NOTES / AANTEKENINGE

DISPARAGEMENT OF A BUSINESS, ITS PRODUCTS OR ITS SERVICES: FREEDOM OF EXPRESSION OF CONSUMERS AND THE PUBLIC

1 Introduction

In two recent cases of the Supreme Court of Appeal which attracted much attention in the media as the so-called “Worst 4 x 4 x Far [Isuzu bakkie]” and “Black Labour [Black Label], White Guilt [Carling Beer]” cases (Delta Motor Corporation (Pty) Ltd v Van der Merwe 2004 6 SA 185 (SCA) and Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International 2005 2 SA 46 (SCA)), the following question arose: to what extent is the public (consumers and private undertakings) free to disparage the business, products or services (including trade marks) of an entrepreneur? Two forms of delict may be relevant in this regard: first, non-defamatory disparagement which infringes the goodwill of a business, irrespective of whether the disparagement is false (so-called injurious falsehood) or true; and, second, defamation of a business enterprise (including its goods or services). (In passing, it may also be mentioned that in instances of passing off and leaning on as forms of unlawful competition, where an entrepreneur misappropriates a rival's distinctive or advertising marks, disparagement may (indirectly) even lie in the fact that the perpetrator’s own performance is of a bad quality and that the public, because of their contact with this performance, forms a lower opinion of the rival's performance as a result of the association between the two performances (see Van Heerden and Neethling Unlawful Competition (1995) 181 fn 184, 195, 203 fn 19 and 283). The aggrieved party may suffer damage as a result of such injury to its business reputation and consequent loss of custom (see eg Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd 1985 4 SA 466 (A) 478; Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc 1977 2 SA 916 (A) 931-932; Truck and Car Co Ltd v Kar-N-Truk Auctions 1954 4 SA 552 (A) 559; Volkskas Bpk v Barclays Bank (DC&O) 1952 3 SA 343 (A) 347; and Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd, Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions Inc v Dallas Restaurant 1981 3 SA 1129 (T) 1138). These forms of disparagement are, however, not relevant to the present discussion.)
2 Non-defamatory disparagement

2.1 False disparagement

Statements that disparage an entrepreneur’s undertaking, goods or services in a false or untruthful manner are an important form of the wrongful infringement of the goodwill of the business. Such statements need not be defamatory to constitute a delict. The courts (eg GA Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1; International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd 1955 2 SA 1 (W) 24; and cf Caxton Ltd v Reeva Forman (Pty) Ltd 1990 3 SA 547 (A) 560-561) consider the applicable remedy for claiming patrimonial damages for false statements as the actio iniuriarum (for which animus iniuriandi is required), or the Aquilian action based on dolus (Van Heerden and Neethling 284-291). Following Geary and Son (Pty) Ltd v Gove (1964 1 SA 434 (A) 441, see eg ECA (SA) v BIFSA (SA) 1980 2 SA 506 (W) 510; Helios Ltd v Letraset Graphic Art Products (Pty) Ltd 1973 4 SA 81 (T) 89-90; and see also Van Heerden and Neethling 289), it is required that the plaintiff must 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 thereof, and that the defendant intended to cause the plaintiff that loss by the false representation”.

This approach is, of course, subject to criticism, firstly because the actio iniuriarum is not the correct remedy to recover patrimonial damages, and secondly because dolus is not a requirement for the Aquilian action – negligence suffices (see Van Heerden and Neethling 284-291; and cf Neethling and Rutherford “Competition” LAWSA Vol 2.2 (2003) 195 275-276). Fault (including intent) is in any event not a requirement for the interdict (R and I Laboratories (Pty) Ltd v Beauty Without Cruelty International (South African Branch) 1990 3 SA 746 (C) 754-755; Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 1 SA 807 (W) 820; Van Heerden and Neethling 290; and Abakor Ltd v Crafcor Farming (Pty) Ltd t/a Riversdale Feedlot 2000 1 SA 973 (N) 977-979).

Important for our purposes is which defences, if any, should be at the disposal of, for example, a consumer for uttering false, disparaging remarks about a business concern. Before answering this question, it should be noted that one is encountering a situation of two conflicting fundamental rights, namely the right to freedom of trade and the right to freedom of expression (ss 16 and 22 of the 1996 Constitution). These rights may be infringed or limited only to the extent that such limitation is reasonable and justifiable in an open democracy based on human dignity, equality and freedom (s 36 of the 1996 Constitution). A proper balancing or weighing up of the opposing rights should therefore take place (Neethling and Rutherford 197; Neethling, Potgieter and Visser Neethling’s Law of Personality (2005) 75; and Neethling, Potgieter and Visser Law of Delict (2002) 21). It is submitted that in this process, as well as in determining whether the limitation of a fundamental right is reasonable and justifiable, the general
principles which have already crystallised in South African law with regard to
the reasonableness (or boni mores) test for the (un)lawfulness of conduct,
including acts infringing the right to goodwill of traders, may serve as prima
facie indications of the reasonableness of a limitation in terms of the Bill of
Rights, or of a proper balancing of conflicting fundamental rights (cf Van
Heerden and Neethling 15-16; Neethling, Potgieter and Visser Delict 22; and
Neethling, Potgieter and Visser Neethling’s Law of Personality 54-56).
Consequently, the defence of qualified privilege (where truth is not a
requirement) and a defence analogous to media privilege (or the reasonable
publication of untruth), both of which apply to defamation (see Neethling,
Potgieter and Visser Neethling’s Law of Personality 146-149 and 155-157),
may also be applicable here. In this regard the decision of the Constitutional
Court in Khumalo v Holomisa (2002 5 SA 401 (CC)) authoritatively
endorsed, albeit in many respects impliedly, that the exposition of the
common law by the Supreme Court of Appeal in National Media Ltd v
Bogoshi (1998 4 SA 1196 (SCA)) was in conformity with the Bill of Rights
(see also Neethling, Potgieter and Visser Neethling’s Law of Personality 130
fn 12; and Neethling “The Constitutional Court Gives the Green Light to the
Common Law of Defamation” 2002 SALJ 700ff). Therefore, where for
example a consumer organisation on reasonable grounds warns the public
that a manufacturer’s product contains poisonous substances or is extremely
dangerous, such a publication may be considered reasonable and therefore
lawful even if it later turns out to be false. It goes without saying that this
defence should be applied with great circumspection and only in (highly)
exceptional cases. Disparaging remarks should as a rule thus be accurate,
taking into account that untrue remarks are more easily overridden by
countervailing interests than true remarks (cf Neethling, Potgieter and Visser
Neethling’s Law of Personality 155-156 as to media privilege).

Be that as it may, in Abakor Ltd v Crafcor Farming (Pty) Ltd t/a Riversdale
Feedlot (supra 979) the court held that the defence of qualified privilege has
no bearing on the Aquilian action for unlawful competition. This viewpoint is
unacceptable. In defamation cases, apart from non-patrimonial damages
which may be claimed with the actio iniuriarum, in principle resultant
patrimonial damages may be claimed with the actio legis Aquiliae. (This is,
however, still a moot point in regard to juristic persons: see Caxton Ltd v
Reeva Forman (Pty) Ltd 1990 3 SA 547 (A) 560-561; and Neethling,
Potgieter and Visser Neethling’s Law of Personality 67.) It is inconceivable
that the grounds of justification which may be raised against the actio
iniuriarum, are in the same circumstances not also applicable against the
Aquilian action for resultant patrimonial damage. The opposite view would
mean that a defence such as qualified privilege would exclude wrongfulness
for the purposes of the former action but not the latter – an unsavoury state
of affairs. From this it logically follows that the relevant recognised grounds
of justification for defamation should also be available where the
disparaging, false conduct (also) amounts to unlawful competition, or
otherwise constitutes an infringement of a trader’s right to goodwill.
2.2 Truthful disparagement

As far as truthful disparagement is concerned, the position is controversial. On the one hand there are decisions indicating that, in the absence of a ground of justification, even truthful disparagement may be wrongful (see Ebrahim t/a Broadway Fisheries v MER Products CC 1994 4 SA 121 (C) 125-126; and Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd 1981 2 SA 173 (T) 187). On the other hand, in Post Newspapers (Pty) Ltd v World Printing and Publishing Co Ltd (1970 1 SA 454 (W) 459, cf Spinner Communications v Argus Newspapers Ltd 1996 4 SA 637 (W) 643), the court held that truthful comparative advertising is not wrongful. It is only where such statements contain untruths which amount to a disparagement of a trader’s goods, service or business that he becomes entitled to relief (see further Van Heerden and Neethling 301-303; and Neethling and Rutherford 276). De lege ferenda, it is submitted that truthful disparagement should be prima facie wrongful and that such disparagement should be justified only where it is also in the public interest (cf Van Heerden and Neethling 302-303), as is the case with the defences of truth and public interest and fair comment in instances of defamation (see Neethling, Potgieter and Visser Neethling’s Law of Personality 153-155 and 157-159).

3 Defamatory disparagement

Just as it is defamatory to make any statement concerning an individual which reflects negatively upon his character or reputation, so it is defamatory to make a statement concerning a trading (or non-trading) corporation reflecting upon its business reputation (see eg Dhlomo v Natal Newspapers (Pty) Ltd 1989 1 SA 945 (A) 952-953; Post and Telecommunications Corporation v Modus Publications (Pty) Ltd 1998 3 SA 1114 (ZS) 1118; Majolica Pottery (Venda) (Pty) Ltd v Barrow and Coetzee 1999 1 SA 1166 (C) 1180-1181; Caxton Ltd v Reeve Forman (Pty) Ltd supra 560-561; Boka Enterprises (Pty) Ltd v Manatse 1990 3 SA 626 (ZH); Argus Printing and Publishing Co Ltd v Inkatha Freedom Party 1992 3 SA 579 (A) 584; GA Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1, 5-6 and 9; Goodall v Hoogendoorn 1926 AD 11; Multiplan Insurance Brokers (Pty) Ltd v Van Blerk 1985 3 SA 164 (D); Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd, Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions Inc v Dallas Restaurant supra 1141; A Neumann CC v Beauty Without Cruelty International 1986 4 SA 675 (C) 688; cf Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty) Ltd supra 281-282; Abakor Ltd v Crafcor Farming (Pty) Ltd t/a Riversdale Feedlot supra 978; see generally Neethling, Potgieter and Visser Neethling’s Law of Personality 68ff; Neethling and Rutherford 276; Van Heerden and Neethling 295ff; and Neethling, Potgieter and Visser Law of Delict 329-330). These decisions imply that juristic persons possess a personality right to a good name, reputation or fama (see Van Heerden and Neethling 295-298; and Neethling, Potgieter and Visser Neethling’s Law of Personality 69-71.) An action will therefore lie at the suit of a trading company for statements defaming it in its business character or reputation. For such defamatory statements non-patrimonial damages may be claimed with the actio iniuriarum, and it is not necessary to prove that
actual loss has been sustained (GA Fichardt Ltd v The Friend Newspapers Ltd supra 6 and 8; and Dhlomo v Natal Newspapers (Pty) Ltd supra 953). Where financial loss has in addition been suffered, patrimonial damages may be claimed with the Aquilian action (Neethling, Potgieter and Visser Neethling’s Law of Personality 168-71). The law of defamation seeks to achieve a proper and viable balance between two diametrically opposed fundamental rights: the right to freedom of expression and the right to reputation (Neethling, Potgieter and Visser Neethling’s Law of Personality 129-130). As said, the exposition of the common law in National Media Ltd v Bogoshi (supra) generally achieves this result and is in conformity with the Bill of Rights. It stands to reason that all the defences available for the defamation of a natural person, should mutatis mutandis also be applicable against actions by business concerns. They include qualified privilege, truth and public interest, media privilege (reasonable publication of untruth), and fair comment (see Neethling, Potgieter and Visser Neethling’s Law of Personality 146-149 and 153-159). To reiterate, all these defences reflect the way in which the right to freedom of expression may be exercised vis-à-vis the right to reputation, simultaneously indicating the reasonableness and justifiability of the limitation of the latter right.

Against this background, we shall now canvass the decisions in Delta Motor Corporation and Laugh It Off Promotions.

4 Delta Motor Corporation (Pty) Ltd v Van der Merwe 2004 6 SA 185 (SCA)

In Delta, the respondent's double-cab “bakkie” developed a bent chassis on a gravel road. He alleged that this was the result of a manufacturer's defect but his negotiations with the appellant, the manufacturer of the vehicle, to have it replaced or repaired at the appellant's expense, proved futile. The appellant maintained that the damage to the vehicle was caused by overloading and bad driving. The respondent thereafter distributed e-mail under the heading “Swakste 4 x 4 x Ver” ("Worst 4 x 4 x Far") explaining his version of what had happened, expressing his dissatisfaction with the way the appellant had handled his complaints, and attaching photographs of the vehicle. He also displayed his vehicle, with its obviously bent chassis, in public with the words "Swakste 4 x 4 x Ver; Grondpad Knak Onderstel" ("Worst 4 x 4 x Far; Gravel Road Bends Chassis") emblazoned on it in large print. The appellant regarded this as a smear campaign against it and its product. It complained that the e-mails and the display of the vehicle with the slogan on it amounted to defamation. The respondent countered that he was merely exercising his right of freedom of expression. When the appellant discovered that the respondent intended displaying his vehicle with the slogans on it outside an exhibition of four-wheel drive vehicles, it brought urgent motion proceedings for an interdict. A temporary interdict was granted restraining the respondent from continuing with the alleged false or defamatory statements about the appellant’s products but the court eventually dismissed the appellant's application for a final interdict. On appeal, the Supreme Court of Appeal confirmed the decision of the court a quo.
According to Jones AJA (191E), it was clear that the appellant did not rely for its relief on the dissemination of a wilful falsehood of the kind described in Geary and Son (Pty) Ltd v Gove (supra; and see above for an exposition of this ground of action). The judge continued (191F-H):

“Delta’s [the appellant’s] case for a final interdict is based squarely on defamation. It must prove a clear right, an actual or imminently threatened violation of that right, and that no other remedy will give adequate protection. There was no dispute about Delta’s right to its commercial reputation, and it was not suggested in argument that any remedy other than an interdict would give adequate protection. The dispute is about the alleged invasion of its rights. For this Delta must establish a wrongful and intentional publication of a defamatory statement about it or its products. Unlike in the case of an injurious falsehood it does not have to prove that the defamatory statement is false. Once publication of a defamatory statement about a person is proved, the elements of wrongfulness and animus injuriandi are presumed, and the onus of proving that the publication was not wrongful is on the publisher.”

While it is true that it is not an element of the delict of defamation that the defamatory statement should be false, thereby placing an onus on the plaintiff to allege and prove such falsity (see National Media Ltd v Bogoshi supra 1218; Mohamed v Jassiem 1996 1 SA 673 (A) 694; Selema v Independent Newspaper Group Ltd 2001 4 SA 987 (NC) 993; Khumalo v Holomisa supra 414; and Sayed v Editor, Cape Times 2004 1 SA 58 (C) 61), and that falsehood is obviously a requirement for disparagement in the form of injurious falsehood (see above), it is trite law, and for good reasons, that fault, either in the form of intent or negligence, is not a requirement for the interdict in our law (see eg Hawker v Life Offices Association of South Africa 1987 3 SA 777 (C) 780; R and I Laboratories (Pty) Ltd v Beauty Without Cruelty International (South African Branch) supra 754-755; William Grant and Sons Ltd v Cape Wine and Distillers Ltd 1990 3 SA 897 (C) 916; Elda Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd 1 1988 2 SA 350 (W) 355; Lang John International Ltd v Stellenbosch Wine Trust (Pty) Ltd 1990 4 SA 136 (D) 143; PepsiCo Inc v United Tobacco Ltd 1988 2 SA 334 (W) 337; Spur Steak Ranches Ltd v Saddles Steak Ranch, Claremont 1996 3 SA 706 (C) 714; Kellogg Co v Bokomo Co-operative Ltd 1997 2 SA 725 (C) 732; Nino’s Coffee Bar and Restaurant CC v Nino’s Italian Coffee and Sandwich Bar CC, Nino’s Italian Coffee and Sandwich Bar CC v Nino’s Coffee Bar and Restaurant CC 1998 3 SA 656 (C) 666; Aruba Construction (Pty) Ltd v Aruba Holdings (Pty) Ltd 2003 2 SA 155 (C) 175; IIR South Africa BV (incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) 2004 4 SA 174 (W) 180; see further Van Heerden and Neethling 74-75; Neethling, Potgieter and Visser Law of Delict 261; and Neethling “Requirements for the Protection of Confidential Information or Trade Secrets” 2003 SALJ 272). In all probability, Jones AJA’s requirement of intent for the interdict was merely an unfortunate oversight.

After an examination of the facts, the court (191I-193A) found that the information in the e-mails, in its ordinary sense and tested against the reasonable understanding of a reader of ordinary intelligence, does not have a meaning that reduces the appellant in his or her estimation and was therefore not defamatory. On the other hand, Jones AJA found (193C-D) that the words displayed on the bakkie are prima facie defamatory because
they reflect adversely not only on the particular vehicle but on the product generally. In his opinion, a reader of ordinary intelligence might reasonably understand the words to mean that the particular bakkies generally are the worst 4 x 4 vehicles by far since they cannot withstand normal use on gravel roads. The judge continued (193E-H):

“Once the statement about Delta’s product is shown to be prima facie defamatory, the onus is on the respondent to show that publication thereof was not wrongful. The respondent seeks to do so by relying on the exercise of his right to freedom of expression. His defence is that of fair comment. There has always been tension between the right to freedom of expression, which is protected by, inter alia, the defence of fair comment, and rights to dignity, fama, and an unsullied reputation, which are protected by the remedies for defamation. The Constitutional Court has held in Khumalo and Others v G Holomisa [supra] that the principles of the common law as recently developed in National Media Ltd and Others v Bogoshi [supra] are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression.”

As indicated above, this exposition of the law can be supported. This also applies to the court’s application of the principles of fair comment to the facts in casu. Jones AJA correctly stated (193H-194A; and see also Neethling, Potgieter and Visser Neethling’s Law of Personality 157-159) that, for the defence of fair comment to succeed,

“the respondent must prove that the statement in question was a comment or opinion and not an allegation of fact; that it was fair; that the allegations of fact commented upon were true and accurately stated; and that the comment was about a matter of public interest”.

In order to be fair, the comment (or criticism) must remain within certain prescribed limits, namely it must be a genuine expression of opinion, it must be relevant and it may not be expressed maliciously (194B). In this regard it should be stressed that if these boundaries are adhered to, the comment will be fair no matter how critical, exaggerated, biased, ill-considered or unbalanced it is (see eg Crawford v Albu 1917 AD 102 114; and Neethling, Potgieter and Visser Neethling’s Law of Personality 158). Applying these principles to the facts in Delta Motor Corporation, the court found that the comment was fair and dismissed the appeal.

5 Laugh it Off Promotions CC vv South African Breweries International (Finance) BV t/a Sabmark International 2005 2 SA 46 (SCA)

In Laugh it Off Promotions a caricature of the Carling Black Label trademark with the words “Black Labour” and “White Guilt” substituted for the words Black Label and Carling respectively, was being imprinted by the appellant on T-shirts that were sold for commercial gain. The respondent, owner of the trademark and a company within the SAB group of companies, obtained an interdict against the appellant from the court a quo. The appellant’s appeal against the grant of the interdict was dismissed. The Supreme Court of Appeal held, in terms of section 34(1)(c) of the Trade Marks Act 194 of 1993, that the use for commercial gain was detrimental to the value or repute of the Black Label trademark, constituted an infringement of the trademark and
was therefore unlawful. It stands to reason that conduct which reflects negatively on the repute of a trademark, may also be disparaging or defamatory of the product itself or the relevant business concern and may therefore also constitute disparagement or defamation as separate causes of action. However, the respondent did not rely on any of these forms of delict for relief (cf par 25).

For our purposes, it is important that the appellant averred that its conduct was justified by its constitutional right to freedom of expression. (The appellant did not rely on defences akin to truth and public interest or fair comment because the defendant did not base its claim on disparagement or defamation. Interestingly enough, Harms JA, in deciding whether a purely derisory parody of a mark should not be entitled to protection (par 33), remarked that defamation principles could be of assistance and that matters such as truth, public interest and fair comment may play a role in determining whether the use of the caricature was justified. According to the judge, that is a reason why the nature of the message conveyed on the T-shirt was important.) In regard to freedom of expression, Harms JA (par 30) held that the appellant was free to use its caricature of the trademark provided that it is not used in the course of trade. It was entitled to use it non-commercially on T-shirts, flags, or on anything else. It was also free to proclaim its message about black labour and white guilt “from rooftops, pulpits and political platforms; and it may place the same words (without appropriating the [Black Label] mark’s repute) on T-shirts, and sell them. In other words, its freedom of expression is hardly affected”. After analysing whether the appellant’s reliance on parody as a defence was justified (par 34-40), the judge concluded, correctly in our view, that such reliance was misconceived (par 41):

“The appellant is using the reputation of [the respondent’s] well-known trade mark, which has been established at considerable expense over a lengthy period of time, in the course of trade in relation to goods to the detriment of the repute of the mark without any justification. Such use and detriment is unfair and constitutes an infringement of the said provision. The appellant’s reliance on the freedom of expression is misplaced. It did not exercise its freedom, it abused it.”

6 Conclusion

From the introductory background above, as well as the analysis of the two Supreme Court of Appeal decisions, it is clear that, under the banner of the constitutional right to freedom of expression, consumers and private organisations may disparage or defame the business, products or services (including trade marks) of an entrepreneur, provided that such disparaging or defamatory comments or criticism takes place within the prescribed limits of a ground of justification compatible with the boni mores of our (constitutional) community. In this regard, new grounds of justification may be developed since existing grounds do not constitute a numeros clausus. Of particular importance are the grounds of justification that have been developed in regard to defamation, such as truth and public interest, fair comment, privilege and the reasonable publication of untruth which may have to be adapted for application in, for example, instances of injurious
falsehood. This view is supported with regard to defamation by the following dictum in National Media Ltd v Bogoshi (supra 1214; see also Khumalo v Holomisa supra 414; Sayed v Editor, Cape Times supra 61; and Mineworkers Investment Co (Pty) Ltd v Modibane 2002 6 SA 512 (W) 520-522), where Hefer JA stated:

“In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court’s perception of the legal convictions of the community. In accordance with this criterion ... it is the task of the Court to determine in each case whether public and legal policy requires the particular publication to be regarded as lawful ... Accordingly, ‘(w)here public policy so demands, [(the Court) would be entitled to] recognise new situations in which a defendant’s conduct in publishing defamatory matter is lawful’.”

[Postscript: After the above note was submitted for publication, the decision of the Supreme Court of Appeal in Laugh it Off Promotions was overruled by the Constitutional Court in a judgment delivered by Moseneke J in Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Freedom of Expression Institute (as amicus curiae) 2005-05-27 case no CCT 42/04 (CC). The merits of the appeal to the Constitutional Court focussed on the question whether the likelihood of detriment to the repute of the marks in terms of section 34(1)(c) of the Trade Marks Act 194 of 1993 had properly been demonstrated. The court held that a party who seeks to oust an expressive conduct protected under the Constitution, must establish a likelihood of substantial economic detriment to the claimant’s mark, which in turn should relate to economic and trade harm only, and this was not the case in casu. Moreover, Moseneke J held that to limit valuable comments upon and criticism of business enterprises (such as the SABI) to non-commercial enterprises, as the SCA did – and therefore banning comments and criticism by commercial enterprises (such as Laugh it Off Promotions) that are not even competitors of the victim – would marginalise alternative and competing (business) voices in society. However, since no substantial economic harm had been shown, the fairness of parody or satire or lampooning did not call for consideration.]

J Neethling
and
JM Potgieter

University of South Africa