

KHUMALO V HOLOMISA CASE SUMMARY

The respondent is a leader of an opposition political party and he sued an editor of a local newspaper, the applicant for publishing an article which stated that the respondent had been involved with a gang of bank robbers and was under police investigation for such involvement. The applicant contended that in consideration of the fact that the respondent did not disclose any cause of action to the particulars of the claim made by the applicant, then the defamatory statement in question was of public interest. Alternatively, because the respondent was a politician and the defamatory statement related to matters of public interest, the respondent was then obliged to allege and establish the falsity of the statement and had failed to do so. (the applicant excepted to the respondent's particulars of claim) This exception was made on two grounds: direct application of S16 which protects the right to freedom of expression and alternatively on the common law which asserts the development of itself, to promote the spirit, purport and objects of the BOR (section 39(2)).

The constitutional court considered if it had the authority to uphold the appeal made by the respondent on the grounds of section 167(6) of the constitution and rules 18,19 and 20 of the rules of the CC, it held in the affirmative.

Principles to pick from the case

The law of defamation in SA is based on the action iniuriarum, a flexible remedy arising from Roman law which afforded the right to claim damages to a person whose rights have been impaired intentionally by the unlawful act of another.

The elements of delict of defamation at common law are : (para 18 of the case)

- A) the wrongful **and**
- B) intentional
- C) publication **of**
- D) a defamatory statement
- E) concerning the plaintiff.

A defendant who wishes to escape liability for defamation must raise a defence which rebuts unlawfulness or intention.

Example: in *Bogoshi*, it was raised that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful because the publication was reasonable. In considering the reasonableness of the publication account must be taken of the **nature, extent and tone of the allegations** (Factors to determine reasonableness of the publication). (*Bogoshi* judgment)

Issues determined in the case: whether the common law of defamation unjustifiably limits the right to freedom of expression. Secondly, to the extent that the common law does not require as an element of the delict of defamation if any circumstances that a defamatory statement be false and leaves the question of truth to be raised only as a defence, it is inconsistent with the BOR as

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