



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable  
Case No 0183/03

In the matter between

**DELTA MOTOR CORPORATION (PTY) LTD**

**Appellant**

and

**JACO VAN DER MERWE**

**Respondent**

Before                      Mpati DP, Brand JA, Conradie JA, Cloete JA, &  
                                    Jones AJA

Heard                      3 May 2004

Delivered                31 May 2004

**Summary:**              Refusal of interdict restraining defamation –  
wrongfulness – whether alleged defamatory statement a fair  
comment on a matter of public interest – order in paragraph 16,  
page 16.

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JUDGMENT

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Jones AJA

JONES AJA:

[1] The appellant, Delta Corporation (Pty) Ltd ('Delta') is a manufacturer of motor vehicles. Its range includes Isuzu KB 280 four-wheel drive double cab light delivery vehicles, or 'bakkies,' as they are commonly called. The respondent is the owner of an Isuzu KB 280 4 x 4 double cab bakkie which he purchased new from a Delta dealer. He maintains that his vehicle developed a bent chassis as the result of a manufacturer's defect. His negotiations to have the vehicle replaced or repaired at Delta's expense have proved futile. This is because Delta considers that the condition of the vehicle is the result of overloading, bad driving, and owner abuse. The respondent is not prepared to accept this. When his efforts to change Delta's mind were unsuccessful he resorted to sending electronic mail via the internet, attaching photographs of the vehicle and explaining to the recipients his version of what had happened to his bakkie and his dissatisfaction with the way Delta had handled his complaints. He also took to displaying his vehicle, which has an obviously bent chassis, in public places with the words 'Swakste 4 x 4 x Ver; Grondpad Knak Onderstel' emblazoned on it in large print. Delta regards this as a smear campaign against it and its product. It complains that the e-

mails and the display of the vehicle with the slogan on it amount to the publication of defamatory statements about it. The respondent says that he is merely exercising his right of freedom of expression.

[2] Things came to a head on 13 June 2002 when Delta discovered that the respondent intended displaying his bakkie, complete with the slogans on the back and side windows of the canopy, outside an exhibition of four wheel drive vehicles to be held at Kyalami, Gauteng that weekend. The exhibition was expected to attract thousands of four-by-four enthusiasts. The result was motion proceedings brought by Delta in the Pretoria High Court as a matter of urgency on the late afternoon of Friday, 14 June 2002. The court (Van der Westerhuizen J) granted a rule nisi operating as a temporary interdict, the effect of which, in summary, was to restrain the respondent from displaying a notice with the words 'Swakste 4 x 4 x Ver; Grondpad Knak Onderstel' on his Isuzu 4 x 4 bakkie in any place to which the public has access, or from publishing directly or indirectly, whether by electronic mail or otherwise, false or defamatory statements about its products, or from displaying any notice, banner or statement which contains false or defamatory statements about its products. The order was

widely framed. One of its provisions precluded the respondent from making any statement alleging that Delta's products were defective or sub-standard, which would prevent him from expressing an honest opinion even to his wife, family and close friends.

[3] On the extended return date the court (R Claassen AJ) dismissed with costs an application for a final interdict in the same terms. Delta now appeals against that dismissal, with leave from this court.

[4] A sketch of the background facts is necessary. The respondent is a four-by-four enthusiast. This was his fourth Isuzu 4 x 4 bakkie. It was manufactured on 23 January 2000, purchased from a Delta dealer on 4 April 2000, and put to use without incident for the next 12 months. When I say dealer, I should perhaps make it clear that Delta dealers sell Delta products, but they are not Delta agents and they do not bring the purchasers into a contractual relationship with the manufacturer. A purchaser's remedies for breach of contract are against the dealer and not the manufacturer. The respondent has not invoked his contractual remedies.

[5] On the version of the respondent, the respondent took his wife and three small children on a camping holiday to Namibia via Botswana and the Caprivi in April 2001. He used the bakkie and towed a trailer. On 5 January 2001, on his arrival at Kunene River Lodge about 50 kilometres from Ruacana, Namibia, he discovered that the chassis of his Isuzu had bent. This was clearly visible, the bakkie portion of the vehicle having pulled away from the cab leaving a gaping aperture. According to the respondent this must have occurred while the bakkie was being driven along the final 30-kilometre stretch of the gravel road to Kunene River Lodge because there was nothing wrong with the bakkie before he commenced that part of the trip. This version was disputed by Delta.

[6] It is common cause that on the respondent's return to Pretoria he told Delta's representatives what had happened. They inspected the vehicle on two occasions, once in Pretoria and once at the factory in Port Elizabeth. Delta ascertained from these examinations that the chassis of the bakkie had indeed bent, although it concluded that the cause was not a manufacturer's defect but the result of an abnormal impact to the chassis probably caused by driver abuse at a time when it was overloaded. In the

meantime, the respondent had arranged for an examination of his vehicle by the South African Bureau of Standards. The SABS referred the vehicle to an independent concern called Eurotype Test Centre (Pty) Ltd, who produced a report expressing the opinion that the bent chassis was probably caused by inconsistency in the thickness of its steel structure. This opinion was disputed by Delta's technical staff. They explained that the design of the chassis deliberately specified a difference in thickness at different points, and that this chassis was within normal specifications. This led to considerable correspondence between the respondent and his attorneys and Delta and its attorneys. The result was a stalemate. No compromise could be reached.

[7] Counsel made it clear during the course of argument that Delta did not rely for its relief on the dissemination of a wilful falsehood of the kind described in *Geary & Son (Pty) Ltd v Gove*<sup>1</sup>. Delta's case for a final interdict is based squarely on defamation. It must prove a clear right, an actual or imminently threatened violation of that right, and that no other remedy will give adequate protection. There was no dispute about Delta's right to its

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<sup>1</sup> 1964 (1) SA 434 (A).

commercial reputation, and it was not suggested in argument that any remedy other than an interdict would give adequate protection. The dispute is about the alleged invasion of its rights. For this Delta must establish a wrongful and intentional publication of a defamatory statement about it or its products. Unlike in the case of an injurious falsehood it does not have to prove that the defamatory statement is false. Once publication of a defamatory statement about a person is proved, the elements of wrongfulness and *animus injuriandi* are presumed, and the onus of proving that the publication was not wrongful is on the publisher.

[8] The alleged defamation is contained in the e-mail and in the words displayed on the vehicle. Photographs of the vehicle were sent with the e-mail. Copies are not attached to the affidavits, but I shall assume that they show the same words: 'Swakste 4 x 4 x Ver; Grondpad Knak Onderstel'. The first question is whether or not this was defamatory. I shall deal with the body of the e-mail first, and then with the words shown on the bakkie and in the photographs of the bakkie.

[9] The e-mail was sent via the internet to some 27 recipients. It reads:

'Subject: FW:SWAKSTE 4 X 4 X VER.

Geagte vriend

Hiermee 'n verhaal wat ek met u graag wil deel. Hierdie bakkie se onderstel het op 5 April 2001 geknak op 29 000 km en 1 jaar en 1 dag oud. Met my terugkoms het Delta gesê ek het die bakkie misbruik aangesien daar 'n duik in die uitlaat pyp is en ook krapmerke aan die agterse ewenaar van die bakkie. Hulle sê ook dat die krapmerke dui daarop dat die bakkie aan 'n abnormale impak onderhewig was - Wat ek absoluut ontken aangesien my klein kinders agter in die bakkie lê en video kyk het op 'n klein TV. Tot vandag kon ek geen milimeter vorder met Delta nie. Ek het die SABS gaan aanklop en hulle het vir my 'n verslag gegee wat sê dat hulle van mening is dat die bakkie geknak het weens oneweredige staal. Selfs die SABS se verslag het Delta geensins laat afwyk nie en die aangehegte foto's is die weg wat ek nou volg. Ek het ook gister vanaf 'n prokureur in Port Elizabeth verneem dat hulle opdrag het om 'n interdik teen my aan te vra. Ek sal natuurlik hierdie interdik ten sterkste teenstaan. Stuur hierdie epos asseblief aan soveel mense moontlik.

Groete

Jaco.'

[10] No innuendo is alleged. The test is whether a reader of ordinary intelligence might reasonably understand the words in the e-mail, in their ordinary sense, to have a meaning which reduces Delta in his or her estimation (*Argus Printing and Publishing Co Ltd*



*v Esselen's Estate*).<sup>2</sup> In my view the answer is no. Ignoring for the time being the heading 'Swakste 4 x 4 x Ver', the e-mail contains no adverse comment about Delta's product generally or about this particular vehicle. Its author relates the common cause fact that the chassis bent when the bakkie was a year and a day old and had done 29 000 kilometres. He gives Delta's view that this was because its driver had abused the vehicle, a conclusion that was reached because of marks on the exhaust and the rear suspension which led to the belief that the vehicle must have been subjected to an abnormal impact. He explains that he denies any such impact because of the presence of his small children in the back of the vehicle watching television. He then expresses dissatisfaction with the way in which Delta has handled his complaint by saying that he has made no progress whatever with them, despite a report from the SABS that the bent chassis was caused by inconsistencies in its steel structure. He comments that even this report did not bring about any change in Delta's attitude. He says that his route is now to go the way of the attached photographs, that he has been warned of an interdict and that he will resist it strenuously. He ends by asking the recipient to send his e-mail on. It is evident that the author of the document has a dispute with

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<sup>2</sup> 1994 (2) SA 1 (A) 20E – 21B.

Delta about his bakkie and that he is dissatisfied with Delta's reaction, but I can find nothing in the wording of the document which is *defamatory*. There is nothing in what is said which might induce the reasonable mind to think less of Delta or its products. It can hardly be defamatory to say that in the writer's view a vehicle made by Delta had a defect, that this conclusion was supported by a technical report, but that after an examination of its own Delta refused to agree.

[11] I turn now to the words displayed on the bakkie and on the photographs of the bakkie. The respondent makes the point that these words do not mention Delta, and that on a fair reading the phrase 'swakste 4 x 4 x ver; grondpad knak onderstel' does not refer to Delta's products in general but to his specific vehicle because, after all, it was only his vehicle whose chassis bent while being driven on a gravel road. This may be so. But the slogan is displayed on an Isuzu bakkie, a product manufactured by Delta, and in my view when it calls the vehicle the worst four-wheel drive vehicle by far, it reflects adversely not only on the particular vehicle, but on the product generally. It raises the possibility that the product is suspect or inferior because what happened to this vehicle could happen to other vehicles of the same make. In my

opinion, this is *prima facie* defamatory: a reader of ordinary intelligence might reasonably understand the words to mean that Izusu bakkies generally are the worst 4 x 4 vehicles by far since they cannot withstand normal use on gravel roads. This applies to the words painted on the bakkie, the words shown on photographs of the bakkie sent by e-mail, and the words in the heading of the e-mail.

[12] Once the statement about Delta's product is shown to be *prima facie* defamatory, the onus is on the respondent to show that publication thereof was not wrongful. The respondent seeks to do so by relying on the exercise of his right to freedom of expression. His defence is that of fair comment. There has always been tension between the right to freedom of expression, which is protected *inter alia* by the defence of fair comment, and rights to dignity, *fama*, and an unsullied reputation, which are protected by the remedies for defamation.<sup>3</sup> The Constitutional Court has held in *Khumalo and others v Holomisa*<sup>4</sup> that the principles of the common law as recently developed in *National Media Limited and others v*

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<sup>3</sup> *Crawford v Albu* 1917 AD 102; *Argus Printing & Publishing Co Ltd and others v Esselen's Estate* 1994 (2) SA 1 (A) 25 B-E; *Hix Networking Technologies v System Publishing (Pty) Ltd* 1997 (1) SA 391 (SCA), 400D – 400F; *National Media Limited and others v Bogoshi* 1998 (4) SA 1196, from 1207D; *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 21 – 28.

<sup>4</sup> Footnote 3, para 35 – 45.

*Bogoshi*<sup>5</sup> are consistent with the provisions of the Constitution and maintain a proper balance between the right to reputation and the right to freedom of expression. It remains to apply those principles to the facts.

[13] For the defence of fair comment to succeed, the respondent must prove that the statement in question was a comment or opinion and not an allegation of fact; that it was fair; that the allegations of fact commented upon were true and accurately stated; and that the comment was about a matter of public interest (*Marais v Richard en 'n ander*).<sup>6</sup> 'The use of the word "fair" . . . is not very fortunate. It does not imply that the criticism for which protection is sought must necessarily commend itself to the judgment of the Court, nor that it must be impartial or well-balanced. It merely means that such criticism must confine itself within certain prescribed limits'.<sup>7</sup> Those limits are that the comment must be a genuine expression of opinion, it must be relevant, and it may not be expressed maliciously.<sup>8</sup>

[14] The words 'swakste 4 x 4 x ver' is an expression of the respondent's opinion, based on the factual allegation 'grondpad

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<sup>5</sup> Footnote 3.

<sup>6</sup> 1981 (1) SA 1157 (A) at 1167F.

<sup>7</sup> *Crawford v Albu*, footnote 3, at 114.

<sup>8</sup> *Marais v Richard en 'n ander*, footnote 6, at 1167C – 1168C.

knak onderstel'. It is of general interest, particularly to the motoring public and four-wheel drive enthusiasts. There is a dispute about the factual allegation, which cannot be resolved on the papers. These are motion proceedings, and Delta, as applicant, could have asked for the dispute to be referred to oral evidence. It chose instead to seek final relief on the papers. This brings into play the general rule in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited*: '[W]here, in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order'.<sup>9</sup> The respondent is entitled to discharge the onus of proving the truth of the statement by calling upon the court to disregard for purposes of deciding the application Delta's evidence which is disputed, and by relying on the facts admitted and alleged by him and his witnesses (*Ngqumba v Staatspresident*<sup>10</sup>). On those facts the chassis was not subjected to any abnormal impact or unusual forces which could have caused it to bend. On the day before the chassis was

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<sup>9</sup> 1984 (3) SA 623 (AD) at 634H-I.

<sup>10</sup> 1988 (4) SA 224 (A) at 259C-263D.

bent and on the day when it bent the bakkie was inspected by the respondent and by other persons travelling the same route. Everything was in order before he started to drive along the gravel road that was to take him the last 30 kilometres between Ruacane and Kunene River Lodge. When he got to Kunene River Lodge the chassis was found to be bent. Whatever caused it to become bent must have occurred during those 30 kilometres. The evidence is that that stretch of road is not a good gravel road. It had many potholes and corrugations. But it could be negotiated by an ordinary motor-car (not necessarily a four-wheel drive vehicle) if driven carefully. The road itself was not such as to cause damage to the chassis of an ordinary vehicle, let alone a rugged four-by-four wheel drive vehicle. The respondent's vehicle was not overloaded or subjected to driver abuse, and there was no impact or bump or other occurrence which could have caused its chassis to become bent. On this version of the facts, the chassis was bent for no reason other than being driven on the gravel road. The most probable inference is that it was defective. For present purposes, these facts, upon which the comment was based, must be accepted as true.

[15] The comment 'swakste 4 x 4 x ver' is a skit on a well-known advertisement of another product, which calls itself the best 4 x 4 x far. The respondent's adaptation of it is, of course, an exaggeration. But this does not make the comment malicious or change its nature to something other than a genuine expression of opinion. There is no factual basis for concluding that the respondent was actuated by malice. In the circumstances the description of the vehicle as the worst 4 x 4 by far because its chassis bent on a gravel road is a fair comment within the meaning of that term in *Marais v Richard en 'n ander*<sup>11</sup>. Furthermore, and in so far as the comment is understood to extend to the product and not merely to the respondent's vehicle, the inference that other vehicles of the same make may present with similar problems on gravel roads arises as a logical and natural inference and cannot be regarded as unfair. It is part of the same fair comment. It is obviously not a statement of fact. The respondent has shown, for the purposes of this application, that he has not committed a wrongful invasion of Delta's rights when he displayed those words on his bakkie, or when he disseminated photographs of his bakkie with the words on it, or when he used the words as a heading for his e-mails.

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<sup>11</sup> Footnote 6.

[16] In the result Delta is not, on the facts it has alleged which are admitted by the respondent together with the facts alleged by the respondent, entitled to an interdict. The appeal is dismissed with costs, which shall include the costs of two counsel.

RJW JONES  
Acting Judge of Appeal

CONCUR

MPATI	DP
BRAND	JA
CONRADIE	JA
CLOETE	JA