for its claim, were untrue. To that extent the special plea must therefore succeed. As to the further consequences, a controversy arose between the parties in argument. While the appellants contended that respondent's claim for special damages should be dismissed, the respondent argued that it should be afforded an opportunity to amend its particulars of claim. In support of its counter argument, the respondent contended that the resulting position is akin to an exception being upheld.

[57] I find myself in agreement with the appellants' argument. With regard to the respondent's counter argument, the fact is that the defence against its claim for special damages was not raised by way of exception. It was put forward as a

substantive defence, albeit in the form of a special plea as opposed to a plea. By agreement between the parties the court a quo was then asked to decide that substantive defence separately. It was obviously understood by both parties that the decision would be final. If despite a decision in the respondent's favour, the appellants would seek to raise the same defence, they would rightly have been met by a plea of *res judicata*. As I see it, the result cannot be different now that the decision goes the other way.

Order

[58] For these reasons it is ordered:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court a quo is set aside and replaced with the following:

'(a) The defendants' special plea with reference to the plaintiff's claim for general damages, referred to in para 16 and prayer 1 of its particulars of claim, is dismissed.

(b) Save for para (a) above, the defendants' special plea is upheld.

(c) The plaintiff's claim for special damages referred to in para 17 and prayer 2 of the particulars of claim, is dismissed.

(d) The plaintiff is ordered to pay the costs of these preliminary proceedings, including the costs of two counsel.'

F D J BRAND

JUDGE OF APPEAL

NUGENT JA

[59] I agree in some, but regrettably not all, respects with the conclusions reached by my colleague Brand JA. And while I agree with the order that he proposes, so far as it goes, I would take it a step further.

[60] In their special plea the appellants took issue with the respondent's entitlement to damages – both special and general – in the absence of allegations that, taken together, would amount to an allegation of injurious falsehood. The concomitant was a further allegation in the special plea that an action for defamation 'is not available to a trading corporation in the circumstances pleaded by the plaintiff'. Elaborating upon that in the heads of argument presented on their behalf, and in argument before us, counsel for the appellants submitted that the damages claimed by the respondent were founded in both cases upon damage to pecuniary interests, which was not recoverable under the actio injuriarum. Moreover, to allow an action for damages for defamation at the hands of a trading corporation, so it was submitted, would intrude unjustifiably upon the now constitutionally protected right to free expression.[1]

[61] Counsel for the respondents accepted that financial loss is recoverable only under the lex Aquilia but contended that the allegations in the particulars of claim sufficiently made out such a claim. As for general damages it was submitted that the cases in this court have recognised such a claim at the hands of a trading corporation, and that, by analogy with cases concerning natural persons, and drawing upon foreign authority, such a claim is a justified intrusion upon the right of free expression.

[62] Counsel for the amici aligned themselves with the submissions made on behalf of the appellants, but made further submissions in their heads of argument

1 Section 16(1): 'Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) and (d) . . .'.

that steered a course between the two extremes chosen by counsel for the respective litigants. Those submissions formed the main thrust of the oral argument that they advanced before us. It is not controversial that awarding damages for defamation intrudes upon the right of free expression, nor that the protection of human dignity justifies such an intrusion when they are awarded to a natural person.[2] But counsel for the amici submitted that a trading corporation does not qualify for equal protection. They submitted that if an action for defamation at its hands is to be recognised, then there are 'less restrictive means to achieve the purpose'[3] of vindicating its reputation than awarding damages, and that the availability of those means strike an appropriate balance between its rights and the right of free expression.

[63] They submitted that damages ought not to be seen as the only appropriate remedy for defamation, and they referred us to the observation by John Fleming[4] that:

'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 civilized 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.'

They submitted in their heads of argument, and developed this in oral argument, that there is 'an array of other remedies by which reputation can be better protected while at the same time imposing less restriction on freedom of expression'. They submitted that a declaration of falsity, an order that the defamer publish a correction, or publish the judgment vindicating its reputation, or a summary of that judgment, or that he or she publish a retraction, and in

2 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 33.
3 Section 36(1)(e) of the Constitution.
4 J Fleming: 'Retraction and Reply: Alternative Remedies for Defamation' *(1978) U B C Law Review* 15 at 15. See, too, Frasier 'An Alternative to the General-Damage Award for Defamation (1968) *20 Stan L Rev* 504; Marc A Franklin 'A Declaratory Judgment Alternative to Current Libel Law' (1986) *74 California L Rev* 809.

appropriate cases an apology, would all serve to vindicate the reputation of a trading corporation, while not intruding unjustifiably on the right of free expression.

[64] I agree with my colleague that special damages for financial loss are recoverable only in an Aquilian action – indeed, that was not controversial before us – and that the respondent's pleadings do not make out an Aquilian claim. That leaves in issue only its claim for general damages. In my view awarding general damages to a trading corporation for defamation is indeed constitutionally objectionable, for reasons that I come to, but that need not imply that it has no recourse at all if it is defamed. I think there is force in the submissions made on behalf of the amici, both in their heads of argument and expanded upon orally, that absent the remedy of damages and confined instead to other available remedies, the action for defamation at the hands of a trading corporation is reconcilable with the right to free expression. Thus the difference between my colleague and me on this issue falls within a narrow compass.

[65] We 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.[5] Where we differ is only on the nature of the redress to which it is entitled. My colleague takes the view that we are bound to follow earlier precedent to the effect that a trading corporation, like a natural person, is entitled to general damages if it is unlawfully defamed. I take the view that it is open to us to reappraise the remedies for defamation, and that remedies other than damages are capable of vindicating its reputation. The view that I take is that general 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. Our difference thus focuses on remedies for defamation and not on its substantive elements.

5 The ordinary elements of unlawful defamation are conveniently summarized in *Holomisa*, above, para 18.

[66] Damage that has been done to property, or money that has been lost, is capable of being repaired through a compensatory award of damages. Impairment of reputation, on the other hand, has this unique feature, that it is repaired by words, so far as it is repaired at all. Good name is restored when those who have heard the defamation are told that what was said is not true and it is retracted. So far as courts can restore good name, it is restored when a declaration to the same effect is made.[6] Just as reputation is impaired by words, so it is by words that reputation is repaired. That applies as much to a natural as to a juristic person. When monetary damages for defamation are awarded to a natural person, they function for the different purpose of compensating for the harm that was meanwhile suffered until such time as his or her good name is restored.

[67] In recent years comparable jurisdictions, upon review of their law of defamation, have introduced by legislation innovative remedies aimed at expeditiously repairing damaged reputation. In England, for example, the Defamation Act 1996 permits a court, on the application of the plaintiff, and in some cases on its own initiative, to dispose summarily of a claim for defamation at any stage of the proceedings, by granting summary relief, which may be 'a declaration that the statement was false and defamatory' alone, or 'an order that the defendant publish or cause to be published a suitable correction and apology'.

[68] The Defamation Act 2009 in Ireland permits a person who claims to have been defamed to apply, on notice of motion grounded on affidavit, for a declaratory order, with nothing more, 'that the statement is false and defamatory of him and her'. Upon an application for such relief the court must make a declaratory order if it is satisfied that:

6 Jonathan M Burchell *The Law of Defamation in South Africa* (1985) p 292, seems to suggest, that damages in addition might be required for that purpose, though it might be that I am reading more into his observations than is justified. Nonetheless, I cannot see how a declaration that there was no truth in the defamatory statement is added to in that respect by damages.

'(a) the statement is defamatory of the applicant and the respondent has no defence to the application,

(b) the applicant requested the respondent to make and publish an apology, correction or retraction in relation to that statement, and

(c) the respondent failed or refused to accede to that request or, where he or she acceded to that request, failed or refused to give the apology, correction or retraction the same or similar prominence as was given by the respondent to the statement concerned.'

[69] In New South Wales the Defamation Act 2005, which is replicated in the other states of Australia, allows the publisher of defamatory matter to make a written 'offer to make amends'[7] to the aggrieved person within a limited time. An offer to make amends must include (s 15(1)):

'(d) . . . an offer to publish, or join in publishing, a *reasonable* correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited, and

(e) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge . . . must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person, and

(f) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer . . .'.

The offer may also include, but this is not obligatory, 'any other kind of offer' to redress the harm, including an offer to pay monetary compensation. If the offer is accepted, and its terms are carried out, the action comes to an end. If it is not accepted, then the fact that the offer was made is a defence to the action if, amongst other things, the offer was reasonable.

[70] In New Zealand the Defamation Act 1992 permits the plaintiff in an action for defamation to ask for, without more, a 'declaration that the defendant is liable to the plaintiff in defamation'. A plaintiff may also ask the court to recommend

7 The English and Irish statutes have comparable provisions.

that the defendant 'publish or cause to be published a correction of the matter that is the subject of the proceedings'. If the court makes such a recommendation, and it is complied with, the proceedings end. If the defendant fails to comply with such a recommendation, and the court finds in favour of the plaintiff, then the failure must be taken into account in the assessment of damages, and the plaintiff is generally entitled to solicitor and client costs.

[71] The function of the civil law is to right a wrong, and its first objective must be to repair the damage so far as that is possible. There is no reason why a wrong must be left to fester, on the basis that damages can later salve the festering, when the wrong is capable of being repaired before the festering occurs. A 1995 report of the New South Wales Law Commission, referred to by Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibane*,[8] made the point succinctly when it called damages as the sole remedy for defamation 'remedially crude'.

[72] It seems to me that our courts are quite capable of expeditiously granting reparatory remedies, without damages, even without the intervention of legislation. As it is, an order that damages are payable implicitly declares that the plaintiff was unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a precondition to having the declaration. And if a declaration alone is claimed, there can also be no reason why it should not be claimed in the more expeditious procedure of application, instead of by action, which is traditionally considered to be necessary when illiquid damages are claimed.[9] If a defence advanced by the defamer were to raise a factual dispute, then the factual dispute is capable of being resolved by oral evidence in the ordinary way, and to be resolved expeditiously.

[73] I also see no reason why a court is not capable of granting other

8 2002 (6) SA 512 (W) para 26.
9 *Cadac v Weber-Stephen* 2011 (3) SA 570 (SCA) paras 13 and 14 held that even a claim for unliquidated damages is capable of being brought upon application.

reparatory remedies of the kind that I have mentioned, and that were advanced by counsel for the amici, if that is what the occasion requires. That they have not traditionally been granted is by itself not a reason to preclude them. The law is there to right a wrong and if an appropriate way of doing so presents itself then I think it would be most unfortunate if a court were to spurn it for no reason but that it is new. The common law at any time is not set in stone. It owes its existence to the courts, which have always taken new steps from time to time so that the law remains relevant to its times. As Oliver Wendell Holmes Jr. said in the introduction to his work on the common law,[10] '[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient . . .'. Lord Tomlin in *Pearl Assurance Company v Government of the Union of South Africa,*[11] cited in by Davis AJA in *Feldman (Pty) Ltd v Mall,*[12] described the Roman-Dutch system of law as

'a virile living system of law, ever seeking, as every system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society. That those principles are capable of such adaption cannot be doubted.'

[74] The Constitutional Court recently reminded us of that again in *Le Roux v Dey*,[13] in which it said that the Roman-Dutch law was a 'rational, enlightened system of law, motivated by considerations of fairness', a feature that is 'sometimes lost from view in pursuit of doctrinal purity',[14] and that the restriction of remedy in defamation to damages is 'an unacceptable state of affairs'.[15] Referring to the value of apology and retraction it said that 'it is time for our Roman-Dutch common law to recognise the value of this kind of restorative justice',[16] and it indeed did so in that case.

10 O W Holmes Jr *The Common Law* (Little Brown and Company 1881) p 1.
11 *Pearl Assurance Company v Government of the Union of South Africa* 1934 AC at 578.
12 *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 789.
13 2011 (3) SA 274 (CC). The paragraphs of the judgment of Froneman and Cameron JJ that I refer to below were supported by all the members of the court: see para 9
14 Para 198, citing John Dugard 'No Jurisdiction Over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus (1991) 7 *SAJHR* 199 at 203, and John Dugard 'Grotius, The Jurist and International Lawyer: Four Hundred Years On' (1983) 100 *SALJ* 213 at 216-7.
15 Para 195.
16 Para 197.

[75] If this court is capable of introducing new rights, like the right to recover pure financial loss in delict,[17] and to an administrative hearing where a person has a legitimate expectation of being heard,[18] I have little doubt that it may also introduce new remedies to vindicate existing rights.

[76] For a century and more, in this country and abroad, it has been the law that trading corporations, like natural persons, have an interest in their reputations that is protectable by the action for defamation. Thus in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd,*[19] the English Court of Appeal held that the law of libel was one and the same for both, and that remains the law in that country. With one exception, that is also the case in other countries that have adopted the English common law. In this country, in *G A Fichardt Ltd v The Friend Newspapers Ltd*,[20] it was accepted by this court, almost as if it was self-evident, that a trading corporation, like a natural person, may protect its reputation through the action for defamation.[21] To the extent that any doubt might have remained on that score, that was put to rest in *Dhlomo NO v Natal Newspapers (Pty) Ltd*[22] (which also extended the protection to non-trading corporations in some circumstances).[23]

[77] The right of a trading corporation to protect its reputation by the action for defamation has more recently been questioned under the growing weight of the right to free expression, and in all the states of Australia the action has been abolished for all but small corporations whose reputation is tied up with that of natural persons.[24] We were invited to follow that example in this case, but I do not think we should do so, though with the reservation I have already to relating

17 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).
18 *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).
19 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 (CA).
20 *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1.
21 See, too, Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* pp 59-60.
22 *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A).
23 At 954D-H.
24 For example, s 9 of the New South Wales Defamation Act 2005.

to remedies.

[78] This court has found, in considered judgments, that a trading corporation has an interest in its reputation that is deserving of legal protection. It has also found that the corporation is entitled to have redress in an action for defamation, which allows a remedy upon proof alone of impairment to its reputation, absent the defamer showing legal cause for having done so. Those findings formed part of the ratio decidendi of the decision in *Dhlomo* when it affirmed that right, and there can be no quarrel with the ratio so far as that goes. 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. No doubt the right to express oneself is restrained to a degree by knowing that criticism of a corporation will have to be justified, but that restraint is so slight in comparison to the infringement that it can hardly be said not to be justified. The difficulty lies only with the further finding in *Dhlomo*, which has been followed by other cases in this court, that damages may be awarded to vindicate that right.

[79] Damages in our law are meant to compensate for loss.[25] 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.

[80] 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

25 *Mogale v Seima* 2008 (5) SA 637 (SCA).

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.

[81] We are not concerned in this case with the reasons why a trading corporation has an interest in its reputation, some of which are given in the judgment of my colleague. We are concerned with the loss that is caused to the corporation when that interest is infringed – if any loss is sustained at all. It is true that employees might feel less pride in working for a corporation that has been defamed, but a corporation exists separately from its human associates, and the corporation itself does not experience that lack of pride. And it is true that a corporation has an interest in being held in public esteem, but it feels nothing when that esteem is lost.

[82] I am not able to picture any loss that might be sustained by a trading corporation that is defamed – if there is loss at all – that does not sound in property, no matter how indirectly or remotely that loss might be brought about. But if there is one thing of which one can be quite certain, it is that if there is loss at all it is not loss to its feelings. As Professor Neethling has said of what he calls 'eergevoel' and 'gevoelslewe', which are what concern us in defamation, in his seminal work on rights of personality:[26]

'Weens die feit dat 'n aantasting van hierdie persoonlikheidsgoedere uitsluitlik in 'n gevoelskrenking geleë is en 'n regspersoon, soos reeds betoog is, nie gevoelens het wat gekrenk kan word nie, is 'n erkenning en beskerming van hierdie persoonlikheidsgoedere in die geval van 'n regspersoon onbestaanbaar.'

[83] My colleague has amply explained that property loss is recoverable through the Aquilian action and not the actio injuriarum. I think it would be most extraordinary if the law were to deny to a trading corporation the right to recover

26 J Neethling *Persoonlikheidsreg* 4ed (1998) p. 89. See, too, J Neethling and J M Potgieter 'Persoonliksheidsregte van 'n Resgspersoon' 1991 (54) THRHR 120.

damages for proved property loss in an action for defamation, yet allow it to recover damages for assumed property loss that is not shown to have been sustained at all. It would mean that, in some cases at least, a trading corporation would be best advised not to show that it has suffered loss, even if it is easily capable of doing so, because otherwise it would need to recover its loss under the more rigorous standard of the Aquilian action. The present case demonstrates the absurdity. The respondent alleges that it has indeed suffered loss, which it is told it may not recover in these proceedings, but it is nonetheless said to be entitled to compensatory general damages, although there is no reason to think it has lost any more than it might in due course recover.

[84] That property loss must be recovered under the Aquilian action goes beyond mere doctrinal purity. The actio injuriarum vindicates personality rights. Rights of that kind are not traded on markets, and they have no empirical money value. But if harm to those rights is to be compensated at all, then money is all that there is for doing so. When personality rights are infringed a court does the best it can, and determines, in general, the amount that it considers sufficient to compensate for the loss. Damages that are awarded under the actio injuriarum for injury to personality rights are general, and not specific to the money value of the loss, because the loss has no demonstrable money value.

[85] It is different when it comes to property rights. Rights of property are traded in markets and they have an empirical value in money. If a court is to make an award of money that is compensatory alone, it must award not one cent more than the money value of the loss, because otherwise the excess is not compensation but a penalty. Thus the Aquilian action requires a plaintiff to quantify and prove the money value of the loss and will award no more than that money value, because it is a compensatory action. The amount of money that is awarded for infringement of property rights is specific to the money value of the loss.

[86] When general damages are awarded to a human under the actio injuriarum it is ordinarily not possible to show that they are other than compensatory, because harm to dignity cannot be determined empirically in terms of money. The award might be excessive relative to other awards but one can say nothing more than that. There are some cases in which courts have made awards which they have suggested included a punitive element, but Professor Burchell has pointed out that awards that were made in those cases might just as well be described as 'aggravated' (but still compensatory) damages,[27] increased from the norm because the conduct of the defamer has been such as to cause more harm than might normally be expected.

[87] The opposite is true if damages are awarded for unquantified harm to property. It is not possible to show that they are compensatory alone – or, indeed, compensatory at all – because the loss indeed has a money value, and if that value is not established it cannot be said that the damages are equivalent to the loss. A defendant who is made to pay money for unquantified property loss will have good reason to complain that he or she is being punished, for no reason but that it is not possible to show the contrary. General damages to compensate for property loss is an enigma that is foreign to the principles of our law of compensatory damages.

[88] When the reputation of a human is harmed, the law presumes consequent loss that is compensatable by general damages[28] – though it is open to the defamer to rebut that presumption. If proof of actual loss is not to be required when a trading corporation is defamed, then that legal presumption must necessarily be changed so as to presume loss of a different kind, because a trading corporation is not capable of suffering the kind of loss that is presumed when a human is defamed. And if general damages are to be allowed in compensation for that loss, then the substituted loss that is presumed must

27 Burchell *Defamation*, above, pp 290-294. See, too, Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) p 448.
28 Burchell *The Law of Defamation*, above, p 144.

necessarily not be property loss, because the principles of our law do not allow for property loss to be compensated by general damages.

[89] So what is the consequent loss, then, that is to be presumed when a trading corporation is defamed, if it is not to be property loss? It is not identified in the cases, it was not identified in argument before us, and it is not identified by my colleague. Indeed, every case that mentions the loss that a trading corporation suffers when it is defamed, speaks of it only in terms of property.

[90] This court has never pertinently asked what kind of loss is to be presumed when a trading corporation sues for defamation. *Fichardt* says nothing on the subject. In *Die Spoorbond v South African Railways; Van Heerden v South African Railways*,[29] Watermeyer CJ assumed, without deciding, that a trading corporation may recover damages for defamation without proof of actual loss, so that judgment is not helpful on the issue.[30] Schreiner JA said no more than that 'some logical justification' could be found in our law for the recognition of an action for damages by a trading corporation, but also decided the case on the assumption that that was so. Cases decided after *Dhlomo*[31] based themselves on that decision and had no cause to consider the question.

[91] In *Dhlomo* the reason why actual loss need not be proved when a trading corporation sues for defamation was disposed of by Rabie ACJ in a single but important sentence, when he said:[32]

'It would be wrong, I think, 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 proof is required of a natural person who sues for an injury done to his reputation.'

[92] The ratio of the judgment – the legal rule that it states[33] – is abundantly

29 1946 AD 999.
30 At 1008.
31 *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A); *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).
32 At 953C-D.
33 Per Schreiner JA in *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 542E.

clear from that reason. Expressed colloquially, the reason for not requiring proof of actual loss was no more than what holds good for the goose also holds good for the gander. But what holds good for a human goose, and also for a trading corporation gander, when both succeed in an action for defamation, are only two of the ordinary elements for defamation. Both have established – as a matter of law – that they have protectable reputations. Both have established – as a fact – that they have been defamed. But the human has established – by legal presumption – that he or she has suffered loss. That presumption is not capable of being applied to a trading corporation without alteration, and no such alteration was suggested by the learned judge.

[93] There are only two possible inferences to be drawn from the fact that no reference was made to the presumption of loss. One is that the learned judge meant the legal rule to be that a trading corporation must be presumed to have suffered the same harm as a human, but that is so absurd that it can be rejected out of hand that that is what he meant. The only other possible inference is that he meant the rule to be that loss need not be established by a trading corporation at all – whether that be by presumption or by evidence.

[94] The inexorable conclusion from that ratio is that damages awarded to a trading corporation are intended to be punitive and not compensatory. For if there is to be no presumption of loss at all, and no loss needs to be proved, it follows that it is not capable of being said that the damages are compensatory.

[95] This court in *Caxton Ltd v Reeva Forman (Pty) Ltd*[34] seems to have been of the view that general damages might in some way combine unquantified property loss, and punitive damages, because in that case the major corporation proved its property loss, but general damages were nonetheless awarded. With regard to general damages Corbett CJ said the following:

'The injury to trade reputation would normally be reflected to a large extent in a reduced

34 1990 (3) SA 547 (A).

volume of business and lower profits. But injury by way of loss of profits is catered for by an award of special damages. I recognise that there is room in a case such as this for claims for both special and general damages indeed the contrary was not argued by appellants' counsel – but it cannot be denied that notionally there is a measure of overlapping between the two claims; and I consider that this is a factor which must be taken into account in computing the general damages in this case. It is not clear to me that the trial Judge did so.' At 574J-575B.

On that basis he reduced the general damages award.

[96] With regard to the minor company, which proved no actual loss, he said the following:

'The learned trial Judge concluded – rightly in my view – that second respondent did suffer actual loss of profits, but in view of the difficulties of quantification flowing from the defects in the company's accounting records he awarded a lump sum of R75 000 to cover both general and special damage.'[35]

[97] It cannot be contested that in the first case the general damages were solely punitive. To the extent that they corresponded with the 'measure of overlapping' with the special damages, they repeated what had already been awarded.[36] And to the extent that they did not overlap there was no suggestion that anything other than the proved loss had been sustained. In the second case, even if unquantifed loss of profits is capable of being proved, which the trial court held that it had been, it cannot be said that the award did not exceed those alleged profits.

[98] But apart from demonstrating that the awards in that case can only have been punitive, at least in part, I do not think that anything should be drawn from the decision, because the issue now before us was not placed in issue, and received no pertinent consideration.

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35 At 575J-576A.

36 Although allowance was made for the 'measure of overlapping' by reducing the award it is not possible to say that the reduction corresponded with that 'measure of overlapping'.

[99] In my view, then, the rule of law laid down in *Dhlomo* can only have been that loss consequent upon defamation is not an element of an action for general damages by a trading corporation, and that damages may be awarded solely to punish. I think that is also the unarticulated premise upon which all the cases have been decided – I can see no other basis for the decisions – and I think that the true nature of damages awarded in such cases should not be left hidden in a closet. Indeed, my colleague recognises, with reference to *Buthelezi v Poorter,*[37] which was adamant on that score, that the award of general damages to a trading corporation serves a deterrent function (which is one of the purposes of punishment), but it is not clear to me from his judgment what compensatory function it serves in addition.

[100] I find myself driven to conclude that damages for defamation of a trading corporation, if no actual loss is proved, can only be said to be punitive, for no reason but that the contrary cannot be shown. Even if proof of unquantified property loss were to be shown, the defamer is entitled to complain that he or she is being punished, at least to a degree, because it is not capable of being shown that the damages do not exceed that unquantified loss.

[101] Damages as punishment for defamation is by no means unusual. It is accepted in the English law jurisdictions, though the circumstances in which they may be imposed are usually circumscribed,[38] and for that reason alone cases from those countries ought to be approached with some care. Moreover, in English law defamation is a discrete and comprehensive tort, with its particular rules that have been developed over time, that are not necessarily consistent with the principles of our law. While it is often beneficial to draw from foreign jurisdictions it has been said many times that care should be taken to ensure that what is extracted conforms with the principles of our law.

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37 *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 617E-F.

38 *Gatley on Libel and Slander* 10 ed (2004) para 9.15. The circumstances in which punitive damages may be awarded are expressly limited by s 28 of the New Zealand Act, and by s 32 of the Irish Act. Section 37 of the New South Wales Act (and comparable legislation in the other states) prohibits punitive damages.

[102] Once it is accepted that general damages to a trading corporation are punitive, or at least that the contrary cannot be shown, the question arises whether punitive damages are permitted in our law. Professor Burchell has given consideration to the uncertainty that existed at the time he was writing,[39] but this court has since said, in *Mogale v Seima*,[40] that damages to punish may not be awarded in an action for defamation. Harms JA expressed that as follows:

'As to the general approach to quantum, there are many dicta that create the impression that compensation may be awarded as a penalty imposed on the defendant and that the amount is not only to serve as compensation for the plaintiff's loss of dignity, for example *Die Spoorbond and Another v South African Railways, Van Heerden and Others v South African Railways* 1946 AD 999 at 1005. These dicta were put in context by Didcott J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) . . . at 830 para [80] when he said the following:

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

In a like vein Hattingh J said in *Esselen v Argus Printing and Publishing Co Ltd and others* 1992 (3) SA 764 (T) at 771G-I:

''In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways – as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conduct may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalise or to deter the defendant for his wrongdoing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of

39 Burchell *Defamation,* above pp 290-294.
40 Above, paras 10 and 11.

the criminal law, not the law of delict. Only a criminal court passes sentence with the object of *inter alia* deterring the accused, as well as other persons, from committing similar offences in future; it is not the function of a civil court to anticipate what may happen in the future or to 'punish' future conduct (cf *Lynch v Agnew* 1929 TPD 974 at 978 and Burchell *The Law of Defamation in South Africa* (1985) at 293).”'

[103] But quite apart from what was said by this court, the matter seems to me to have been put to rest authoritatively by *Fose v Minister of Safety and Security.*[41] That case concerned a claim for ‘constitutional damages’ for assault, including ‘punitive damages’, over and above ordinary compensatory damages, but I think the ratio binds us to find that it applies as much to punitive damages for defamation.[42]

[104] In that case the claim was dismissed, on the grounds that the Constitution does not permit punishment without the legal safeguards of criminal proceedings.[43] Ackermann J referred with approval to criticisms of punitive civil damages, and said the following:[44]

‘I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution. I can do no better than repeat and adopt the following telling condemnation of Lord Devlin:

“I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law”[45]

and the incisive comments of Lord Reid:

“To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence . . . (t)here is no limit to the punishment except that it must not be unreasonable . . . (a)re we

41 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
42 Burchell *Personality Rights*, p 474, suggests that the effect of the decision might be more confined, but I can see no distinction in principle.
43 See *Hoho v S* [2009] 1 All SA 103 (SCA) para 33 for the difference in proving civil and criminal defamation respectively.
44 Para 70.
45 *Rookes v Barnard* [1964] AC 1129 (HL) at 1230.

wasting sympathy on vicious criminals when we insist on proper legal safeguards for them?"[46]

In my view it becomes even more unacceptable in a country which has become a constitutional State, which has enacted an interim Constitution which is the supreme law of the land and in which extensive criminal procedural rights are entrenched.'

[105] I have expressed the view that general damages for defamation can never be said not to be punitive, even if that is so only in part, if only because the contrary cannot be shown, and if they are only partly punitive the good is not capable of being separated from the bad. I cannot see how we can compel a defendant to pay money for a wrongful act if he or she is justified in saying that it serves to punish. Indeed, I think it would be absurd if a trading corporation that is not capable of exacting punishment for criminal defamation because it is not able to demonstrate its elements,[47] were to be capable nonetheless of exacting punishment from the less exacting standards of the civil law. In those circumstances I consider *Fose* to bind me to find that they are constitutionally prohibited, if for no reason but that to punish without the protections that are afforded by the criminal law is not constitutionally permitted. Even if I had not been bound *Fose* in that regard I would in any event not hesitate to reach that conclusion for the reasons given in that case.

[106] It seems to me also to follow inexorably that to impose general damages on a person who has defamed a trading corporation must then also be an unjustified invasion of the protected right of free expression. It is true that the European Court of Human Rights found in *Steel and Morris v The United Kingdom*[48] that the award of damages to a trading corporation will not necessarily infringe the protection of free speech in s 10 of the European Charter. But that was on the basis that the state 'enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and

46 *Broome v Cassel & Co* [1972] AC 1027 (HL) at 1087.
47 See the requirements for criminal defamation in *Hoho v S*, above, para 33.
48 *Steel and Morris v The United Kingdom* [2005] ECHR 103.

limit the damage, of allegations which risk harming its reputation',[49] and it is for the courts in this country to decide what falls within our own 'margin of appreciation'.

[107] It needs also to be borne in mind that, notwithstanding the decision in *Steel and Morris*, it was by only a bare majority that the House of Lords in *Jameel (Mohammed) v Wall Street Journal Europe Sprl*[50] affirmed the rule in that jurisdiction that damages to a trading corporation without proof of actual loss did not offend free speech. I find nothing in the reasons that were given by Lord Bingham for affirming the rule that persuades me that it ought also to be the rule in this country. It is true that a trading corporation has an interest in its reputation, as Lord Bingham found, and that is also recognised in our law, but it does not follow that it must be protected by what amounts to a criminal fine. Baroness Hale, supported by Lord Hoffman, opined that there must at least be evidence of the 'likelihood' of financial loss, observing that

'[t]hese days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.'[51]

[108] The position, in my view, is even clearer here. Once it cannot be said that general damages are not punitive, and in my view that will invariably be so, then quite clearly the award of prohibited damages will not justify an intrusion upon freedom of expression. It is different where a human is defamed, because then the award cannot be said to be other than compensatory, and it is not controversial that compensatory damages for harm to human dignity justifies that intrusion.

[109] I am not sure that there really was anything for us to decide in this case

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49 Para 94.
50 *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL).
51 Para 158.

that has not already been authoritatively decided. *Dhlomo* affirmed that a trading corporation has an interest in its reputation that requires legal protection, and in that respect I agree. Upon analysis, its ratio was that proof of unlawful defamation, without more, entitles it to relief, with the inevitable implication that general damages might be awarded to punish. *Mogale* found that our law does not allow for damages to punish. *Fose* went further and found that they are constitutionally prohibited, for denying the protections of the criminal law, and I think that it must follow that they are also an unjustified intrusion upon freedom of expression. For both reasons, then, I would disallow the claim for general damages.

[110] But I need to reiterate that a trading corporation is entitled to a remedy to vindicate the interest that it has in its reputation – and I would find that even if *Dhlomo* was not binding upon us in that respect. I have also pointed out that there are alternative remedies available for that purpose. I am not sure why it should be thought to be uncertain what those remedies are. Leaving aside the availability of an interdict against anticipated future conduct, I have already said that a trading corporation – indeed, any plaintiff in an action for defamation – is entitled to a declaration of falsity in respect of defamation that has already occurred. If it is warranted by the occasion, in my view a plaintiff is also entitled to an order directing publication of a correction, or publication of a retraction, with or without an apology, or an order directing that the judgment or a summary be published, or directing publication of the correct facts, as submitted on behalf of the amici. Indeed, as pointed out by their counsel, an order incorporating substantially all those features was sought, and granted by Musi J (in my respectful view correctly) in *University of Pretoria v South Africans for the Abolition of Vivisection.*[52] What was claimed, and granted, in that case, was a declaration that the respondents had published defamatory and false statements, an order directing them to publish an unqualified statement that what had been published was false and that they retract it and apologise, and an order directing that the statement to be published must include the true facts, which were set out

52 *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O).

extensively and in detail in the order.

[111] It is true that an order of that kind will not serve to punish, and that the prospect of such an order being granted will have a lesser deterrent effect than an award of damages. But if it is punishment and deterrence that is really wanted then civil proceedings are not the place to exact them. Unlawful defamation constitutes a criminal offence – as this court recently affirmed in *Hoho v S*[53] – and it is the criminal process that must be looked to for punishment and deterrence, as in the case of any act that constitutes both a criminal offence and a civil wrong. Indeed, in my view it would be unconscionable if a plaintiff were to be permitted to abjure its criminal remedy in favour of exacting punishment and deterrence through the medium of the civil law.

[112] For those reasons, and the reasons given by my colleague for dismissing the claim for special damages, I agree with counsel for the appellants that damages are not recoverable by the respondent in this action. In the circumstances I would extend the order proposed by my colleague so as to uphold the special plea in relation to general damages as well and dismiss both claims.

R W NUGENT
JUDGE OF APPEAL

SNYDERS JA

[113] I have had the benefit of reading the judgments of both of my colleagues, Brand JA and Nugent JA. I agree with the judgment, conclusion reached and order proposed by Brand JA. Insofar as the judgment of Nugent JA is concerned, I agree with it, but for the observations that follow.

53 Above.

[114] The special plea taken is that a claim for defamation as a derivative from the *actio iniuriarum* is not available to the respondents for the recovery of general damages. The point that general damages are not available as a remedy to a juristic person that avails itself of a claim for defamation, as found by Nugent JA, was not raised in the special plea, nor argued on behalf of the appellants. His judgment, compelling as it is, should therefore not lead to a dismissal of the respondent's claim for general damages. Counsel for the amici argued that a trading corporation does not have a claim for defamation, and only if this court is to hold that it does have such a claim, it should be for remedies other than damages. Brand JA has dealt fully with the reasons why the first point is not to be upheld and at no stage was a solution suggested to the implications stated in para 40.3 of his judgment.

[115] Insofar as the second point is concerned, even though I agree with the view expressed by Nugent JA, I am disinclined to deny the respondents at this stage of the proceedings, general damages as a possible remedy considering that it has been available to them for as long as the action for defamation itself has been available to them, the point has not been raised between the parties to the litigation and we have not had the benefit of full ventilation of the issue of the availability or appropriateness of alternative remedies in the relevant factual context. It is conceivable that an award of damages may, in a given situation, be the only appropriate alternative, unsatisfactory as it may be, that would prevent the denial of a remedy to a juristic person for a legitimate claim. The remarks of Froneman and Cameron JJ in *Le Roux v Dey* [2011] ZACC 4 at paras 195 to 202, also referred to by Brand JA at para 53 above, are apposite. It is clear that the direction taken by Nugent JA needs to be explored in future litigation of this kind.

S SNYDERS
JUDGE OF APPEAL

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