IN THE CONSTITUTIONAL COURT OF LESOTHO

CC 11/2016

In the matter between

BASILDON PETA	APPLICANT
AND	
THE MINISTER OF LAW, CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS	FIRST RESPONDENT
ATTORNEY GENERAL	SECOND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS	THIRD RESPONDENT

JUDGMENT

CORAM	: HON. M. MAHASE J
	: HON. J.T.M. MOILOA J
	: HON. M. MOKHESI A.J
DATE OF HEARING	: 19TH FEBRUARY 2018
DATE OF JUDGMENT	: 18TH MAY 2018

CASE SUMMARY

Application to declare sections 104,102 and 101 of the Penal Code Act no.6 of 2010 inconsistent with the Constitution----Held, on account of the impugned sections' overbreadth, vagueness of the concepts used, the availability of civil remedies and the overall undesirability of criminalizing defamation, they are declared inconsistent with section 14 of the Constitution---held further that the declaration of invalidity shall operate retrospectively. Applicant awarded costs of suit.

ANNOTATIONS:

STATUTES:

Constitution of Lesotho 1993

Penal Code Act No.6 of 2010

INTERNATIONAL INSTRUMENTS:

African Charter on Human and Peoples' Rights

International Covenant on Civil and Political Rights

Universal Declaration of Human rights

United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2000

REPORTS:

Pen-International Report *"Stifling Dissent, Impeding Accountability; Criminal Laws in Africa"*

BOOKS:

Currie, I and De Waal J, *Bill of Rights Handbook* (6thEd.Juta)

CASE LAW:

Attorney General of Lesotho v 'Mopa LAC (2000-2004)

R v Sekhonyana (CRI/T/36/94)

Tlali v Litaba and Others (CIV/T/423/01)

FOREIGN JUDGMENTS:

Affordable Medicines Trust and others v Minister of Health and Another 2006 (3) SA 247 (CC)

Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232(CC)

Blindender Kunstler v Austria ECtHR Appl.No.68354/01

Dikoko v Mokhatla 2007 (1) BCLR 1(CC)

Editions Plon v France ECtHR (Appl.No.58148/00)

Independent Newspapers Holdings Ltd and others v Suliman 2004 (3) ALL SA 137 (SCA)

In Re Munhumeso and others 1995 (2) BCLR 125(25)

Irwin Toy Ltd v Quebec (AG) [1989]1 S.C.R 927

Kulis and Rzycki v Poland ECtHR Appl. No. 27209/03

Konate v Burkina Faso, African Court on Human and Peoples' Rights (2014) Appl.No 004/2013

Lingens v Austria ECtHR Judgment of 8th July 1986 Series A No.103

Mandahire and Another v Attorney General (No.CCZ2/2014)

Malone v The United kingdom Appl .No. 8691/79 Judgment of 2nd August 1984 ECtHR

National Media Ltd and others v Bogoshi 1998 (4) SA 1196 (SCA)

Nikowitz and Verlagsruppe News GMbH v Austria ECtHR Appl.No. 5266/03

Okuta and Another v Attorney General and others Petition No 397 of 2016 [2017] eKLR

Prager and Obserschlick v Austria ECtHR Appl.NO.15974/90

R v Big M. Drug Mart Ltd [1985] 1 S.C.R 295

R v Oakes (1986) 26 DLR (4th) 200 (S.C.C)

R v Nova Scotia Pharmaceuticals Society [1992] 2 S.C.R 606

R v Sekhonyana (CRI/T/36/94) Unreported

R v Zundel [1992] 2 S.C.R 731

Reizer Pharmaceuticals (PTY) Ltd v Registrar of Medicines and Another 1998 (4) SA 660 (T)

S v Hoho 2009 (1) SACR 276 (SCA)

South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)

Sunday Times v The United Kingdom Appl. No. 6538/74 Judgment of 26, April 1979

PER MOKHESI A.J

[1] *Introduction.*

Applicant is the owner and publisher of a popular weekly newspaper, the *Lesotho Times*. In the 23rd – 29th June 2016 issue of the same newspaper, he published an article headlined *"Flicker of hope for my beloved kingdom..."* This article appeared in a concomitant satirical section titled the *'Scrutator'*. The *'Scrutator'* column satirizes current affairs in Lesotho by using humor, irony and exaggeration "to expose and criticise shortcomings of an individual or society."[1]

The article in issue related to the then-Commander of the Lesotho Defence Force, Mr Tlali Kamoli. The article detailed how Mr. Kamoli in an apparent show of power and influence, ordered Ministers and the then-Prime Minister to do ridiculous and plainly absurd things. In one respect it said:

> "An interesting story had been doing rounds around Maseru, it goes like this. During one of his moody days, Tlali Kennedy Kamoli pitched up at a cabinet meeting unannounced. He then forced the chairman, Ntate Mosisili, to halt proceedings half-way through. The Premier dutifully complied.
>
> The reason for Ntate Kamoli doing all this, the story goes, was because he wanted to show who is indeed the mighty King of this country. He wanted to prove where real power resides. King Kamoli then ordered all male ministers to remove their vests and shirts and move into the grounds of State House to each perform a 100 press ups.

[1] Applicant's Founding Affidavit page 8 at para. 12

Younger cabinet members like the ever-indefatigable Selibe Mochoboroane and Joshua Setipa quickly stripped off their vests, exposing their well aligned six packs. In less than a minute Mochoboroane and Setipa had each completed their hundred (100) press (push) ups! The older members of the cabinet struggled. Ntate Mosisili could not complete in the first minute but finished in the third. Ample proof that he is still a spring chicken and fit to be Prime Minister."

[2] Barely a week later, the applicant was charged with contravening the provisions of section 104 of the Penal Code Act No.6 of 2010 read with sections 101, 102(1) and subsection (2) thereof. This section proscribes criminal defamation. The charge alleged that the applicant had published the above-mentioned article with intent to defame the then-Commander of the Lesotho Defence Force, Mr. Tlali Kamoli. While this criminal case was still pending in the Magistrates' Court, the applicant launched this constitutional challenge seeking relief in the following terms:

"1. Declaring section 104 of the Penal Code No.6 of 2010, and sections 101 and 102 which inform section 104, inconsistent with section 14 of the Constitution of Lesotho, 1993 and therefore invalid.

2. Costs of suit."

[3] *Jurisdiction.*

This application was lodged in terms of the provisions of section 22 of the constitution of Lesotho, 1993. It provides:

"(1) If any person alleges that any of the provisions of section 4 to 21 (inclusive) of this constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person

who is detained, if any other person alleges such a contravention in relation to the detained person), without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction:-

(a) to hear and determine any application made by any person in pursuance of subsection (1) and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such process and give such directions as it may consider appropriate for the enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution."

This court's jurisdiction to determine the issue raised by the applicant is not in doubt as he is facing criminal charges which charges he alleges are in breach of his freedom of expression as enshrined in section 14 of the Constitution of Lesotho, 1993.

[4] *Constitutional Provisions on Freedom of Expression.*

Section 14 of the Constitution provides that:-

"(1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, public morality or public health, or

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) for the purpose of imposing restrictions upon public officers.

(3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision, or, as the case may be, the thing done under the authority thereof does not abridge the freedom quarantined by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2) (b) or (c).

(4) Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as law may establish."

[5] Subsection (4) ordains a restorative justice to disputes resolution. It provides for an aggrieved person whose reputational interests have been injured to require a correction to be made using the same medium. By means of subsection (4) the Constitution allows the space for restorative justice which has a virtue of facilitating "interpersonal repair and restoration of social

harmony"[2] over recourse to criminal proceedings and monetary compensations. Extolling the virtues of restorative justice, Sachs J said the following:-

> "The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than doling out punishment..... And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been and continue to be underpinned by the philosophy of *ubuntu- botho*."[3]

[6] It is clear that section 14 does not confer an absolute and unconditional freedom of expression. Freedom of expression must be enjoyed without prejudicing the rights of other persons, which is why under section 14(2) the Constitution allows for promulgation of laws which may curtail freedom of expression for the sake of protecting matters itemized in that subsection which include among others, individuals' reputational interests. This model of guaranteeing a right and then providing circumstances for its curtailment is based on Article 19 of the **International Covenant on Civil and Political Rights (ICCPR).**

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[2] Sachs J in Dikoko v Mokhatla 2007 (1) BCLR 1 (CC) at para. 105

[3] Ibid at para. 114

[7] *Freedom of Press.*

Although freedom of press is not accorded a specific standalone protection under the constitution it does not follow that it is not constitutionally protected. It has always been recognized by this Court that freedom of press is constitutionally protected as a subset of an all-encompassing freedom of expression guarantee under section 14 of the Constitution. Thus, Majara J (as she then was) in ***Tlali v Litaba***[4] made the following observations regarding the freedom of press-

> "With regard to the freedom of press which finds its roots within the fundamental freedom of expression, there is a plethora of authorities wherein there is a general consensus that the media should enjoy the freedom to publish information that serves to inform the public. The press is allowed to enjoy a wider latitude especially where the subject matter involves political and / or public figures".

[8] *Freedom of expression: Its value, purpose and importance.*

Freedom of expression has two justifications, *viz*, instrumental and constitutive justifications[5]. Instrumentally, freedom of speech is "important not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us."[6] Secondly, in terms of the constitutive conception, freedom of expression is

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[4] Tlali v Litaba and Others (Civ/T/42/01) (NULL) [2004] LSHC 130 at para.6

[5] Currie, I and De Waal, J *Bill of Rights Handbook* (6th Ed. Juta) at p.339 quoting Ronald Dworkin's formulation of freedom of Expression defences or justifications

[6] Ibid

justified on the basis that "it is a constitutive feature of a just political society that government treat all its members ....as responsible moral agents."[7]

Freedom of expression serves at least the following important purposes: (1) It assists in the search for truth by individuals;(2)It fosters and encourages individuals' political decision making ;(3) It helps individuals to obtain self-fulfillment[8]. Its importance is underscored by its inclusion in international instruments[9]. Because the freedom of expression is one of the fundamental pillars of any democracy[10], by allowing the public to share information and to engage in public discourse helps to expose misdemeanors and malpractices by public officials. By virtue of the fact that there is an inherent value to the individual and society as a whole when there is diversity of ideas and opinions, freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'....[T]his freedom is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly."[11]

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[7] Ibid

[8] Irwin Toy Ltd v Quebec Attorney General [1989] 1 S.C.R 927 at p.927; see also In Re Munhumeso and Others 1995 (2) BCLR 125 (ZS) at p.130

[9] Article 9 of the African Charter on Human and Peoples' Rights; Article 19 of the Universal Declaration of Human Rights

[10] Editions Plon v France, Appl. No.58148/00 at para. 42; South African National Defence Union v Minister of Defence and Another 1999 (4) (CC) at para.7; National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA) at 1207I-1208F;Gvernment of the Republic of South Africa v Sunday Times Newspaper and Another 1995 (2) SA 221 (T) at 227H-228A

[11] Edition Plon v France ibid at para 42

[9] *Satire as a form of expression protected by section 14 of the Constitution.*

Satire as a form of artistic expression is protected by section 14 of the constitution. In its robust interrogation of the topical issues the press is allowed latitude to employ some measure of exaggeration or provocation[12]. It can rightfully be sarcastic, ironic, humorous and satirical [13]in its commentary. This can best be illustrated by the case of ***Vereinigung Blindender Kunstler v Austria where the European Court of Human Rights (ECtHR)***[14] dealt with a matter involving a group of artists which held on exhibition under the umbrella of the applicant association. Among the works exhibited was one by an artist depicting a collage of public figures, including Mother Teresa and other prominent public figures, in sexual positions. Using satirical elements, their naked bodies were painted, heads and faces were depicted showing blown up photos taken from newspapers. The eyes of some were hidden under black bars. A member of National Assembly launched the proceedings against the applicant seeking an interdict to prohibit them from exhibiting the said pictures. In addition he sought compensation as he said he was depicted in a manner that debased him. The matter served before domestic courts until it got to the ECtHR. Before the ECtHR the issue was whether the decision of the Austrian courts prohibiting the applicant association from exhibiting their works contravened Article 10 of the Convention. The court held as follows regarding the satirical depiction mentioned above:

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[12] Kulis and Rzycki v Poland ECtHR Appl. No. 27209/03 para.46; Prager and Obserschlick v Austria ECtHR Appl.No. 15974/90 at para.38

[13] Nikowitz and Verlagsgruppe News GMbH v Austria ECtHR Appl.No.5266/03 at paras 25-26

[14] ECtHR Appl. No.68354/01

"However, it must be emphasised that the painting used only photos of the heads of the persons concerned, their eyes being hidden under black bars and their bodies being painted in an unrealistic and exaggerated manner...

[T]he painting obviously did not aim to reflect or even suggest reality; .... The court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care."[15]

[10] Public figures, like the former Commander of the Lesotho Defence Force being a public figure featured in the satirical piece forming the subject matter of the proceedings which propelled the applicant to launch this application enjoys less protection and should display a high degree of tolerance to criticism. Any person, by accepting public office "inevitably and knowingly lays himself open to close scrutiny of his every word and deed.....and he must consequently display a greater degree of tolerance." [16]

[11] *Constitutional Requirements for a Valid Legislative Enactment.*

Section 14(2) of the Constitution is the source of the impugned provisions of the Act. Like every other legislative enactments it is subject to two very important constitutional constraints[17]. The first

[15] Ibid at para.33

[16] Lingens v Austria ECtHR Judgment of July 1986 Series A No. 103; see also Tlali v Litaba supra n.4 at para 6

[17] Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3 ; 2006 (3) SA 247 (CC) at para.74

constraint is that there must be rational connection between the legislation and the achievement of a legitimate government purpose. Secondly, any legislative enactment must not infringe upon constitutionally protected rights and freedoms except where such limitation is provided or allowed by the Constitution.

Section 14(2) of the Constitution provides, in relevant part, that "nothing contained in or done under the authority of ***any law*** shall be held to be inconsistent with or in contravention of this section..." (My emphasis)

Section 14(2) authorizes an abridgement of the freedom of expression to cater for the enumerated circumstances, which includes among others, protection of reputations. However, section 14(2) crucially, in terms of the concept "any law", requires that such a limitation of freedom of expression guarantee must have a legal foundation. Such a law must evince the following characteristics. Firstly, the law must be written in easy and accessible manner. It must be formulated with sufficient precision to enable the citizens to regulate their conduct accordingly[18]with reasonable certainty. The doctrine of fair notice to the citizen requires reasonable certainty in the law and not perfect lucidity[19]. The citizens must be able to foresee to a reasonable degree what the consequences of their actions might look like. Precision in formulation does not, however, mean that the law should be rigid.

[18] R v Nova Scotia Pharmaceutical Society [1992] 2 S.C.R 606 ; Sunday Times v The United Kingdom Appl. No.6538/74 judgment of 26 April 1979 at para 49

[19] Affordable Medicines Trust and Another supra at para.108

[12] The second requirement or characteristic in addition to fair notice to the citizen, is the limitation of enforcement discretion. What is required in terms of this requirements in that "it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[20]

[13] *The Wording and Ambit of the Impugned Sections of the Penal Code (hereafter 'the Act').*

When the Act was enacted it was intended to be a codification of *Roman Dutch Law* principles with modifications "where it has been thought that modification is appropriate."[21] It is therefore, important that the Act be understood in that context.

Section 104 proscribes criminal defamation in the following terms:

> "A person who, by print, writing, painting or effigy, or by any means otherwise than, solely by a gesture, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another, with intent to defame that other person, commits an offence of defamation"

'Defamatory matter' is defined in section 101 of the Act, thus:

> "'Defamatory matter' means matter likely to injure the reputation of any person by exposing him or her to hatred, contempt or ridicule, or likely to damage the

[20] Malone v The United Kingdom ECtHR Appl. No.8691/79 Judgment of 2nd August 1984 at
[21] Statement of Objects and Reasons of the Penal Code Act 2010 at p.593

person in his or her profession or trade by injury to his or her reputation, and it is immaterial whether at the time of the publication of the defamatory matter the person concerning whom the matter is published is living or dead".

Section 102 of the Act defines "publication" as follows:

"(1) A person publishes a defamatory matter if he or she causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof become known to either the person defamed or any other person.

(2) It is not necessary for defamation that a defamatory meaning should be directly or completely expressed, and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged defamation itself or from any extrinsic circumstances, or partly by the one and other means."

Section 103 of the Act provides explains publication of a defamatory matter thus:

"103. Any publication of defamatory matter concerning a person is unlawful within the meaning of this part, unless –

(a) The matter is true and it was for the public benefit that it should be published; or

(b) It is privileged on one of the grounds set out in this part."[22]

[22] Section 105 provides for cases in which publication of defamatory matter may be conditionally privileged

[14] *Is the limitation levied by the impugned provisions an unjustified impairment of the freedom of expression guaranteed under section 14 of the Constitution?*

Mr. Marcus for the applicant, contended that the applicant's freedom of expression is unjustifiably impaired by the impugned sections of the Act on the basis of their over-breadth, and more generally that the crime of defamation is constitutionally unwarranted given that a more suitable alternative of civil action for damages still exist to redress impaired reputations. He argued further that on the score that a less deleterious alternative of civil action for damages still exist proscribing defamation encroaches on the freedom of expression "to a greater extent than is necessary in a practical sense in democratic society.""

Mr. Leppan for Government, on the other hand, contended that proscribing defamation has for a long time been part of the laws of this country and, therefore, that constitutes a reasonable and justifiable limitation to the freedom of expression. He argued further that since the courts in South Africa have upheld the constitutionality of the crime of defamation, then on the strength of persuasion of those decisions, criminal defamation should be declared constitutionally compliant in the kingdom as well.

(i) *Onus and Burden of proof*

The onus of proving that an impairment of fundamental rights and freedoms guaranteed in the Constitution is justified rests on the Government[23],and

[23] R v Sekhonyana (CRI/T/36/94) (Unreported) at p.30

must be discharged "clearly and convincingly."[24]Because fundamental human rights and freedoms in the constitution "are the moral and legal norms relating to the rights of individuals and the concomitant powers of the legislature in regard thereto"[25], an unjustified abridgment of such rights and freedoms will be declared inconsistent with the constitution. When interpreting rights and freedoms a benevolent and purposive rather than a legalistic interpretation is adopted with the aim of ensuring that the purposes of the right or a guarantee are fulfilled, and that individuals' full benefits of constitutionally guaranteed rights or freedoms are secured.[26]

(ii) *Test for Impairment*

The test for determining whether any law infringes the rights and freedoms guaranteed in the constitution was articulated in ***Attorney General of Lesotho v 'Mopa***[27] (adopting the ***R v Oakes test***[28]) being whether the limitation "is reasonable and demonstrably justified in a free and democratic society." In terms of this test, the enquiry is a two-step one. Firstly, it determines the objective the limitation is designed to serve. This objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[29] Under this first step the court is required to weigh the state's interest in proscribing defamation against the applicant's right to freely express his views under section 14 of the Constitution. The

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[24] Attorney General of Lesotho v 'Mopa LAC (2000-2004) at para 34 quoting with approval S v Makoanyane 1995 (3) SA 391 at para. 1021

[25] R v Sekhonyana at 30 quoting with approval Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 at pp 556-567

[25] R v Big M. Drug Mart Ltd [1985] 1 S.C.R 295 at para. 117

[27] Supra n.24

[28] Rv Oakes [1986] 1 S.C.R at 103

[29] R v Big M Drug Mart Ltd supra n.26 p.352

interest of the state is proscribing defamation should be sourced from the objectives of the measure limiting the applicant's freedom of expression. In determining the objectives of section 104 of the Act, ".... [t]he court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision."[30]

[15] (iii) *The Objective of Proscribing Defamation and its importance*

The objective of placing section 104 in the Act is not explained in the Act. There is an explanation for retaining other crimes with the exception of criminal defamation and bigamy. *Ex facie* the impugned provisions of the Act, it is clear that they are geared at protecting reputational interests of individuals pursuant to section 14(2)(b) of the Constitution. If this is to be regarded as the purpose of section 104 can it be said that the Government has discharged its burden of establishing that the objective of protecting individuals' reputation interest is "of sufficient importance to warrant overriding a constitutionally protected right or freedom," given that it is constitutionally ordained to enact laws for protection of individuals' reputations?. In view of the fact that it is constitutionally ordained to enact laws for protecting reputations, I would, therefore, proceed on the basis that the purpose of section 104 is "of sufficient importance' to merit an abridgement of freedom of expression guaranteed under section 14 of the Constitution.

[30] R v Zundel Infra n.40 at para. 3

[16] *Proportionality*

In terms of the second step of ***R v Oakes*** enquiry, once it is determined that the purpose of the measure curtailing a right or freedom is "of sufficient importance," the enquiry must turn to establishing whether the limitation of rights or freedoms is proportionate. Proportionality test has three components to it:

(i) Firstly, the measure limiting the right or freedom must be rationally connected to achieve that purpose.

(ii) Secondly, the measure, even if rationally connected to the objective should impair "as little as possible" the right or freedom under the spotlight.

(iii)Thirdly, there must be proportionality between the effects of the measure limiting the right or freedom and the purpose which has been classified as "of sufficient importance". Dickson CJ in ***R v Oakes*** expounded on this last component as follows:

> "With respect to the third component, it is clear that the general effect of any measure impugned under section 1 will be the infringement of a right or freedoms guaranteed by the Charter; ... the inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measure which impose the limit trench upon the integral principles of free and

democratic society. Even if an objective is of sufficient importance, and the first two elements of proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."[31]

[17] (i)*Rational Connection*

I would assume without deciding that Section 104 read with sections 101, 102 and 103 are rationally connected to achieving the purpose of protecting individuals' reputations.

[18] (ii) *Minimum Impairment*

(1) *Issues of Vagueness and Overbreadth .*

Under ***R v Oakes*** the issues is over breadth and vagueness of the impugned measure are considered under the minimum impairment category. Over breadth analysis looks at the means chosen by the legislature to achieve its purpose. In this case the means chosen by the legislature to protect individual reputation interest will be examined to see if they are not sweeping in relation to the stated objective. The Court in ***Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines and Another*** *quoted with approval the Canadian Supreme Court decision in* ***R v Nova Scotia Pharmaceuticals*** [32] wherein the relationship between overbreadth and vagueness was described as follows:

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[31] Supra n.28 at p.139

[32] 1998 (4) SA 660 (T)

"Over breadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of over breadth the means are too sweeping in relation to the objective. Over- breadth analysis looks at the means chosen by the State in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the state, in pursuing a legislative objectives, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individuals' rights will have been limited for no reason. The effect of over breadth is that in some applications the law is arbitrary or disproportionate." [33]

(a) *Publication*

This section is over-broad for the following reasons. In terms of section 102(1) and (2) of the Act criminal defamation prosecution can be initiated even when no person other than the complainant became aware of the supposedly defamatory statement.. In terms of this section 102(1) the Act on top of a time-honoured test in defamation matters which is, whether "...the words tend to lower the plaintiff in the estimation of right-thinking members of society"[34]- has now added a new dimension in terms of which the statement which is heard only by the aggrieved person is considered defamatory. Secondly, in terms of section 102 (2) there is no need for a statement to be completely defamatory to be labeled as such. In my view quite clearly, the means chosen to protect the individuals' reputational interests are broader than necessary to accomplish the said objective.

[33] Ibid at p. 670

[34] Independent Newspapers Holdings Ltd and Others v Suliman infra n.35 at paras 29-30

(b) *"Public benefit"*

The concept"public benefit" is has not been explained in the Act. Anything could be characterized as not being for "public benefit" due to the elasticity of this concept. Its practical problems were highlighted in ***Independent Newspapers Holdings Ltd and Others v Sulliman***[35] where the court said:

> "That brings me to the question of public benefit or interest – a troublesome aspect of the case. The criterion allows for considerable elasticity in its application and is woefully unhelpful in failing to provide any indication of what is meant by public benefit or interest. It is true that what is interesting to the public is not necessarily the same as what it is in the public interest for the public to know but leaves unanswered how to distinguish the two. It seems obvious that what is in the public interest for the public to know may not in fact be interesting to the public and what the public finds interesting may not be in the public interest for the public to know..."[36]

In my view the concept, "public benefit", has a worrying potential of abuse by the political powers-that-be to silence legitimate criticism on its strength to cover up for their misdeeds. To limit such an important and fundamental freedom on the basis of such a vague and undefined concept seems wholly inconsistent with the intension of the Constitution to entrench freedom of expression. Although perfection in drafting legislation is not a requirement, imprecision and use of vague terms on the other hand does not enable people to reasonably foresee which of their conduct will attract criminal consequences as is the case with the use of concepts like "public benefits".

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[35] 2004 (3) ALL SA 137 (SCA)

[36] Ibid at para. 42

In my considered view the Legislature by making use of this concept as a filter to such an important freedom seems wholly unjustified. By making use of this concept the Legislature has all but granted an unfettered discretion on the prosecutorial authorities. In my view a conviction is will automatically flow from the decision to prosecute based on this concept, and this should not be countenanced. The egregious effects of unfettered prosecutorial discretion were highlighted in *R v Nova Scotia* (supra) where it was said:

> "A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. When the power to decide whether a charge will lead to conviction or acquittal normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague." [37]

The result of this vagueness, in my view, is the chilling of truth-searching and the concomitant undermining of the purposes of guaranteeing freedom of expression under section 14 of the Constitution.

(c) *"Defamatory Matter"*

Sticking out conspicuously in section 101 of the Act is the fact that it extends cover for "defamatory matter" to dead persons. Protecting reputations of dead is not without its valid justifications, but without any limiting feature built into it, this section unnecessarily limits freedom of expression as a result of its over-breadth as I will attempt to highlight below. Protecting reputations of dead persons should be time-bound. It should be appreciated that in the immediate aftermath of demise of any person, (including public

[37] Supra n.18 at para V

figures) a historical public discussion of his or her life touching on his or her reputation will in the main be an insensitive thing to do, as it places an exacting emotional strain on his or her surviving family members. In my view with the efluxion of time the sensitivity of the matters relating to the dead person recedes, with the result that by placing a not time-bound or limitless protection on reputational encroachment into the deceased falls foul of unconstitutional over-breadth. The result of this over-breadth is to bestow an unlimited enforcement discretion on the prosecuting authorities. To illustrate the vital role the efluxion of time plays post the demise, and the need to open up the space for historical discussion of the deceased public figures' life, the case of ***Editions Plon v France***[38] presents a more analogous scenario to section 101 protection of the dead. What happened in that case is that barely ten days after President François Mitterrand of France had died as a result of prostate cancer, his physician, responding to public attacks about his competency in treating the late President – published a book titled *Le Grand Secret* ("The Big Secret"). In this book sensitive details of patient-doctor relationship were laid bare. Former President's wife and children, aggrieved by this, launched an urgent application on 19 January 1996. An interim interdict was issued on 18 January 1996 by the Paris Court (Paris *Tribunal de Grande* instance) against the publisher and the physician. The interim interdict was later made final on 23 October 1996, where the applicant company was ordered to pay damages to the widow of the late President. The court on the 23 October 1996, further maintained a total ban on distribution of the book. The applicant company (publisher) appealed the

[38] Supra n.10

decision until the matter served before the European Court of Human Rights (ECtHR). In dealing with the injunction which imposed a complete ban on distributing the book after nine (9) months of the President's death, and the argument that the ban was justified, the ECtHR held as follows:

> "The court is not persuaded by such reasoning. It notes that by 23 October 1996, when the *Paris de Grande instance* gave judgment, François Mitterrand had been dead for nine and half months. Clearly, the context was no longer the same as on 18 January 1996, when the urgent – applications, judge issued the interim injunction prohibiting the distribution of ***Le Grand Secret***. The Judge issued the injunction the day after the book's publication, which itself had taken place barely ten days after President Mitterrand's death, as the court has already held, distribution of the book soon after the president's death could only have intensified the legitimate emotions of the deceased's relatives, who inherited the rights vested in him (see para. 47 above). In the court's opinion, as the President's death became far distant in time, this factor became less important. Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality. This certainly does not mean that the court considers that the requirements of historical debate may release medical practitioners from the duty of confidentiality, ...However, once the duty of confidentiality has been breached,... the passage of time must be taken into account in assessing whether such a serious measure as banning a book – a measure which in the instant case likewise general and absolute – was compatible with freedom of expression."[39]

[39] Ibid at para. 53

I am in respectful agreement with the sentiments expressed above, and in my view are applicable with equal force to the 'dead' persons protection under scrutiny.

(2) Criminalizing satire.

Under section 103(a) publication of a "defamatory matter" is unlawful unless it is true and it was for the public benefit that it should be published. This section seems to be premised on the idea that deliberate lies, exaggeration and distortion of reality cannot serve any usefulness connected to the purposes of freedom of expression. Because satire by its nature distorts and exaggerates reality, it follows that by providing that publication of a defamatory matter is unlawful provided *it is true* and for the public benefit, section 103 has the effect of implicitly criminalizing satirical expression. Satirical expression, notwithstanding the fact that it distorts and exaggerates reality, assists individuals in attaining self-fulfillment and fostering political participation. Commenting, (in a different context), on the argument that deliberate lies do not in any way contribute to furthering the values underlying guaranteeing freedom of expression, the Supreme Court of Canada ***R v Zundel*** (Mclachlin J) said the following:

> "[T]he submission presents two difficulties which are, in my view, insurmountable. The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying section 2(6) of the Charter.... The first difficulty results from the premise that deliberate lies can never have value. Exaggeration – even falsification – may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g 'cruelty to animals is increasing and must be stopped.' A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate

> the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both assertion of fact and a manifestly deliberate lie;...All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment."[40]

I respectfully agree with these views. In my view by criminalizing satire, the Act impinges upon the freedom of expression more than is necessary in a practical sense in a democratic society.

[19] (iii) *Proportionally between the effects of criminalizing defamation and its curtailment of the freedom of expression.*

(a) *Effects of Criminalizing Defamation in General.*

(i) Its deleterious effects on journalistic freedom of expression.

Criminalizing defamation has a chilling effect on journalistic freedom of expression. Fear of potential criminal sanction for reputational incursion may result in media practitioners doing what is known as self-censoring. The corollary of this self-censoring is to stop the flow of information, leaving the public less-informed about the goings-on in Government.[41]

(ii) *Civil and Criminal Remedies and their respective effects on individuals involved.*

The Respondents (Government) had argued that criminal defamation should be retained as it has always been part of our law and that it was declared not to be inconsistent with the South African Constitution in the case of *S v*

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[40] [1992] 2 S.C.R 731 at para.2

[41] PEN International Report *"Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa"* p 47 available at www.pen-international.org

Hoho[42]. In ***Hoho*** the Supreme Court of Appeal recognized that "[a] criminal sanction is indeed a more drastic remedy than civil remedy"[43] but then went on to argue that this is counterbalanced by the onerous burden of proof beyond a reasonable doubt which is a requirement in all criminal matters as against proof on the balance of probabilities in civil matters. This assertion was admirably jettisoned by Vinayak Bhardwaj and Ben Winks, in an article in the *Mail and Guardian of* 1 to 7 November 2013, when commending on ***Hoho's*** case and in the process touching on the stigmatizing effects of being charged criminally with defamation, (which was quoted with approval in ***Madanhire and Another v Attorney General***[44]). I respectfully align myself with the conclusions reached in that article as I quote extensively what was said therein to draw a distinction between civil and criminal liability:

> "Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending.
>
> For assault, imposing imprisonment or suspension is essential to protect the victims and the public at large. For damaging speech, however, the civil law is as effective, if not more so, in providing the public with proportionate protection from offenders.
>
> Crucially, freedom of expression is constitutionally enshrined and encouraged, as a life blood of democracy. The freedom to wield fists and firearms enjoys no similar status in our analogy between assault and defamation breaks down. It is an unreliable guide to finding an appropriate balance between the rights to dignity and free speech.

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[42] 2009 (1) SACR 276 (SCA)
[43] Ibid at para. 33
[44] (ZC 2/ 14)

It is also disputable that civil and criminal defamation impose equivalent limitations, and that the harsher consequences of criminal liability are neatly offset by the heavier burden of proof. There are important differences in practice and in principle. First, a prosecution targets the journalist rather than the journal. A civil suit is aimed primarily at the defendant with the deepest pockets.

Furthermore, while civil liability may be discharged within days, through payment or some other performance, criminal liability endures longer after the sentence has been served, or even if the sentence has been suspended. Criminal liability is permanent and pervasive. It brands the accused with a mark so deep and indelible, it can be expunged only by presidential pardon. It stains every sphere of that person's life. He becomes a criminal, and must disclose that every time he applies for a job, visa or even a bank account.

Even if the state does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal. These ills can barely be corrected on appeal, and thus crime could easily be used to cow courageous journalists.

It is this brand of public disapproval that criminal law rightly casts on murderers, rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are elusive and essentially subjective."[45]

[20] *International Perspective:*

Although the Supreme Court of Appeal (South Africa) held in ***Hoho*** that criminal defamation is not inconsistent with the Constitution of the Republic

[45] Ibid at p 13

of South Africa, it is important to note that a Bill was introduced into the Parliament of that country. Its aim is to repeal the offence of criminal defamation. The Bill is titled *The Judicial Matters Amendment Bill* of 2016. In its explanatory note it recognizes the chilling effect of criminal defamation law on journalistic freedom of expression. It further recognizes the harmful effect of criminal defamation laws on the freedom of expression.

[21] The African Court on Human and People's Rights (ECtHPR) handed down a landmark judgment in ***Konate v Burkina Faso Government.***[46]The Court unanimously held that the Burkina Faso government had violated ***Konate's*** freedom of expression as guaranteed by the African Charter on Human and People's Rights when they imprisoned him on the charges of criminal defamation.

[22] *International Instruments:*

In ***2010, the African Commission*** passed a resolution arguing member states to repeal criminal defamation laws. The resolution declares that:

> "Underlining that criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith;
>
> Expressing concern at the deteriorating press freedom in some parts of Africa, in particular, restrictive legislations that censor the public

[46] (2014) Appl. No.004/2013; see also the Kenyan case of Okuta and Another v Attorney General and Others, Petition No. 397 of 2016 [2017] EkLR, 6 February 2017 wherein the Kenyan High Court declared the offence of defamation unconstitutional.

rights to access information, direct attacks on journalists; their arrest and detention; physical assault and killings, due to statements or materials published against government officials;

Commending states parties to the African Charter that do not have, or have completely repealed insult and criminal defamation laws;

Calls on state parties to repeal criminal defamation or insult laws which impede freedom of speech and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments...."

[23] *The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression In 2000* advanced argument for the repeal of criminal defamation laws thus:

> "Criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations and criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction."

[24] *Conclusion.*

The foregoing discussion has brought to the fore the deleterious effects of criminal defamation in section 104 read with sections 101,102 and 103 of the Act. The means used to achieve the purpose of protecting reputation interests, in some instances, are overbroad and vague in relation to the freedom of expression guarantee in section 14 of the Constitution. Furthermore, having concluded that criminal defamation laws have a chilling effects on the freedom of expression, and that, civil remedies for reputational encroachment are more suited to redressing such reputational

harm, I have come to the conclusion that the extent of the above-mentioned sections' encroachment on the freedom of expression is "not reasonable and demonstrably justified in a free and democratic society." Having concluded thus, what remains is the relevant order that this court should make. In terms of section 22(1) (6) of the Constitution, this court "may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution". Mr. Marcus had argued that the only appropriate order in the circumstances of this case is to declare section 104 of the Act inconsistent with the Constitution and to strike it out. I am in full agreement that section 104 and its accompanying sections should be struck down altogether, this is in view of the fact that these sections are so inextricably linked, and further that, the crime of defamation has no place in our current Constitutional dispensation.

[25] *Costs:*

On the strength of ***Biowatch Trust v Registrar***[47], the applicant being a successful party against the Government, is entitled to be paid the costs of this application.

[47] Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) Paras 21-23

[26] *Order:*

In the result the following order is made

a) Section 104 of the Pena Code Act no.6 of 2010 together with sections 101, 102 and 103 of the same Act are declared inconsistent with section 14 of the Constitution and, therefore invalid.

b) This declaration of invalidity shall operate with retrospective effect.

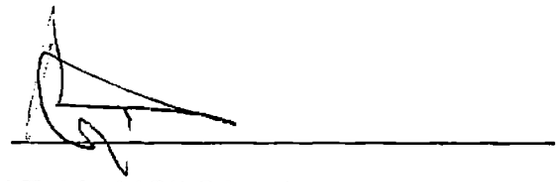
c) The applicant is awarded the costs of this application. Such costs shall include the costs consequent upon employment of two counsel where necessary.

M. A. MOKHESI A.J

I AGREE

M. MAHASE J

I AGREE



J.T. M. MOILOA J

For Applicants: Adv. Gilbert Marcus S.C assisted by Adv. Isabel Goodman

For 1st and 2nd Respondents: Adv. Nqhae

For 3rd Respondent: Adv. G. J. Leppan