

**SHOULD A COMPANY'S DIGNITY BE
PROTECTED UNDER SECTION 10 OF THE
CONSTITUTION? THE QUESTION IN**

***Reddell v Mineral Sands Resources (Pty) Limited*
[2022] ZACC 38**

1 Introduction

In *Reddell v Mineral Sands Resources (Pty) Ltd* ([2022] ZACC 38) (*Reddell*), the Constitutional Court considered whether section 10 of the Constitution of the Republic of South Africa, 1996 (the Constitution), as read with section 8(4), should be interpreted to protect the dignity of juristic persons (in this case, mining companies). The majority and minority judgments arrived at conflicting decisions on the point. Unterhalter AJ, for the minority, held that juristic persons should be protected under section 10, while Majiedt J, for the majority, held otherwise. The majority also developed the common law of defamation to limit the circumstances in which a juristic person may succeed in a claim for general damages for non-patrimonial loss.

The authors make two claims. First, it is argued that the minority judgment correctly interpreted the nature and purpose of section 10 (the guarantee of human dignity) when read with section 8(4) of the Constitution, which provides that juristic persons are entitled to bear the rights in the Bill of Rights as required by the nature of the right and the nature of the juristic person in issue. It is asserted that the two sections can be interpreted to entitle companies to rely on section 10 of the Constitution to protect their right to dignity, encompassing their good name and reputation. Secondly, it is argued that the majority's development of the common law of defamation – to create a special exception for cases where a juristic person sues for general damages – was unnecessary, and has created legal uncertainty.

The case note proceeds as follows. First, the authors introduce the facts of the case, and then explore the *ratione decidendi* of both judgments. Secondly, the note addresses the ambit and scope of human dignity as a constitutional right, followed by the applicable principles governing constitutional interpretation, including the role of the heading of a statutory provision. This is followed by a discussion of the law of defamation concerning whether a juristic person can claim damages for an infringement to its reputation under the *actio iniuriarum*. The legal position prior to the judgment in *Reddell* is compared to that which now applies. Finally, the decision is evaluated with reference both to the reasoning used by the majority and minority respectively and the significance of the outcome of the case for our law.

A detailed discussion of the constitutionality of awarding general damages to corporations for defamation on the basis that such claims unjustifiably limit

section 16 of the Constitution (the right to freedom of expression) falls outside the scope of this case note.

2 Facts

The mining companies in the *Reddell* case, including Mineral Sands (Pty) Ltd, instituted a defamation suit against a group of environmentalists, including Reddell (the activists). The claim was based on the activists' widespread criticism of the mining companies' operations, which they alleged harmed the environment, a matter that was hotly contested. The mining companies sought damages for defamation and a public apology.

In defence, the activists raised a special plea – namely that a trading corporation had no remedy for defamation without alleging and proving that the defamatory statement concerned was false, and that the false statement was made wilfully, causing the company to suffer patrimonial loss (par 13). This defence was eventually narrowed down, with the activists conceding that a trading company is entitled to sue for defamation and to claim relief other than general damages, including patrimonial damages, a declaratory order and an apology (par 33). The activists contended, however, that the common law of defamation should be developed to prevent a trading company from claiming and receiving general damages for defamation on the basis that such a claim restricts the right to freedom of expression (par 33). The premise of the defence was that a trading corporation is not a natural person, cannot be a bearer of the constitutional right to human dignity, and thus cannot claim non-patrimonial damages for defamation.

The court had to decide whether trading corporations could have their dignity protected under section 10 of the Constitution, and whether the proper interpretation of section 8(4) extended section 10 to corporations. However, it is important to note that the majority refused to distinguish between trading and non-trading companies in its judgment, emphasising that its decision applies to all corporate entities, regardless of whether such entity is incorporated, trading or operating as a business. The principles apply equally to non-profit organisations and political parties (par 98).

3 Judgment

3.1 *Majority judgment*

The majority judgment, per Majiedt J, considered whether a corporation can be the bearer of the right to human dignity. The majority emphasised that there are numerous facets to human dignity that are not applicable to a corporation. These include the development of a person's humanness and unique talent, the deep personal understanding of ourselves, individual worth in a material and social context, and *uBuntu*, which is the core foundation of the right to dignity (par 58; also, Ackermann *Human Dignity Lodestar for Equality in South Africa* (2012) 97). To avoid diminishing what it means to be a person, there must be a clear distinction between the concept of personhood, which is exclusive to humans, and that of corporate identity (par 81). While humans form corporations, they do so to enjoy the benefit of a legal *persona* that is separate from the identity of natural persons.

Majiedt J held further that, for the provisions in the Bill of Rights to be understood contextually and purposively, the history of the provisions and the reasons for the Bill of Rights' enactment must be taken into account. In this respect, Majiedt J stressed that the crux of the right to human dignity is humancentric. The Bill of Rights was adopted as a means to cure the fact that in the past human beings were treated as unworthy of respect and concern. Thus, he held:

"The right to dignity was not to ensure that companies are treated as entities worthy of respect, companies do not have intrinsic self-worth." (par 60)

Regarding the rights of juristic persons, Majiedt J added that a company's right to be treated equally is protected by section 9, but certainly not by section 10 of the Constitution. Section 10 is headed "Human dignity"; and, understood purposively, the right is intended to protect human beings. Thus, the right to human dignity cannot be borne by a juristic person. The fact that a corporation can enjoy some rights in the Bill of Rights does not lead to the extension of the protection in section 10 to a juristic person. The contrary is true; there are other rights that are not enjoyable by a juristic person – section 8(4) of the Constitution makes this clear (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certificate of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) par 57).

In relation to the development of the common law of defamation, the majority considered whether a corporation could claim damages for an infringement to reputation as a component of the constitutional right to human dignity (par 62 and 81). The majority held that the right to human dignity only protects a human being's reputational interests (par 62–63). The fact that a company has an interest that is protected by a certain constitutional right does not mean that it enjoys that right. Plus, the right to human dignity should not be conflated with the common-law right to reputation, which all corporations may enforce.

The majority concluded that a company does not have an *unqualified* claim for general damages for harm to its reputation or good name (own emphasis). The reason is that a company does not have "hurt feelings" for which a claim for damages would provide solace. Thus, it cannot rely on the constitutional right to dignity to justify a claim for general damages for harm caused to its good name. However, a company does have a common-law right to a reputation, which, if infringed, could undermine its goodwill. To protect these interests, a company may claim patrimonial loss (if its goodwill is infringed) and general damages (if its reputation is undermined), but the common law should be developed so that the latter claim is not absolute. In cases of public discourse involving debates in the public interest, the impact on freedom of expression must be considered by the trial court, which will have a discretion to award general damages (par 150). A public-interest rider of this sort ensures that the right to freedom of expression is not unjustifiably infringed (par 132). The development of the common law in this manner, said the majority, will not prejudice companies because their reputational interest is sufficiently protected under the common law of delict, even though such interest does not enjoy the protection of a constitutional guarantee.

3.2 *Minority judgment*

The minority judgment, delivered by Unterhalter AJ, decided otherwise. It held:

“The injunction of section 8(4) of the Constitution is that a juristic person is entitled to the rights in the Bill of Rights.” (par 156)

The minority held that weight must be given to section 8(4) of the Constitution when interpreting section 10. Notwithstanding section 10’s heading (“Human dignity”), its ambit is not confined to a narrow conception of dignity, and it should not be limited to self-worth. The question of who enjoys the right is answered by the text of section 10, which provides that “everyone” is entitled to bear the right. In addition, it is a standard rule of constitutional interpretation that rights must be interpreted generously (par 156). It is also indisputable that a juristic person enjoys the right to a reputation under the common law.

The constitutional right to dignity is multi-faceted and includes a right to a reputation (par 157). Trading companies have a reputation to uphold and should be entitled to rely on the constitutional right to dignity to protect their reputation. Such an interpretation is supported by section 8(4), which 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, which is supported by the wording of section 10, extending the right to everyone.

Unterhalter AJ acknowledged the textual obstacle posed by the heading of section 10 – “Human dignity” (par 158). He also agreed that the wording of the heading seems to indicate that only natural persons are bearers of the right, excluding juristic persons. He held, however, that the consequence of this approach would be to cast section 10 as an exception to the application of section 8(4). Such result is untenable; dignity embraces reputation, and a trading corporation has a reputation to protect. It is thus unreasonable to withhold the entitlement of a juristic person to have its dignity protected under section 10. Unterhalter AJ acknowledged that it has been held that juristic persons do not have a right to human dignity (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) par 18, and also, *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2013] ZACC 19; 2013 (2) SACR 443 (CC); 2013 (10) BCLR 1180 (CC) par 35), but found that this approach cannot be accepted at face value; the position is far more nuanced. Even though a trading company cannot claim damages for hurt feelings, it should be entitled to rely on the right to human dignity to protect its reputation, which is a core aspect of dignity in any event, and if infringed, causes harm (par 169).

4 The right to human dignity

The inherent right to human dignity afforded by section 10 of the Constitution is the cornerstone of the South African Constitution. Human dignity is both a right and a value, and serves as the foundation for the birth of the

constitutional dispensation (ss 1(a) and 7(1) of the Constitution, and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) par 45).

The inherent right to human dignity is at the heart of individual rights in a free and democratic society (*President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), which referred to *Egan v Canada* (1995) 29 CRR (2d) 79 106). The significance of this right is derived from the fact that in South Africa, during apartheid, people were stripped of their dignity, respect and selfhood (*S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)). The South African constitutional dispensation accordingly rejects our shameful past. It seeks the achievement of equality for all persons in South Africa by recognising and promoting human rights and freedoms, and by promoting human dignity, which is fundamental to the Constitution (*Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) par 35).

Section 10 provides that everyone's right to human dignity must be respected and protected. The content of the right is both complex and broad, and protects a wide variety of interests, including self-worth, reputation, a good name, being worthy of respect, identity, empowerment, freedom, collective group-based dignity, the right to be different, and the right to enjoy the material conditions of well-being – such as water, housing and so on (see generally *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 28; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 53 and *Daniels v Scribante* 2017 (4) SA 341 (CC)). When read with sections 7 and 8 of the Constitution, it is submitted that both natural and juristic persons can bear the right.

5 The principles of constitutional interpretation

The question of whether section 10 of the Bill of Rights can be interpreted to protect the dignity of juristic persons is now addressed. Section 39(1)(a) of the Constitution is the starting point. It provides that an interpretation of the Bill of Rights, which includes both sections 8(4) and 10, must promote the values that underpin an “open and democratic society, based on human dignity, equality and freedom – the founding values of the Bill of Rights. This provision is peremptory, but sections 39(1)(b) and (c) are also important. The interpreter must consider international law and may consider relevant foreign law when interpreting the meaning and ambit of rights. The Bill of Rights also does not deny the existence of any other rights that are recognised or conferred by common law, provided that they are consistent with the Bill of Rights (s 39(3)).

When interpreting provisions in the Bill of Rights, the basic rule is that the Constitution is at the forefront of the interpretative process, with the constitutional values serving as guiding principles (ss 1 and 2 of the Constitution). A valued-based interpretation promotes a normative construction of the Bill of Rights and ensures the fullest protection of the

rights guaranteed (*S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC) par 15–17).

A number of other principles underpin constitutional interpretation. First, rights must be interpreted generously or liberally so that each right is fully protected (*Ramakatsa v Magashule* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) par 70). Secondly, while a strict and mechanical adherence to the text in the Constitution is not necessary, the text of each provision must be considered and cannot be ignored (*Shabalala v The Attorney General of Transvaal* 1996 (1) SA 725 (CC) par 27). Thirdly, as with the interpretation of all other legislation, a contextual and purposive approach to interpretation is required (*Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) par 232). The context includes the circumstances that gave rise to the adoption of the Constitution. Fourthly, each right must be interpreted to give effect to the interest it was intended to protect (*S v Zuma* par 15). Fifthly, interpretation is a holistic process; the Bill of Rights must be interpreted as an entire document, not in a piecemeal fashion. A harmonious reading of rights must be promoted (*New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) par 18 and 63). Finally, where two provisions in the Constitution deal with the same subject, the one being general and the other specific, the latter should prevail (*Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) par 49).

The *Reddell* majority used the principle that the Bill of Rights must be interpreted purposively and contextually to find that section 10 only protects *human* dignity (own emphasis), holding that the reason human dignity was included in the Bill of Rights was to ensure that human beings in South Africa would always be treated as worthy of respect and concern (par 70). In their view, the limitation of the right in this manner accords with its heading and textualism, and does not amount to mere formalism (par 61). The minority, however, expressed doubt as to whether section 10 should be interpreted so narrowly. The minority added that the heading of section 10 – “Human dignity” – should not be definitive of the provision’s scope. Instead, section 8(4) should also apply (par 158). As both the majority and the minority focused on the value of section 10’s heading, an understanding of the purpose of statutory headings is required to consider whether section 10 was correctly interpreted by the majority.

5.1 *The value of a heading*

In its interpretation of the scope of section 10, the *Reddell* court had to deal with the text of section 10(1) and its heading. Section 10 is titled “Human dignity”, the literal meaning of which excludes juristic persons. In *Turffontein Estates Ltd v Mining Commissioner Johannesburg* (1917 AD 419 431), the court held that the value attached to headings will depend on the circumstances of each case. The meaning of a title of a statute and its heading are not definitive of what a statute and its provisions are about, but are explanations of the context in which the statute was enacted and the nature of its provisions. Also, in *Jaga v Dönges* (1950 (4) SA 653 (A) 664B),

Schreiner J held that when interpreting a statute, the context of the statute and the words being interpreted should be considered together. Schreiner JA's views were echoed in *Natal Municipality Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) par 17–26).

While it is an accepted tool of construction that a statute's title and the heading of a provision in a statute are valuable interpretative guidelines, especially when it comes to determining the purpose of the legislation or a legislative provision, the accepted position is that headings are not definitive of the meaning of the statute or provision. A court merely has regard to the heading to help determine the meaning of the provision (*Hugo* par 12; *S v Jordan* [2002] ZACC 22; 2002 (6) SA 642 (CC) par 49).

Headings must also be interpreted in the context of the legislation as a whole. Their literal meaning should not prevail. The ultimate aim is to determine the meaning of the provision in light of the Constitution's values and the other rules already referred to. Interpreting a statute narrowly may also be problematic because the courts are not agents of the legislature, and the Constitution does not provide that the courts be such organs; nor do the courts have a duty to find what the legislature intended. That would be acceptable under a system of parliamentary sovereignty, but given the Constitution's supremacy, it is against public policy. The courts' duty is to promote the spirit, purport and object of the Bill of Rights and the Constitution (*Prince v Cape Law Society* 2002 (2) SA 794 (CC) par 155; Perumalsamy "The Life and Times of Textualism in South Africa" 2019 22 *PER/PELJ* 1 17).

5.2 Other relevant interpretational tools

There are other rules of statutory interpretation to consider when deciding whether a corporate entity can be a bearer of the right to human dignity. Two rules are mentioned here.

The first is that legislation should be read to give effect to the rule that "the law is always speaking". This rule ensures that statutes are given a current, updated meaning. It also permits the Constitution to be interpreted in a way that reflects new developments and the current values of society, although the sanctity of the rule of law is also important (*Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) par 136–137). Nonetheless, the Constitution must be interpreted to allow for growth and to give effect to the values it endorses, not only for now, but also for the future (*Khala v the Minister of Safety and Security* 1994 (4) SA 218 (W) 122D–E; *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E)). This interpretational approach, it is submitted, underscores the need to protect a corporation's reputation as part of the right to dignity, especially given the valuable economic role that corporations play in the country. This point, while recognised by the *Reddell* majority, did not convince it to treat corporations as bearers of the right to dignity.

The second rule is that a contextual interpretation of a statute requires that regard be had to existing law; consistency between the Constitution, legislation and the common law must be achieved, with the Constitution guiding the process of interpretation and development (*Shaik v Minister of*

Justice and Constitutional Development [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) par 18). This rule promotes legal certainty and gives credence to the rule of law (*Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) par 120). When interpreting the ambit of the right to human dignity, it is thus necessary to consider the extent to which the common law of defamation recognises that the reputation of a juristic person is encompassed within the concept of *dignitas* and is worthy of protection. It is to this aspect that the authors now turn.

6 Defamation of a corporation under the common law

Defamation is the wrongful, intentional publication, concerning another person, that has the impact of undermining their status, good name or reputation. The law of defamation is based on the *actio iniuriarum*, a remedy giving a right to claim damages to a person whose personality rights have been impaired by another. The action was not designed to compensate for patrimonial loss; instead, it was created to give personal satisfaction when a personality right is impaired (*Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) par 90). Personality rights include both reputation and self-worth.

It has long been accepted that a corporation (whether trading or not) may sue for defamation for the infringement of its reputation, good name or *fama* if the defamatory statement will injure its business reputation, or affect the trade or business that it carries on, or cause it "financial loss, irrespective of whether such loss has actually occurred" (Neethling and Potgieter "Defamation of a Corporation: Aquilian Action for Patrimonial (Special) Damages and Actio Iniuriarum for Non-Patrimonial (General) Damages: *Media 24 Ltd v SA Taxi Securitisation and Amici Curiae* 2011 5 SA 329 (SCA)" 2012 75 *Journal of Contemporary Roman-Dutch Law* 304).

In *Reddell*, both the majority and minority agreed that the reputation of the mining companies was protected under the common law of delict. Thus, they were entitled to bring an action under the *actio iniuriarum*, claiming damages vindicating their reputation. The issue, however, was whether companies were entitled to claim general damages for defamation. Such a claim was permitted by the Supreme Court of Appeal (SCA) in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) (*SA Taxi*)), but the activists claimed that this decision was incorrectly decided because it equated the dignity of a trading company with the dignity of a human person (par 14). Their case was that a claim for general damages in these circumstances would undermine the right to freedom of expression; and the companies could not in any event rely on the constitutional right to dignity to trump the activists' right to freedom of expression. For these reasons, they asked that the common law be developed to prevent trading companies from claiming general damages for defamation.

To contextualise the way in which the common law of defamation has been developed by the decision in *Reddell*, the principles established in *SA Taxi* are introduced, followed by a description of the way in which *Reddell* has changed the law.

6.1 *The decision in SA Taxi*

The respondent (the plaintiff in the court a quo), a finance company, gave financial assistance to purchasers and lessees of taxis. It sued the publisher, editor and a reporter of *City Press* for defamation based on an article they published asserting *inter alia* that the respondent cheated on taxi operators. The respondent claimed general damages of R250 000, plus special damages for lost profits for R20 million suffered as a result of the defamation.

The appellants (the defendants in the court a quo) pleaded that the respondent, as a juristic person, should not be entitled to claim either general damages (for personality infringement) or special damages (for patrimonial loss) in terms of the law of defamation. Their argument was that a corporation does not have personality rights or feelings of hurt or shame. The *actio iniuriarum* for defamation, which has always been reserved for the protection of personality rights, giving a *solatium* for wounded feelings, should be reserved for such loss (par 36). Although the appellants accepted that an injury to a corporation's reputation diminishes its goodwill, causing loss of profit or patrimonial loss, their argument was that these losses should be claimed using the *actio legis Aquiliae* only (specifically, the claim for injurious falsehoods).

In assessing whether a corporation may claim general damages under the law of defamation, the majority (per Brand JA) reviewed previous case law on the point, focusing on *Dhlomo NO v Natal Newspapers* (1989 (1) SA 945 (A) *Dhlomo*) and *Caxton Ltd v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A) *Caxton*). The majority held that the *ratio decidendi* in these cases was that all corporations, both trading and non-trading, have a right to their good name and reputation, which is protected by the usual remedies under our law of defamation, including a claim for damages (par 37–41). The *SA Taxi* majority added that the reasons advanced by the appellants in support of their plea had already been considered and correctly dismissed in *Dhlomo*, and that the court was bound by its own precedent. In any event, the modern-day *actio iniuriarum* had become more nuanced (par 38). On the one hand, a human person need not prove hurt feelings in the true sense of the word to claim non-patrimonial damages because a person's external dignity can be harmed without suffering any personal distress (see, e.g., *Boka Enterprises (Pvt) Ltd v Manatse* 1990 (3) SA 626 (ZHC) 631J–632A). On the other hand, a juristic plaintiff can have an interest in its external dignity, even though it may not have suffered a financial loss (par 39).

The *SA Taxi* majority also rejected the argument that a corporation does not have a constitutional right to a reputation, finding that section 8(4) of the Constitution specifically extends rights to juristic persons (par 48). Such rights include personality rights, which can overlap with constitutionally protected rights, including the right to privacy. In this respect, the majority referred to the Constitutional Court's decision 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)), where the court held that corporations have a right to privacy, which is protected both by the common law and the Constitution. Moreover, the right to dignity is wide and has numerous components (par 45). A correct reading of

sections 8(4), 10 and 39(3) of the Constitution thus permits a finding that a corporation, whether trading or not, is entitled to enjoy the protection of the constitutional right to dignity.

6.2 *The position after Reddell*

The *Reddell* majority held that the SCA's majority judgment in *SA Taxi* was incorrect. It gave the following reasons.

First, the wording of section 8(4) makes it clear that juristic persons can enjoy the protection of the rights in the Bill of Rights in qualified or limited circumstances – depending on the nature of the right and the nature of the juristic person in issue. Human dignity is a uniquely personal right, and the many facets of human dignity cannot all apply to corporations. A juristic person's right to a reputation is a personality right, but is not part of the constitutional right to human dignity (par 81).

Secondly, the *SA Taxi* court was incorrect when it held that the constitutional right to dignity is broader than the common-law concept of dignity, and that the former encapsulates a wider range of interests than the latter (par 82). This approach, which equated the right to dignity with the right to privacy, citing the decision in *Hyundai*, was conceptually flawed. The Constitutional Court in *Hyundai* in fact held that while juristic persons may have a constitutional right to dignity, they do not have a similar right to dignity and, in any event, corporations possess neither a wide nor a narrow sense of dignity (par 83–85).

Thirdly, the rights-balancing exercised between freedom of expression and dignity conducted in *SA Taxi* was misplaced, because in defamation cases involving trading corporations as plaintiff, there can be no reliance on the right to dignity (par 86).

Thus, in sum, according to the *Reddell* majority, it is not our law that a corporation has a defamation claim based on its constitutional right to dignity. A corporation merely has a common-law right to its good name and reputation, which can be enforced through the common law of delict. So, in a defamation case where a corporation is the plaintiff and the defendant relies on the right to freedom of expression to answer the plaintiff's claim, a court should not engage in a rights-balancing exercise to resolve the dispute between the parties. This finding, however, does not mean that a corporation can never sue for general damages for defamation. It may do so, but not if the defendant's statement is published as part of a debate of public importance, as occurred on the facts in *Reddell* (par 105). Where the statement is published in the course of "public discourse on issues of legitimate public interest", then general damages for a corporation should not be considered (par 114).

The result is that the *dictum* in *SA Taxi* – namely that a corporation has a constitutional right to human dignity – is no longer part of our law. Moreover, while a corporation has a common-law right to protect its reputation if harmed through the publication of a defamatory statement, it will not be permitted to claim general damages for defamation in all cases. Where the publication is of public importance and forms part of public discourse, the claim will be qualified, and the trial court will have a discretion to exclude an

award of general damages. This qualification is required because an award of general damages to a defamed corporation limits the right to freedom of expression guaranteed by section 16 of the Constitution, and cannot be justified under section 36.

7 Evaluation

Both the majority and minority in *Reddell* agreed that juristic persons have a common-law right to a reputation. They also agreed that the harm caused to a corporation's reputation by a defamatory statement may undermine both the corporation's goodwill, causing financial loss, and its reputation, causing non-patrimonial loss. A corporation may therefore rely on the *actio iniuriarum* to protect its reputation.

The majority and minority disagreed, however, about whether companies can bear the constitutional right to dignity to protect their reputation. They also disagreed on the need to develop the common law of defamation to limit a juristic person's claim for general damages. In the authors' view, the minority judgment offers a more balanced and less intrusive approach to rights protection than does the majority judgment, and also creates synergy between the common law and the Constitution. The authors' position is based on four main premises.

First, it is argued that when interpreting the ambit of the constitutional right to human dignity and, in turn, whether a juristic person is entitled to bear the right, all the principles of constitutional interpretation addressed here should have been considered. In particular, it is argued that while section 10 is headed "Human dignity", the heading of a provision is not the determining factor of its scope. Other important interpretational principles include that section 10's wording extends the right to "everyone", that rights should be interpreted generously, and that section 8(4) permits juristic persons to bear the rights in the Bill of Rights to the extent required by the nature of the right. It is acknowledged that a core component of the right to human dignity is "humancentric", but this does not mean that juristic persons should be completely excluded from the ambit of protection. Section 8(4)'s qualification that a juristic person can bear a right *to the extent required* by a particular right indicates that a juristic person is entitled to bear aspects of a particular right – in this case, the right to a reputation forming part of the right to dignity. The relationship between a juristic person and the right to equality in section 9 illustrates the point. Corporate entities can rely on sections 9(1), (3) and (4) to claim equal protection of the law and the right not to be discriminated against, but they are certainly not entitled to the right in section 9(2), namely the benefit of affirmative action measures. The wording of section 9(2) makes this clear. The right is limited to persons disadvantaged by unfair discrimination. In short, the *Reddell* majority's approach was too restrictive. The minority was correct not to be restrained by the literal meaning of the heading to section 10. It properly treated the heading as explanatory of the content of the right as opposed to a determining interpretative factor. The scope of the right had to be interpreted according to the context as a whole.

The authors' second claim is that constitutional interpretation requires that there be a harmonious reading of provisions in the Constitution. The

Constitution should not be interpreted in a piecemeal fashion. Section 8(4) does not specifically exclude a juristic person from being a bearer of any of the rights in the Bill of Rights. In fact, it permits such application. Section 10 applies to everyone. Read together, and given that a specific provision (in this case, section 8(4)) should prevail over a more general one (the right to human dignity borne by everyone), it is argued that a company should be entitled to rely on the constitutional right to human dignity to protect its reputation and good name. This argument is supported by the principle that South Africa has one system of law (*Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC) par 44). This rule means that the Constitution is the supreme law, with all law being informed by its normative content, and that there should be consistency between the Constitution, the common law and legislation. Given that the common law protects a company's right to a reputation and that reputation forms part of the right to dignity, a constitutionally compliant interpretation of section 10 permits a company to rely on the right to dignity to find a claim protecting its reputation.

The authors' third argument is that the Constitution is a living document and should be interpreted to reflect current, updated values. In the authors' view, the majority's narrow interpretation of section 10, which excludes corporations from its ambit and restricts its application to humans only, undermines the importance of businesses and corporate entities in the current legal and economic framework. The minority was thus correct to emphasise the need to interpret the Constitution to provide protection against harm caused by defamatory statements to corporate reputational harm (par 175).

Finally, it is maintained that the majority's development of the common law of defamation – to restrict a juristic person's right to claim general damages in cases where the speech is of public importance and/or requires public debate – was neither necessary nor required. The already extant balancing of rights for all defamation cases (*Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC)) is sufficient to ensure that the right to freedom of expression is not subsumed by the right to dignity. The authors also agree with the minority that it is irrational to distinguish between a corporate entity's claim to general damages versus a claim to patrimonial damages to protect freedom of expression. It is by no means apparent that an award of general damages would undermine freedom of expression more restrictively than would a claim for patrimonial damages.

The new rule is also likely to create legal uncertainty. While the authors understand the majority to have given courts a discretion to award general damages to a juristic person for reputational damage caused by speech in the public interest, it is unclear whether the new rule applies absolutely or is discretionary. The confusion is caused by assertions in the majority judgment to the effect that in cases involving public discourse in the public interest "general damages *may not be considered*" (par 114; own emphasis). This wording creates a blanket exclusion. Yet, later on in the judgment the rule is clarified to explain that if the defamatory statement does not fall within the new qualification, the extent of the general damages would need to be determined "on a fact-based approach from case to case" (par 114). Here,

discretionary language is used. The same approach is repeated in the majority's conclusion (par 150). In addition to these unfortunate contradictions, the reality is that the law of defamation does not require a new public-discourse exception. The public interest is always relevant when determining whether a statement in issue is defamatory and, if so, whether a plaintiff may claim general damages. More problematically, the addition of a public-discourse exception leans toward the free-speech approach adopted in the United States (US), where laws limiting speech in the public discourse are permitted only in very narrow circumstances. In the authors' view, the danger of the public-discourse qualification created in *Reddell* is that it disregards the Constitutional Court's caution in *S v Mamabolo (E TV & others Intervening)* (2001 (3) SA 409 (CC) par 40–43) that courts should be wary of using US free-speech jurisprudence to develop the South African law of freedom of expression as the two constitutional dispensations are completely different.

8 Conclusion

The purpose of this case note has been twofold. The authors have compared the majority and minority judgments in *Reddell (supra)* and have analysed the different approaches to the interpretation of section 10, as read with section 8(4) of the Constitution, and to the development of the common law of defamation.

While both judgments envision the importance of protecting a juristic person's reputation, the majority held that a juristic person is not entitled to rely on the right to dignity under the Constitution. In the authors' view, this approach undermines section 8(4) of the Constitution and the wide ambit of the right to human dignity. It also fails to recognise that the heading of a statutory provision should not define the content of that provision and should merely serve an explanatory purpose.

Both judgments also accepted that a juristic person may rely on the common law of defamation to protect its reputation. However, such a claim is no longer unqualified. Where the defamatory speech forms part of public discourse on a matter involving the legitimate public interest, a court has a discretion to exclude an award of general damages. The authors' case is that this approach undermines the already careful balance our courts have forged between the competing rights in defamation cases, and is likely to cause confusion rather than promote freedom of expression.

Minenhle Alfred Nzimande
Nelson Mandela University

Razaana Denson
Nelson Mandela University

Joanna Botha
Nelson Mandela University