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Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

A well-known politician is suing the applicants for defamation arising out of the publication of an article in the Sunday World. According to our common law of defamation, it is not necessary for a plaintiff to assert that the defamatory material was false. In this case, however, the newspaper and those responsible for the article (the applicants) asked the High Court to dismiss the claim as it was not asserted that the statements in the article were false. They argued that the common law needed to be developed in the light of the Constitution. The High Court dismissed this argument and they then approached this Court.

This Court held that to succeed the applicants needed to show that the common law rule was in breach of the Constitution. In the recent case of *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), the SCA held that besides being able to establish that the contents of a defamatory statement were true and their publication to the benefit of the public, a publisher could avoid liability for defamation where it could not prove that the statement was true but it could establish that publication was nevertheless reasonable.

The applicants relied on section 16 of the Constitution which entrenches the right to freedom of expression. The Court noted that this is an important right constitutive of democracy and individual freedom. The mass media have a particular role in the protection of freedom of expression — to ensure that individual citizens are able to receive and impart information and ideas. They are thus bearers of both constitutional rights and obligations. A further relevant constitutional issue is that of human dignity which accords value both to the personal sense of self-worth of individuals and to the public's estimation of that worth. The common law therefore needs to strike an appropriate balance between these constitutional interests.

Requiring an injured party to prove a statement to be false means that he or she may not succeed even where the publication of the defamatory statement was not reasonable. Moreover, proving the falsehood of statements may often be difficult. O'Regan J, for a unanimous Court, held that the rule the applicants contended for would not strike an appropriate balance between conflicting constitutional interests. However, she found that the defence of reasonableness developed in *Bogoshi's* case does establish an appropriate balance.

The Court accordingly held that the applicants had not shown that the common law of defamation is inconsistent with the provisions of the Constitution and therefore dismissed the appeal with costs.