

## Case Summaries

### KHUMALO V HOLOMISA

#### Facts:

- Newspaper published defamatory remarks about Holomisa
- Defence based on direct application of s16 of bill of rights or alternatively through common law by way of interpretation of s39(2) to reflect the spirit purport etc.
- Excipient claimed in his defence that unless, the respondent could prove the falsity of the statements, that the allegation/information was of public interest and therefore respondent could not be entitled to recover damages.
- Thus raising the question whether the common law of defamation was inconsistent with constitution, as publication does not necessarily have to be false in order to be actionable for defamation. Therefore limiting the press rights to freedom of expression under s16

Court: O' REGAN

#### *Horizontal Application of Section 16*

- Applicants argument that s8(1) binds all organs of state including judiciary, that s16 should therefore be directly applied in this case to the common law of defamation.
- The applicant's argument cannot succeed as s8(2) provides for natural and juristic persons to be bound to the extent that the right is applicable, taking into account the nature of the right, and nature of any duty imposed by the right"
- Given that qualification and provisions of s8(3) O' Regan went on to investigate whether or not the common law of defamation is in conflict with the constitution

#### *Is the common law inconsistent with constitution on this issue?*

- Common law defamation requires only that there is harm to fama, regardless of whether or not publication is true or not
- Therefore the onus is on defendants to prove that there was no malice in publication and that the spirit in which the information is published is not with harmful intent (dolus) even if it is in fact true
- While truth was raised as part of defence, it is not considered by the common law as a complete defence
- Objection made by applicants as unreasonable restriction on freedom of speech, as it results in undue influence of media and rights to publication.
- They proposed an onus on offended party to prove falsity of claim in order to claim defamation
- O' Regan looked to judgment of Hefer J in *National Media Ltd v Bogoshi* in which the reasonableness argument was introduced. Basically that if publication was false it could still be defensible on the basis that it was made reasonably and without malicious intent
- Therefore O' Regan found that given the import of *National Media* into the common law, that there was substantial defence afforded to the s16 rights to freedom of speech.
- She did however apply indirectly the bill of rights to the situation by looking at common law in light of s8(3) to see whether or not the common law was in need of constitutional revision. Still indirect application!

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**M Walker**



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