

IN THE WESTERN CAPE HIGH COURT, CAPE TOWN
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 15450/12

In the matter between:

SOLAL TECHNOLOGIES (PTY) LIMITED

Plaintiff

and

KEVIN CHARLESTON

Defendant

DEFENDANT'S EXCEPTION

The defendant hereby excepts to the plaintiff's particulars of claim on the grounds that it lacks averments necessary to sustain a cause of action as follows:

FIRST GROUND OF EXCEPTION

- 1 In its particulars of claim, the plaintiff pleads that:
 - 1.1 it is a company which carries on the business of manufacturing, marketing and distributing complementary medicines;
 - 1.2 the defendant is an individual who authored an article concerning the plaintiff which was published throughout South Africa and the world; and
 - 1.3 the article concerning the plaintiff is wrongful and defamatory of it.
- 2 The plaintiff accordingly claims payment of general damages of R350 000 and certain further relief.

3 The plaintiff's claim for damages is based on the Aquilian action. However:

3.1 A trading corporation has no personality right to protect nor any feelings of hurt or shame which can be compensated under the *actio iniuriarum*.

3.2 Accordingly, on common law principles, the plaintiff's claim for general damages based on the *actio iniuriarum* is unsustainable as a matter of law.

4 Moreover, and in any event, to the extent that the common law permits a trading corporation to claim general damages for defamation, this is inconsistent with the Constitution:

4.1 Trading entities, including the plaintiff, are juristic persons and are accordingly not the bearers of the right to human dignity enshrined by section 10 of the Constitution.

4.2 The defendant is the bearer of the right to freedom of expression in section 16 of the Constitution, including the right to impart information or ideas in terms of section 16(1)(b) of the Constitution.

4.3 Any right of a trading corporation to claim general damages constitutes a significant limitation of the right to freedom of expression.

4.4 A trading entity which alleges that it has been defamed has various other remedies at its disposal, including a claim for special damages in the form of lost profits, a claim for an interdict, a claim for an apology and a claim for a declaration of falsity.

- 4.5 In all the circumstances, the common law is inconsistent with the Constitution, in particular section 16(1) thereof, to the extent that it permits a trading entity to claim general damages for defamation.
- 4.6 The common law ought accordingly to be developed to provide that a trading entity has no right to claim general damages for defamation. Such development of the common law is required and permitted by section 8(3) of the Constitution and/or section 39(2) of the Constitution.
- 4.7 In the circumstances the plaintiff's claim for general damages is bad as a matter of law.

SECOND GROUND OF EXCEPTION

- 5 In its particulars of claim, the plaintiff pleads that:
- 5.1 it is a company which carries on the business of manufacturing, marketing and distributing complementary medicines;
- 5.2 the defendant is an individual who authored an article concerning the plaintiff which was published throughout South Africa and the world; and
- 5.3 the article concerning the plaintiff is wrongful and defamatory of it.
- 6 The plaintiff accordingly claims payment of general damages of R350 000 and an order directing the defendant to procure the cessation of the publication of the article.

- 7 The plaintiff has not alleged that the defamatory statements alleged to have been made by the defendant are false.
- 8 Trading entities, including the plaintiff, are juristic persons and are accordingly not the bearers of the right to human dignity enshrined by section 10 of the Constitution.
- 9 The defendant is the bearer of the right to freedom of expression in section 16 of the Constitution, including the right to impart information or ideas in terms of section 16(1)(b) of the Constitution.
- 10 The common law is inconsistent with the Constitution, in particular section 16(1) thereof, to the extent that:
 - 10.1 it permits a trading entity to succeed in a claim for defamation in circumstances where it does not allege and prove the falsity of the defamatory statements concerned;
 - 10.2 alternatively, it permits a trading entity to succeed in a claim for defamation in circumstances where it does not allege and prove the falsity of the defamatory statements concerned and where the defamatory statements are on a matter of public interest.
- 11 The common law ought to be developed to render it consistent with the Constitution. This development of the common law is required and permitted by section 8(3) and/or section 39(2) of the Constitution.

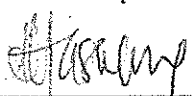
12 In view of the absence of an allegation that the statements are false, the plaintiff's claim is bad in law.

WHEREFORE the defendant prays that this exception is upheld and that the plaintiff's claim is dismissed with costs, including the costs of two counsel.

DATED and SIGNED at JOHANNESBURG on this 20th day of SEPTEMBER 2012



GILBERT MARCUS SC

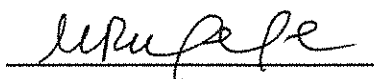


ADILA HASSIM



STEVEN BUDLENDER

Defendant's Counsel



SECTION 27

Defendant's Attorney

6th floor, Braamfontein Centre

23 Jorissen Street

Johannesburg, 2001

Ref: Umunyana Rugege

C/O CLIFFE DECKER HOFMEYR INC

11 Buitengracht Street

Cape Town

Tel: 021 405 6101

Ref: L Stansfield / 10102556