

## 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; *Volkscas 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 Reeve 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 Reeve 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 Ghwano (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 (Pvt) 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 Reeva Forman (Pty) Ltd supra* 560-561; *Boka Enterprises (Pvt) 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; *Selemela 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; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* 1 1988 2 SA 350 (W) 355; *Long 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

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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 derisive 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 *numerus 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



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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.]

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