CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 26/94

In the matter of:

NIGEL MAURICE RHETT GARDENER **Applicant (Plaintiff)**

and

ERIC WHITAKER **Respondent (Defendant)**

Heard on: 15 November 1995

Delivered on: 15 May 1996

JUDGMENT

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[1] **KENTRIDGE AJ**: This is an application for leave to appeal against a judgment of Froneman J in the Eastern Cape Division of the Supreme Court, given on 11th November, 1994, and reported at 1995 (2) SA 672 (E); 1994 (5) BCLR 19 (E). The applicant who was at the material time the town clerk of East London, had sued the respondent, an East London city councillor, for damages in respect of an allegedly defamatory statement made during a meeting of the action committee of the City Council on 21st June 1993. Action was instituted in the same year, and came on for hearing during September, 1994. I shall refer to the parties as the plaintiff and the defendant.

[2] The facts giving rise to the action are fully set out in the judgment of Froneman J. For present purposes it is sufficient to record that the meeting had before it a report from officials of the Council, including the plaintiff and that, during the discussion of this report, the defendant quoted a passage from it and said "I want to tell you emphatically that that is a lie". The plaintiff alleged that that statement was defamatory of him. The defendant denied that the statement referred to the plaintiff, or that it was defamatory of him. In the alternative he pleaded truth and public benefit, and qualified privilege. The judge made a number of findings of fact on these issues. He found that the words complained of did refer to the plaintiff, and that they were defamatory of him. He held, however, that the defamatory statement related to a matter of public interest and was made on an occasion where open and frank discussion of such matters was called for. In the circumstances, he found, a duty rested on the defendant to speak and those present had a corresponding duty to receive his statement.[1] He referred in this regard to the well-known case of *De Waal* v *Ziervogel* 1938 AD 112 at 121-3, a leading authority on what constitutes an occasion of qualified privilege.[2] The judge further rejected a submission that the defendant was actuated by malice. In the result he granted absolution from the instance with costs.

[3] As appears from the brief summary which I have given, the pleadings, the evidence and the judge's findings were all in accordance with the well-understood principles of the law of defamation. Moreover, it appears from the judgment that the trial was conducted by both parties

[1] Judgment at 693F-G; 39D-E.

[2] He might also have referred to cases in which meetings of local authorities were held to be occasions of qualified privilege, such as *McLean* v *Murray* 1923 AD 406 and *Young* v *Kemsley and Others* 1940 AD 258.

without any reference to constitutional issues.[3] It seems that after the stage of oral argument the parties' advocates were invited to submit written argument in respect of any constitutional issues "but chose not to do so".[4] How is it in those circumstances, that the unsuccessful plaintiff applied to the judge for leave to appeal to this Court, that such leave was granted and that the present application is before us? For reasons explained in an affidavit by the applicant's attorney, the application to this Court for leave to appeal was filed only in June, 1995. It was supported by a written argument, in terms of Rule 18(g) of the Rules of this Court, in which a number of findings which the judge had made on constitutional issues were attacked. Thereafter, the President of this Court invited both parties to submit argument on whether, in relation to certain of the grounds of appeal, the court which had jurisdiction to hear the appeal was the Constitutional Court or the Appellate Division. The case was set down for oral argument on that issue, to be heard on 14th November, 1995. In the event, the applicant's legal representatives filed written argument, but informed the Registrar that there was nothing that they wished to add by way of oral argument. The respondent chose to submit no argument, written or oral.

[4] Before dealing with the question of jurisdiction it is necessary to explain how it came about that the judge made any findings on constitutional issues, and to ascertain what those findings were. At the outset of his judgment, indeed before setting out the factual background of the case, the judge stated the legal issues which, he said, arose for decision in the case. These were -

> (1) whether the provisions of the Constitution are to be applied in litigation that was pending at the time of the commencement of the Constitution;

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[3] The judge described it as "a matter conducted on traditional common-law lines" - judgment at 694B-C; 39I-J.

[4] Judgment at 692B-C; 37I-J. See also the judgment of Froneman J on the plaintiff's application for leave to appeal, 12th December 1994.

(2) whether the provisions of Chapter 3 of the Constitution dealing with fundamental rights apply to litigation between private individuals or entities;

(3) if so, whether and to what extent those provisions affect the present common law of defamation; and

(4) the effect of the conclusions reached in respect of the first three issues on the present matter.[5]

[5] The judge regarded the first issue as turning on whether or not, in the light of section 241(8) of the Constitution, pending proceedings were excluded from the operation of the Constitution. He referred to numerous conflicting decisions in provincial divisions of the Supreme Court, including some in his own division which had held that the provisions of Chapter 3 were applicable to proceedings pending at the date when the Constitution came into force. He was not prepared to hold that the decisions in his own division were incorrect, and therefore accepted that Chapter 3 did apply to pending proceedings[6], including the case before him.

[6] In relation to the second issue, which for convenience he identified as being whether Chapter 3 had "horizontal" as well as "vertical" application, he identified the relevant sections of the Constitution as sections 7, 33(2), (3) and (4), and 35(3). Having analysed these sections, and having considered the solutions offered to analogous questions in Canada, Sri Lanka, Germany and the United States, he said this -

> "From this brief comparative survey it is apparent that fundamental rights charters are primarily aimed at safeguarding the rights of individuals against the unjustified intrusion upon those rights by public organs of the State. This is apparent not only from the central position of importance of the respective charters within each system's broader constitutional structure, but also from the content of most of the protected rights and the explicit provisions in some charters restricting their application to instances involving State action. Despite this primary aim, there is an apparent need to ensure that the values inherent in the charters should permeate throughout

[5]Judgment at 675G-H; 22B-C.

[6]Judgment at 680E; 26I.

the entire legal system, albeit indirectly in most cases".[7]

Later, with specific reference to the South African Constitution he said -

> "Our constitution is also, obviously, primarily concerned with the protection of individual rights against State action. The content of most of the fundamental rights makes this apparent, as well as the thread of accountability of public institutions that runs throughout the Constitution ... . But the Constitution is also concerned that the entire legal system, including the common law and customary law, should accord with the broader values of the Constitution. Hence the general provisions of section 7, 33(2), (3), (4) and 35(3), already referred to earlier. Insofar as the common law and customary law corresponds to and extends the provisions of Chapter 3, it is not challenged (section 33(3)). Where it restricts or diminishes the rights protected in Chapter 3, it cannot survive. The courts are obliged to prevent the restriction of those rights if they are directly threatened (section 7(4)) and to adapt the common law to the broader objects of the Constitution even where they are not directly affected (sections 35 (1) and 35 (3)).
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> What all this shows, in my view, is that the "deepest norms" of the Constitution should determine whether the alleged breach of a fundamental right in private litigation involves explicit constitutional adjudication, or whether it could safely be left to the rules of the common law to evolve, implicitly, in harmony with the values of the Constitution. Approached in this manner the distinction between "vertical" and "horizontal" application loses its significance, for the extent of State involvement will not necessarily provide an answer to the issue in question. There is no uniform and single answer to the question whether an alleged breach of a fundamental right contained in Chapter 3 of the Constitution can found an action between private individuals and entitles [sic], or whether it only applies between individuals and State organs. It all depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs".[8]

Finally, on the second issue, he concluded -

> "It follows that, in my view, all aspects of the common law, including the present state of the law of defamation, should, in cases that now come before the courts, be scrutinised to decide whether they accord with the demands of the Constitution. To leave those areas of the common law which are in conflict with the Constitution unaffected would in effect, if not by intent, perpetuate aspects of an undemocratic, discriminatory and unjust past".[9]

[7] Froneman J then addressed at length the third issue, namely what impact, if any, the Constitution had on the present state of the law of defamation. His conclusion, as applied to the case before him, was that there was a clash between the fundamental right of free speech on the

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[7]Judgment at 683F-H; 29J-30B.

[8]Judgment at 684D-I; 30G-31C.

[9]Judgment at 686A-B; 32C.

one hand, and the right to reputation, as part of the fundamental right to human dignity on the other. Those rights, he said, were inherently of equal value, and it was for the court to balance the competing interests.[10] How that was to be done is explained in two passages in the judgment. The first which I regard as the key passage in this section of the judgment, (at 691C-E; 37B-C) reads -

> "It seems eminently reasonable in practical terms (and because, conceptually, justification in terms of section 33 does not arise in a matter concerning competing fundamental rights), to require that a plaintiff who seeks to rely on the precedence of one fundamental right over another should bear the onus of establishing the basis for such precedence. Having done so it may then still be possible for a defendant to defeat the claim by relying on a defence justified by a rule of law of general application, but the onus of showing that it complies with section 33 (the limitation clause) would then, in that regard, rest on the defendant."

The second passage applies the above general statement to the particular case, as follows -

> "In keeping with the approach suggested above the onus would be on the plaintiff to show, in this particular case, that the right to his good name and reputation should take precedence over the defendant's right to free speech and expression. This would involve proving the following: (1) that the statement made by the defendant referred to him, the plaintiff; (2) that the statement would have been understood as infringing his right to his reputation; and (3) that the statement is not worthy of protection as an expression of free speech. The first two requirements differ little, if at all, from the present law. It is the third requirement that may present some difference in approach. In the common law it was up to the defendant to prove the defences which relied upon freedom of expression as their basis. The Constitution has, in my view, changed that. The plaintiff now bears the onus of showing that the defendant's speech or statement is, for example, false; not in the public interest; not protected by privilege; unfair comment, and the like. Of course a plaintiff will not be restricted to these traditional considerations in attempting to prove that his or her right to a good name or reputation deserves greater protection than the particular expression of speech by the defendant. And if this initial hurdle is cleared by the plaintiff, the defendant may still defeat the claim by relying on a defence not based on any fundamental right, provided that such a defence complies with the provisions of section 33 of the Constitution".[11]

[8] Finally (the judge's fourth issue) he held that the plaintiff had failed to prove-

> "that the defendant's statement is not worthy of protection as an instance of freedom of speech or expression".[12]

He supported this finding by reference to the considerations of public interest to which I have

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[10]Judgment at 691B-C; 37A-B.

[11]Judgment at 691F-692A; 37D-H.

[12]Judgment at 693F; 39D.

referred in paragraph 2 of this judgment, and which, as I have pointed out, would support the finding that the occasion was one of qualified privilege under the common law.

[9] It is not altogether easy to discern whether, in reaching his conclusion on the constitutional issues which he himself had raised, the judge was applying section 15 of the Constitution (freedom of speech and expression) directly horizontally as between private parties, or whether he was merely having "due regard to the spirit, purport and objects" of Chapter 3, in terms of section 35(3). My impression is that he was doing the latter. He was balancing one fundamental right (dignity, including reputation) against another, (freedom of speech) and developing (or altering) a common law rule in a manner which in his opinion struck the correct balance. He did not find that there had been an infringement of one or other of the two fundamental rights, and then go on to consider whether the infringement was justifiable in terms of section 33(1). Indeed, in one passage in his judgment[13] he points out that whereas the limitation provision in Chapter 3, i.e. section 33 (1) seeks to diminish a right regarded as fundamental by the Constitution, "the same cannot be said of competing fundamental rights. They are inherently of equal value in terms of the Constitution". In another passage he puts this even more explicitly. He says -

> "It seems to me that where the alleged infringement of one fundamental right has to be determined in the context of another, competing, fundamental right, the Constitution creates no hierarchy of fundamental rights. The limitation clause (section 33) is of little help here, because by its very inclusion as a fundamental right in Chapter 3 of the Constitution, such a right already by definition complies with the requirements of section 33, namely that of being reasonable, necessary and justifiable in an open and democratic society based on freedom and equality. It can also hardly be said that one fundamental right can negate fully the content of another fundamental right".[14]

This would seem to exclude the direct horizontal application of either of the competing rights. I

[13]Judgment at 691B; 36J - 37A.

[14]Judgment at 689J-690B; 35J-36B.

do not overlook the fact that in other passages, including one quoted above[15], Froneman J re-introduces section 33(1) as applicable in some situations. I must confess that I do not find it easy to envisage the situations which the judge has in mind but, be that as it may, I remain of the view that the judge was exercising his function of developing the common law rather than attempting to give direct horizontal application to section 15 of the Constitution. He has in fact purported to fashion or perhaps to select a new principle of the law of defamation.[16]

[10] Whether or not the altered principle of law constitutes a justifiable or desirable development of the common law is, for reasons which I shall develop, not a question to be addressed in this judgment. I must nonetheless advert to what in paragraph 7, above, I have called the key passage in Froneman J's judgment on the effect of Chapter 3 on the law of defamation. In that passage, notwithstanding his findings that the fundamental rights under Chapter 3 were "inherently of equal value", he held it to be "reasonable in practical terms" that a plaintiff who sought to rely on the precedence of one fundamental right over another should "bear the onus of establishing the basis for such precedence". With all respect to the judge, whatever the practical merits of such a rule in the law of defamation (as to which I say nothing) I am bound to say that I can find nothing in Chapter 3 which remotely suggests that in the balancing of competing rights it can be of any moment whether the person asserting one of those rights is a plaintiff or a defendant. Such an arbitrary and mechanical test seems to me, on any interpretation of Chapter 3 to be alien to the objects of the Chapter.

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[15]At para 7, n11. See also the judgment at 691J-692A; 37H.

[16]Not the same, I would point out, as the one fashioned by Cameron J in *Holomisa* v *Argus Newspapers Ltd*, unreported judgment of the Witwatersrand Local Division, 14 February 1996, case number 19883/95.

[11] The way is now clear to consider the issue of jurisdiction in an appeal against the judgment of Froneman J. The application for leave to appeal to this Court was supported by an argument filed in terms of Rule 18(g)(iv) of the Rules of the Constitutional Court, in which the applicant set out the grounds on which he wished to appeal. His first ground is the following -

> 1. Chapter 3 of the Constitution was not intended to apply to litigation upon civil wrongs between private persons,
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> alternatively,
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> if the Constitution was intended to apply to such litigation, it was not intended to operate in respect of matters such as the instant case which was pending at the date upon which the Constitution came into force.

[12] In the further alternative, the applicant asserts that even if he is wrong on the first ground, the judge in any event erred in his findings on the effect of the Constitution on the action. He submits that "the effect of the provisions of the Constitution is none of the following:"

> 1.1 to create an onus upon a litigant in the position of Applicant seeking to recover damages for defamation, to show that his interest in his good name enjoys precedence over Respondent's right to free speech and expression;
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> 1.2 to create an onus upon Applicant, the discharge of which would involve Applicant proving that the statement made by the Respondent referred to him; that the statement would have been understood as infringing Applicant's right to his reputation; that Respondent's speech or statement complained of as defamatory by the Applicant was false; or not in the public interests, or not protected by privilege, or unfair comment or some like consideration;
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> 1.3 the existence of other, as yet unspecified, considerations to which Applicant in the instant action might have recourse in attempting to prove that his right to a good name or reputation deserves greater protection than the protection of freedom of speech or expression by Respondent;
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> 1.4 to provide that even in the event of Applicant discharging the onus described in paragraph 2 (above), Respondent may still defeat Applicant's claim by reliance upon a defence not based on any fundamental right provided that such defence complies with the provisions of Section 33 of the Constitution;
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> 1.5 Applicant requiring to prove that Respondent's statement concerning him was not worthy of protection as an instance of freedom of speech or expression.

[13] The grounds of appeal in paragraph 11 above obviously raise matters relating to the

interpretation and enforcement of the provisions of the Constitution. They are therefore within the jurisdiction of this Court, and are excluded from the jurisdiction of the Appellate Division. Both the issue of retrospectivity and the issue of horizontality have, however, now been dealt with by this Court in the case of *Du Plessis and Others* v *De Klerk and Another*.[17] It follows from the judgment in that case that although Froneman J was correct in his interpretation of section 241(8)[18], the right of freedom of speech under section 15 cannot be invoked as providing a defence to an action for damages founded upon a defamation uttered before the Constitution came into force.[19] The judgment and order of Froneman J nonetheless stand. As I have indicated, the judge in my view reached his decision not on a direct horizontal application of section 15, but by purporting to develop the common law, having regard *inter alia* to the values embodied in section 15 and, I emphasise, by *applying* it as so developed to the case before him. Consequently, and notwithstanding that they are couched only as alternatives to the first ground, the grounds of appeal numbered 1.1 to 1.5, above, still require to be considered. The issue of jurisdiction remains alive.

[14] The solution to the issue of jurisdiction requires consideration of the scheme of appeals laid out in Chapter 7 of the Constitution. This is a scheme distinct from the provisions for referrals, although it is also to be found in section 102. The relevant sub-sections are the following -

> (3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on

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[17]Unreported judgment of the Constitutional Court, 15 May 1996, CCT 8/95.

[18]See *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

[19]The reservation or *caveat* contained in para 20 of that judgment has no bearing on the present case.

such issues as are within its jurisdiction.

(4) An appeal shall lie to the Appellate Division against a decision of a provincial or local division in terms of subsection (3).

(5) If the Appellate Division is able to dispose of an appeal brought in terms of subsection (4), without dealing with any constitutional issue that has been raised, it shall do so.

(6) If it is necessary for the purposes of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision.

(7) The Chief Justice and the President of the Constitutional Court shall jointly make rules to facilitate the procedure for dealing with appeals in which there are both constitutional and other issues, which may provide for the constitutional issues to be referred to the Constitutional Court before or after any such appeal has been heard by the Appellate Division.

(12) Appeals arising from matters referred to in section 101(3) and which relate to issues of constitutionality shall lie to the Constitutional Court.

These provisions recognise that in many cases before the Supreme Court there will be both constitutional and other issues. In such cases any appeal will lie in the first place to the Appellate Division, subject to any rules which may be made under sub-section (7), above. The logic underlying this order of appeals appears from sub-section (5), which requires the Appellate Division, if able to do so, to dispose of an appeal before it without reference to any constitutional issue. Constitutional issues may come from the Appellate Division to this Court in terms of sub-section (6) only when *necessary* for the disposition of the appeal. This accords with the general principle which this Court has stated on more than one occasion, that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.[20] A Rule has been made under sub-section (7), which provides that in some cases the normal order in which issues on appeal are to be dealt with is to be reversed. Rule 23(3) of the Rules of the Constitutional Court provides-

[20]See *S* v Mhlungu and Others, *supra* n18 at para 59; *Zantsi* v *Council of State, Ciskei and Others* 1995 (3) SA 614 (CC); 1995 (7) BCLR 793 (CC) at para 3.

> (3) If the Chief Justice, in consultation with the President, is of the opinion that it is in the interest of justice that a constitutional issue raised in an appeal be determined before the appeal is dealt with by the Appellate Division, he or she shall make an order directing the appellant to proceed first with the appeal on the constitutional issue and to prosecute the appeal to the said Division only if it is necessary to do so after the constitutional issue has been decided and, if such an order is made, the appellant shall proceed in accordance with the provisions of rule 19.

This Rule underscores the fact that where there are both constitutional issues and other issues in a case any appeal must ordinarily first go to the Appellate Division. What must therefore be decided is whether, even if there are constitutional issues in this case, there are also other issues.

[15] I have no doubt that the action in the provincial division did raise issues other than constitutional issues. In the first place it raised issues of fact, or mixed law and fact, which could hardly be categorised as constitutional. Thus the judge had to decide and did decide whether the defendant's statement was capable of referring to the plaintiff, whether reasonable persons would so understand it, and whether persons present did so understand it[21]; whether the words were defamatory[22]; and whether the defendant was actuated by malice.[23] I note that in the application to Froneman J for leave to appeal to this Court one of the grounds on which leave was requested was that the judge had erred in rejecting the plaintiff's submission that the defendant had been actuated by malice. Froneman J himself, in his judgment on the application, held that that ground did not raise a constitutional issue "but merely a ground for an appeal of fact". A moment's consideration shows that the Appellate Division might be able to dispose of an appeal by the

[21]Dealt with in the judgment at 692E-693B; 38C-I.

[22]Dealt with at 693B-E; 38J-39C.

[23]Dealt with at 693H-694B; 39F-I.

plaintiff without dealing with any constitutional issue, as envisaged by sub-section (5). For example the Appellate Division might find that the words complained of did not refer to the plaintiff, or were not defamatory of him; or that in any event the defendant was protected by qualified privilege without need to invoke any constitutional protection or any new principle of law. Or it might find, on the other hand, that even if the principles enunciated by the judge were assumed to be correct, the defendant was on the evidence actuated by malice and therefore that his statement was "not worthy of protection". Those are all matters proper to be dealt with by the Appellate Division, and not by this Court.

[16] There is another, more fundamental, reason why the appeal, if any, in this case must go to the Appellate Division. The constitutional considerations which were canvassed by the judge led him to formulate new principles of common law, and to apply them to the case before him. In my judgment in *Du Plessis and Others v De Klerk and Another, supra* n17, I stated that the development and application of the common law and customary law is the task of the Supreme Court, including the Appellate Division. As pointed out in para 63 of that judgment "the application and development of the common law and customary law"[24] is not a matter which falls within the jurisdiction of the Constitutional Court under section 98(2) of the Constitution, and is therefore not excluded from the jurisdiction of the Appellate Division under section 101(5). The present case demonstrates why that must be so. A court which has regard to the dictates of section 35(3) does not merely develop the common law *in abstracto*: it must apply the law as found to the case before it. That is what Froneman J did. In a recent case[25] in the Witwatersrand Local

[24]The words used in section 35(3).

[25]See n16 above.

Division the judge also considered that the "spirit, purport and objects" of Chapter 3 required a reconsideration of the law of defamation. I have already remarked that his reformulation of the common law is not the same as that of Froneman J. I repeat what was said in paragraph 59 of my judgment in the *Du Plessis* case - that it is not within the powers of this Court to choose between competing versions of the common law, all of which may be consistent with the Constitution. That choice on appeal is for the Appellate Division, at least in the first place.[26] Whether this choice can be exercised on the facts of this case - a matter left open in the *Du Plessis* judgment[27], is a question which need not be decided now.

[17] In paragraph 63 of the *Du Plessis* judgment this Court's ultimate power to interpret section 35(3) and to review its application was reserved. It is unnecessary for present purposes to consider the extent of that power.

[18] It follows that the application for leave to appeal to this Court must be dismissed. The applicant may, if so advised, apply to the judge for leave to appeal to the Appellate Division, subject of course to obtaining condonation of the lateness of such application.

Order

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[26]In addition to the formulations of Froneman J and Cameron J referred to above, the Appellate Division would doubtless have before it the decision in *Potgieter en 'n Ander v Kilian* 1995 (11) BCLR 1498 (N) in which, dissenting from the judgment of Froneman J, Squires and McLaren JJ found nothing in the Constitution to require a change in the onus of proof in defamation; and also the opinion of G. Marcus in Chaskalson et al (eds), *Constitutional Law of South Africa* (1996), para 20.8.(b), that the rule in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (that a public official should have no right to sue for defamation save on proof that the statement complained of was false and that the defendant knew of, or was reckless as to, falsity) is constitutionally required to be incorporated *holus-bolus* into our law.

[27]See *Du Plessis* judgment at para 66.

[19] The application for leave to appeal is dismissed.

S KENTRIDGE
Acting Justice of the Constitutional Court

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Kentridge AJ.

Case No	**:**	**CCT 26/94**
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Instructed by	:	Bate Chubb & Dickson Inc.
Counsel for the Respondent (Defendant)	:	No appearance
Date of Hearing	**:**	**15 November 1995**
Date of Judgment	**:**	**14 May 1996**