

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL 996/08

ECD 2396/08

In the matter between:

BOUDEWYN HOMBERG DE VRIES SMUTS	First Plaintiff
RIAN DU TOIT N.O.	Second Plaintiff
BOUDEWYN HOMBERG DE VRIES SMUTS N.O.	Third Plaintiff
IAN FORRESTER N.O.	Fourth Plaintiff
DOCTOR ROSS KOBUS N.O.	Fifth Plaintiff
EDWARD GUTSCHE N.O.	Sixth Plaintiff
ALBERT SCHULTZE N.O.	Seventh Plaintiff
JOHAN VAN SCHALKWYK N.O.	Eighth Plaintiff

and

NOKULUNGA MASWANA	First Defendant
<u>EASTERN CAPE PARKS BOARD</u>	<u>Second Defendant</u>

JUDGMENT – LEAVE TO APPEAL

Y EBRAHIM J:

- 1] The plaintiffs seek leave to appeal against the entire judgment of this Court,
including the order for costs, handed down on 26 July 2011.

- 2] Mr Byleveld submitted that leave to appeal should be granted as there was a reasonable prospect another Court would arrive at a different conclusion and that absolution from the instance should not have been granted. He contended that the words uttered by the first defendant *prima facie* had a non-defamatory and a defamatory meaning. There was a subjective element to the meaning of words and not only the natural or ordinary meaning was to be considered but also what they implied.
- 3] In my view, this submission overlooks the fact that the Court took account not merely of the natural or ordinary meaning of the words but also what they implied. The Court's judgment indicates that this was given proper consideration in determining the meaning of the words.¹
- 4] Then, it is so that there is a subjective element to the meaning of words. However, the determining factor in respect of wrongfulness is not the subjective element of the words. As has been stated by the authors Neethling – Potgieter – Visser, '[t]he only relevant question is whether, in the opinion of the reasonable man (person) with normal intelligence and development the reputation of the person concerned has been injured (thus an objective approach).² These submissions are without merit.
- 5] In a further submission Mr Byleveld stated that the Court over-emphasised

¹ See fn 7 in the Court's judgment quoting the portion of the judgment in *Argus Printing & Publishing Co Ltd v Esslen's Estate* 1994 (2) SA 1 (AD) where the test that is to be applied is enunciated

² *Law of Delict* (6th edition) at p 333 at 3.2.2.2. See also *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 451; *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA) at para [8] (330I-J to 331A); *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at paras [15] to [17] (378D-I to 379A-B)

the campaign launched by the Landmark Foundation to boycott farmers' products. Such a campaign, he said, was not necessarily anti-conservation.

- 6] I find no substance in the submission that the Court over-emphasised the boycott campaign. I am in agreement with Mr Buchanan that in view of the confrontational approach adopted by the Landmark Foundation – one which challenged the Parks Board to respond to the Foundation's boycott campaign – the plaintiffs could not now complain at the response this had elicited.
- 7] Mr Buchanan submitted that the plaintiffs were not challenging the statement of law set out in the Court's judgment. Moreover, as the Court had pointed out, the context in which the statement was made was all important. No criticism was being directed either at the Court's approach in determining that the words uttered by the first defendant were not defamatory.
- 8] I am not persuaded there is a reasonable prospect that another Court would reach the conclusion that the first defendant's statement exceeds the limits of freedom of expression entrenched in the constitution and goes beyond critical comment and is defamatory of the plaintiffs. I am of the view, therefore, that the application for leave to appeal falls to be dismissed.

9] Insofar as costs are concerned Mr Byleveld has not contended that costs should not follow the result if the application is unsuccessful. I can find no reason to deprive the defendants of an order for costs in their favour.

10] In the result, the plaintiffs' application for leave to appeal the judgment and costs order of this Court is dismissed with costs, inclusive of the costs of two counsel; the plaintiffs are liable jointly and severally, the one paying the other to be absolved, for the costs of the first and second defendant.

Y EBRAHIM
JUDGE OF THE HIGH COURT

23 SEPTEMBER 2011

Judgment delivered: 26 September 2011

Counsel for the plaintiffs: A Byleveld SC

Attorneys for the plaintiffs: Abdo & Abdo Attorneys

EAST LONDON

Counsel for the first and second defendants: R Buchanan SC with X S Nyangiwe

Attorneys for the defendants: Gordon McCune Attorney

KING WILLIAMS TOWN

