REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: 40902/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

CELL C (PTY) LIMITED	First Applicant
Y CELL (PTY) LIMITED	Second Applicant
VAN ROOYEN, RIAAN	Third Applicant

And

PROKAS, GEORGE	First Respondent
EMIRA PROPERTY FUND	Second Respondent

JUDGMENT

WEINER J:

Introduction

1. The Applicants ("Cell C" and/or "Van Rooyen") apply, as a matter of urgency, for

an interim interdict pending the final determination of the relief set out in part B of the notice of motion. The terms of the interim interdict prayed for are as follows:-

1.1. calling upon the First Respondent ("Prokas") alternatively the Second Respondent ("Emira") to remove the large banner erected on the outer wall of the "World Wear Mall" on the corner of Beyers Naude Avenue and Wilson Avenue in Fairlands, Johannesburg, displaying the trademark and colours of Cell C ("the original banner") within two hours of this order being granted;

1.2. interdicting and restraining Prokas and/or Emira from publishing defamatory statements of and concerning any one of the Respondents;

1.3. directing and authorising the Deputy Sheriff to remove the banner in the event that Prokas and/or Emira fail to do so within the time period stipulated above; and

1.4. interdicting and restraining Prokas and/or Emira from publishing the personal cell phone details of Van Rooyen.

Agreed Facts

2. The parties agreed to certain facts which they submitted to the court.

2.1. The original banner contains the Cell C trademark; in small print, the words "perceived by the owner of this billboard to be" and in larger print "the most useless service provider in SA as experienced by Cell C Sandton City". Underneath are the words, "Cell C's Van Rooyen franchise manager" and his cell number and the words "his

unnamed executive head refuses to assist the customer".

2.2. Prokas later effected certain alterations to the banner ("the second banner"). The way in which the second banner differs from the original banner is that the colours and circle around the second "C" of Cell C have been removed, as has the "TM" designating the trademark. In addition, the words "perceived by the owner of this billboard to be", have increased in size. Other than that, the second banner appears to be the same as the original banner.

2.3. At an unknown time and overnight on 11 or 12 of November the banner inscription was again altered. After this alteration, it reads "Cell C, perceived by the owner of this billboard to be the most useFULL service provider in SA. As experienced via Cell C Sandton City. WE LOVE CELL C." The alteration was affected in an amateurish fashion, by hand. Prokas states that the alteration was not affected at his instance and Cell C states that it was not affected at its instance.

2.4. Prokas has said that if the interdict is not granted, he intends to display the banner as it was prior to the amateurish alteration (i.e. as appears in the second banner referred to in 2.2 above). However he will not mention Van Rooyen's name or cell number on the banner. The relevant portion will read, "Cell C's Franchise Manager says his unnamed executive head refuses to assist the customer!!" Prokas states that the removal of Van Rooyen's name and cell number will be done solely for the purpose of avoiding controversy on this aspect and is not to be construed as a concession by him that he was not entitled to included Van Rooyen's name and cell number as

per the original banner.

3. It is common cause that the original banner was erected by Prokas at approximately 4pm on 6 of November 2014. Cell C alleges that Emira was the owner of the mall. It now appears that Emira is not the owner of the mall but merely a lessee. However nothing turns on this and Emira has agreed to be bound by the court order. Reference below to the Applicant refers to Prokas.

4. Cell C alleges that the banner is unlawful. Firstly, it was erected in contravention of certain bylaws of the Municipality; secondly it is wrongful and defamatory of Cell C and published with the intention of defaming Cell C and causing harm to its reputation; thirdly that the publication of Mr Van Rooyen's cell phone number, without his permission, is an unlawful violation of his privacy, which has caused, and continues to cause, harm to his right to privacy.

Background

5. Cell C sets out a brief background to the reason for the application. In so far as this is disputed by Prokas in the answering affidavit, I will attempt to find a middle path between those versions so that the court is put into a position of assessing, as clearly as is possible, the factual background, before the original banner was erected. However, as will appear below, most of the material facts are not in dispute.

6. In August 2013, Prokas took his daughters' cellphone to Cell C Sandton because it had ceased to operate after a few months. His wife and daughter made a number of visits to Cell C Sandton to enquire on the progress of the repair. They received no satisfactory information. After a

considerable period had lapsed, Prokas went to Cell C Sandton and spoke to one Nerran Chetty, the Manager ("Chetty"). Prokas could not recall the date of his visit, but he pointed out to Chetty that the phone had been brought in a considerable period beforehand and he asked where it was. Chetty replied that he would revert on the following Monday. Chetty did not do so.

7. Prokas then made a number of attempts to contact Chetty by telephone, all of which were unsuccessful. He was advised by the person answering the phone that Chetty was engaged with a customer or unavailable for another reason. He left messages and Chetty did not return his calls.

8. About 6 months after the phone was handed in, Prokas was advised that it had been repaired and was available for collection. He went to Sandton Cell C and was handed a phone, which he did not recognise. This one bore signs of physical damage as the screen was cracked. He informed the employees that this was not the condition of the phone when he handed it in, and that the phone also did not work as it did not turn on. He declined to accept delivery of the phone. He informed Chetty that the phone should be replaced or the contract cancelled. He told Chetty he could not be expected to pay for a phone that he did not have and, that if the problem was not resolved, he was going to stop paying. According to Prokas, Chetty laughed and said that he had signed a contract and was obliged to pay. Prokas was incensed by this answer and the attitude and could not understand why he was expected to pay in circumstances where he did not have the phone and where Cell C had failed to attend to the repair of the phone.

9. In August 2014, the phone had still not been returned and Prokas hadn't heard anything further from Cell C. He accordingly acquired another phone for his daughter on contract from another cell phone provider. He continued to effect all payments in respect of the contract for a phone which he had purchased for his son from Cell C. It then came to his attention that the number which had been allocated to his daughter's phone, which he believed was still in the possession of Cell C, was active and being used by a complete stranger, one Mfundo Ndaba. He was still being billed for the phone usage. He accordingly stopped paying.

10. In about September 2014, Prokas sought to purchase a car for his wife and found that his application for finance had been declined because of a listing on the credit bureau, ITC, which reflected him as a bad payer, arising out of non-payment to Cell C of R5,754,00. Prokas asked his secretary, Ms Cameron ("Cameron"), to lodge a complaint with Cell C. She tried but was told that only the account holder could do so. She was advised that someone from Cell C would phone back, but no one did.

11. In the time that he has been able to draft his answering affidavit, Prokas has located certain communications which he annexes to his affidavit. As appears therefrom:-

    11.1. In mid-September 2014, he spoke with one Tumiso Motsepe ("Motsepe") of Cell C's legal department concerning the listing on the ITC. Motsepe advised that she would revert by the Friday 19 September which she did not do. On Monday 22 September 2014, Prokas attempted to contact her at the number he had been provided with, but the line remained engaged. He sent an e-mail to Cell C's customer services department recording this and asking

how else he could contact the legal department.

11.2. On 25 September 2014, he received a call from Cell C. He asked to be transferred to Motsepe and also asked for a contact number. The caller furnished him with a telephone number and then attempted to transfer the call to Motsepe, but the line went dead.

11.3. Cameron, repeatedly dialled the contact number which the caller had supplied, but it was always engaged. When she finally obtained a ringing tone, the phone rang incessantly until it cut off. Prokas described these instances in an e-mail to Cell C on 25 September 2014.

11.4. On 7 October 2014, Cell C's "escalated queries department" advised Prokas that the account had been handed over to a debt collection agency. He had previously asked on various occasions for a copy of the contract which had been signed because he could not believe that he was required to effect payment in circumstances where he did not have the phone, which was apparently still being repaired, and was being used by someone else.

11.5. He sent an e-mail with this repeated request on 10 October 2014.

11.6. On 13 October 2014, Cell C Sandton replied that they were awaiting feedback from Head Office, but they hoped to revert to him before close of business and they hoped to resolve the matter by the end of the week. On the following day, a further e-mail was sent to Cell C by Prokas, and the response was that they were still awaiting feedback.

11.7. On 14 October 2014, Cameron sent an e-mail to Chetty

requesting him to advise Cell C to remove the default listing at the ITC Credit Bureau until such time as Cell C could provide the signed contract.

11.8. On 15 October 2014, Cameron sent a further email. She stated that on Cell C's own version, a certain handset was returned, not-repaired. Cell C alleged that this device was collected by the client after having been notified by the store. This according to Cell C occurred in Rosebank. According to Prokas, he has never had any dealings with Cell C Rosebank; he never took the phone there nor did he/his wife or daughter collect it from there.

11.9. Cell C referred Prokas to the serial number of the phone which had been collected. It was not the serial number that was applicable to his daughter's phone or the phone that had been handed in at Sandton.

11.10. On 14 October 2014, Cell C represented by one Candy Gordon ("Gordon") informed Prokas that, according to their records, the phone that was booked in at Cell C's Rosebank store, was repaired and handed back to him. Again he disputed that this ever happened.

11.11. He then had several conversations with one Ismail Ravid ("Ravid"), who he thought was the owner of Cell C Sandton and voiced his dissatisfaction.

11.12. On 23 October 2014, Cameron, on Prokas' behalf, sent an e-mail to Customer Service at Cell C, to the Cell C store at Sandton City and to seven other individuals who represent Cell C and/or Sandton

City. In this e-mail, she advised that Prokas would erect a banner unless, by 5pm on 24 October 2014, Cell C attended to and resolved his problems. A copy of the banner that he intended to erect was attached to that e-mail. The email read as follows:

> "Hello everyone.
>
> We are not getting anywhere with Cell C, no contract supplied, no proof of anything supplied.
>
> We're not getting anywhere with Sandton Cell C store - outright refusal to supply store owner's name and contact details.
>
> We're not getting anywhere with Sandton City Centre Management - no response to the request for their tenant's name and contact details.
>
> My boss has a great sense of humour though so …. if there is no resolution to the problem BY CLOSE OF BUSINESS (17:00) TOMORROW, we're going ahead with the production and installation of a rather large banner at a rather busy intersection on the corner of Beyers Naude Driver and Wilson Street in Fairland.
>
> **The attachment shows the proof of what we are about to amend and approve**…" [emphasis added]

11.13. It is common cause that attached to the email was a copy of a banner, which was in a slightly different form to the original banner erected later. It did not contain the words "in the opinion of the owner of the billboard" or "perceived by the owner of this billboard". It simply said "Cell C was the most useless service provider in South Africa as experienced by Cell C Sandton". It did not have the franchise Manager's name and number. Cell C was certainly put on notice that unless Prokas' problems were dealt with he was going to erect a banner, which had the potential to show Cell C in a negative

light.

11.14. On 24 October, 2014, Prokas received an e-mail from Gordon of Cell C advising that Cell C undertook to procure the removal of the ITC listing by no later than 27 October 2014, and to expunge the amount owing of R5,754. The relevant persons at Cell C regarding the query were copied on the email. Gordon stated "On behalf of Cell C Sandton, we the franchisee, would like to express our sincerest apologies for all the inconvenience caused to Mr Prokas and hopefully will be given a chance to rectify the business relationship lost as we do value him as a loyal customer..."

12. If sanity had continued to prevail, the matter would have ended there. However, Cell C failed to comply with the undertaking and Prokas remained listed as a bad payer on ITC. On 28 October 2014, he ascertained that he was still listed as a bad payer on ITC. He immediately phoned Ravid and pointed this out. Ravid advised Prokas that Cell C had reversed its undertaking. He stated the matter was out of his hands and that he should speak to the franchise Manager, Van Rooyen. He gave him his cell phone number.

13. Prokas telephoned Van Rooyen, identified himself to him and enquired why Cell C had reneged on its undertaking.

14. Van Rooyen stated that his executive head had ruled that the ITC listing would only be removed if he paid the sum of R5,754. Prokas attempted unsuccessfully to obtain the number of the executive head and he admits that he used intemperate language in his frustration.

15. On 6 November 2014 at approximately 4pm, Prokas caused the original

banner to be erected as he believed Cell C was not assisting him meaningfully, and he had exhausted all other options.

16. The original banner that was erected read as follows: "***Cell C***; in small print the words "***perceived by the owner of this billboard to be***" and in larger print "***the most useless service provider in SA as experienced by Cell C Sandton City***" Underneath were the words, "***Cell C's Van Rooyen franchise manager***" and his cell number and the words "***his unnamed executive head refuses to assist the customer***".

17. Prokas believed that he was entitled to express this opinion. He states that, in this day and age, social media are replete with opinions both positive and negative of various service providers. He had however, used an old fashioned medium to express his right to freedom of speech and freedom of expression.

18. Cell C, in seeking the relief that they do, state that the erection of the banner is unlawful and that Cell C and Van Rooyen have been defamed and their right to reputation has been, and continues to be, infringed.

Urgency: Rules and Practice Manual

19. The first issue that needs to be decided is whether or not Cell C was entitled to enrol the matter in the manner in which it did. The rules of this court and the relevant practice directives in so far as applications of an urgent nature are concerned are clear and precise.

20. Cell C launched this application on 7 November 2014. It was served on Prokas and Emira at approximately 16h30 on the same day. They were directed to deliver an answering affidavit by no later than 4:30 on Friday 7 November. The matter was set down for 17h00 on Friday 7 November

2014.

21. It is not clear whether or not the Judge dealing with urgent applications on Friday 7 November 2014 would not entertain the matter, at that point, or whether Cell C decided to rather set it down for Monday 10 November 2014, at 10:00.

22. When the matter was called at 10:00 on Monday 10 November, 2014, Cell C's counsel asked for the matter to stand down until Wednesday 12 November at 10:00, as a supplementary affidavit was to be filed. In addition, they were expecting opposition from Prokas.

23. The opposition came in the way of the answering affidavit filed by Prokas on November 12 2014.

24. The Rules of Court and Practice Manual are clear. If a matter is not set down the previous Thursday for the following Tuesday at 10:00, the circumstances surrounding such deviation from the rules, and the reasons for such urgency, must be set out in detail. The court must be advised why it is so urgent that the matter cannot be placed on the ordinary motion court roll, alternatively, timeously on the urgent roll.

25. The way in which Cell C has seen fit to bring the matter to court on less than one hour's notice, requiring Prokas to deliver an affidavit within half an hour is simply an abuse of the rules of this court.

26. More particularly, Cell C had been informed by Prokas on 23 October 2014, that if the matter was not resolved, the banner was going to be erected the following day. The copy of the banner which was sent to Cell C (via the email) is, in some ways, more serious than the banner which was eventually put up, because it does not contain the words that the

information on the banner is the opinion of Prokas. As it stood (at the time the email was sent), it might very well have been defamatory, without the material words later inserted.

27. Despite this, Cell C ignored the warning given to them on 23 October. Cell C later attempted to resolve the matter when they offered an undertaking to Prokas on 24 October, to withdraw the ITC listing and waive the payment. However, they failed to comply with that undertaking, and then reneged on the undertaking on the advice of their executive head.

28. In my view, if Cell C had any right to bring the application urgently, it could have done so after it received the e-mail of 23 October 2014, attaching the banner that was to be erected unless the matter was resolved, alternatively immediately that it reneged on its undertaking.

29. As it now appears the original banner has been up for several days. It has appeared in various forms in the media and the damage has already been done.

30. I therefore find that the application was not urgent, alternatively, the urgency was self-created. On that ground alone, the application should be struck off the roll.

Ongoing Damage

31. Mr Whitcutt for Cell C, however, contended that there is ongoing damage and ongoing harm that needs to be stopped. That may very well be so, if Cell C has the rights which it claims, to support the relief it seeks. The issue of Van Rooyen's right to privacy need not be dealt with, as the second banner does not mention his name or cell phone number.

32. In order to deal with Mr Whitcutts' submissions, it is necessary to traverse the merits of the matter.

The Merits: Defamation/Interdict

33. Cell C contends that a defamation has taken place, that it is *prima facie* unlawful and that Prokas has failed to show that he was justified in making the statements which he did.

34. From the authorities dealing with defamation and the requisites for an interdict, the rights which Cell C seeks to protect, and which they allege are being infringed by Prokas include:

    1. The right not to be defamed;

    2. The right, in respect of Van Rooyen, to privacy and dignity; and

    3. The right to prevent the unlawful contravention of bylaws.

35. In regard to the latter proposition, it is not for Cell C to state that Prokas is breaching bylaws. This is for the relevant Municipality, if it believes it has reason to do so. This aspect was not pursued seriously by Cell C.

36. The delict of defamation is the unlawful publication *animus iniuriandi* of a defamatory statement concerning the plaintiff. The statement is defamatory if it has the effect of injuring a plaintiff's reputation. The onus is dealt with in the following manner: since defamation is aimed at the protection of a person's reputation, that is the public estimation of the worth of a person, it is an essential element of the delict that the defamatory statement be published or disclosed to third parties.[1] Publication is presumed if a

[1] Neethling, Potgieter and Visser, The Law of Delict, 5th Edition, p307.

document or a statement has been distributed to the public.[2]

37. It is common cause that Prokas made the statement and that it has been in the public domain.

38. Whether the statement is *per se* defamatory or defamatory in its ordinary meaning, involves a two stage enquiry- 1) the ordinary meaning of the statement must be ascertained; and 2) once the ordinary meaning has been ascertained, it must be determined whether that meaning is defamatory.[3]

39. At the first stage, an objective test is applied when determining the ordinary meaning of a statement.[4] The test entails determining what meaning a reasonable reader of ordinary intelligence would attribute to the statement in its context.[5]

40. At the second stage, the meaning which should be ascribed to a statement is considered. As was set out in Simm v Stretch[6]:

> "*…a statement is defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally*"

41. A right thinking member of society has been held to be a reasonable person of normal understanding and development and "society should be understood to mean a respectable section of the community".[7]

42. For the purposes of the application for interim relief, Cell C contends that, once it has established that Prokas has published his statement

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[2] LAWSA, vol7, p233, para236
[3] Sindani v Van der Merwe 2002 (2) SA 32 (SCA) at 36B-C
[4] Crawford v Albu 1917 AD 102 119
[5] Sindani v Van der Merwe supra
[6] 1936(2) All England LR 1237 HL 1240
[7] LAWSA, vol7, p235, para237

concerning Cell C, two rebuttable presumptions of fact arise, namely, that the publication was wrongful, (that is there is presumption of unlawfulness) and that the defendant acted with *animus iniuriandi,* (that is that there is a presumption of intent).

43. Once these presumptions arise, the onus rests on Prokas to rebut them. It has become settled that wrongfulness and fault are separate elements of a delict. In the case of defamation, the presumption of wrongfulness can be rebutted by justification. The presumption of *animus iniuriandi* can be rebutted by showing that Prokas did not intend to injure Cell C's reputation.

44. To rebut the presumption of unlawfulness, it was decided in Neethling v Du Preez; Neethling v The Weekly Mail[8] that the defendant bears the full onus of proof.

45. As to a defence excluding *animus iniuriandi* or fault, the position appears to be less clear. In Suid-Afrikaanse Uitsaai Korporasie v O'Malley [9] it was held that the intention to defame places only an evidentiary burden on the defendant. Cell C contends that there appears to be some doubt, however, whether the differentiation between unlawfulness and fault as far as the onus is concerned can be justified, and whether O'Malley's decision has survived subsequent developments. It is not however, necessary, at this stage, for the court to resolve this question.

46. Prokas must also show that the statements relate to a matter of public interest. Service providers are there to "provide" a "service" to members of the public. In my view, Prokas was treated abusively and received no service from his "service provider". On the contrary, he was pushed from

[8] 1994(1) SA 708A
[9] 1977(3) SA 394A, 401 - 403

pillar to post for over a year. To add insult to injury, he was charged for calls being made by a stranger, on a phone in the possession of Cell C.

47. Cell C and Van Rooyen contend that they have a clear right not to be defamed. They submit that the statements are per se defamatory, in that statements of this nature tend to lower Cell C and Van Rooyen in the estimation of right thinking members of society generally. Cell C contends that accordingly they have established that Prokas has published defamatory statements and as a result the two rebuttable presumptions of unlawfulness and presumption of intent arise.

48. Cell C states that Prokas might rebut these presumptions in due course. This can be dealt with in the fullness of time, but, in the interim, the banner must be removed and until Prokas discharges his onus, the balance of convenience, considered carefully, will favour the removal of the banner.

49. On the papers before me, Prokas does not need time to discharge his onus. In my view, he has discharged the onus on the papers as they appear, having regard, *inter alia*, to the fact that Cell C chose not to reply. In effect, it doesn't appear from the correspondence between the parties that there is much in in Prokas' version that can be disputed.

50. In regard to the grounds of justification and more particularly the defence of fair comment or protected comment, in Citizen (1978) (Pty) Ltd v McBride [10] the Constitutional Court held that the defence protects criticism, comments or expressions of opinion on facts which are true, and which relate to matters of public interest, and if they are such that any fair man might make them on those facts.

[10] 2011 (4) SA 191 CC, 217E-F, [80]

51. To establish this defence, a defendant has to show that:

    1. The statements in question were comment or opinion;

    2. they were fair;

    3. the facts that the comments were based on were true; and

    4. the comments related to a matter of public interest.[11]

Comment or Opinion

52. In order to establish this defence, Prokas must show that the statements in question were comment or opinion. The statement that was put on the banner is that "*it is the opinion*" of the person erecting the banner, and "*is perceived by the owner*" of the banner that Cell C's service is "*useless*". This is an indication that the statement is the opinion of the owner of the billboard, Prokas.

Fair Comment

52. The question is then, whether the comments were fair. In regard to what is fair comment, Justice Cameron set out in McBride[12] the following:

> *"Nearly a century ago, in the judgment that firmly authenticated the defence in South African law (in regard to comments being fair), Innes CJ remarked that the use of the term fair to describe the defence is not very fortunate. He was right, as he explained the criticism sought to be protected need not commend itself to the court, nor need it be impartial or well balanced. In fact, fair in the defence, means merely that the opinion must be one that a* ***fair person, however extreme, might honestly hold even if the views are extravagant, exaggerated or even prejudiced****. The comment need be fair only in the sense*

[11] Supra at 217E-F, [80]
[12] Supra at 217, [81]

*that **objectively speaking it qualifies as an honest, genuine**, though possibly exaggerated and prejudiced expression of opinion **relevant to the facts upon which it was based and not disclosing malice**."* [emphasis added]

53. Cameron went on to state[13]:

"Protected comment need thus not be fair or just at all in any sense in which these terms are commonly understood. Criticism is protected even if it is extreme, unjust, unbalanced, exaggerated and prejudiced so long as it expresses an honestly held opinion without malice on a matter of public interest on facts that are true. In the succinct words of Innes CJ "the defendant must justify the facts, but he need not justify the comment".

54. As was stated by Cameron J, relying on Innes CJ's comments, all that is required in this regard is that Prokas must have held this "as an honestly held opinion without malice". The criticism need not be one that the court accepts. It does not have to be impartial or well balanced. It only needs to be fair in the sense that Prokas held it as an honest, genuine expression of his opinion. It seems clear from the facts in this matter that Prokas has established that the facts forming the basis of the comments led him to hold his honest and genuine opinion. In addition, they were fair (as defined by Cameron J in McBride supra).

55. Cell C chose not to file a replying affidavit. Although the well-known *ratio* in Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd[14] is not applicable in a matter where an interim interdict is being sought, it has some bearing when allegations remain unanswered. The Respondent's factual version as to what happened and how he got to the point where he felt his only way of dealing with his problem was to erect the banner,

[13] Supra at 217, [83]
[14] 1984 (3) SA 623 (A)

appear to be common cause. In his view, the service that he received was paltry and he believed that what he describes as a useless service provider was true.

56. Reference was made by Cell C to the case of Delta Motor Corporation Propriety Ltd and Jaco Van Der Merwe[15]. In that matter the Respondent ("Van Der Merwe"), who had bad service from Delta Motor Corporation, put a sign on his car with the words "*swakste* 4x4 by far", meaning the worst 4x4 by far. Underneath in blazoned enlarged print he put the words "as a result of a manufacturer's defect"… "a bent chassis".

57. Delta regarded this as a smear campaign against its product and it brought an application for an interdict. An interim interdict was granted in the lower court. It doesn't appear from the judgment in the SCA what the basis was for the grant of the interim order. The principle, however, that Cell C wishes to rely on in relation to the present case, is that in the present case, insufficient facts were placed on the banner, and that without such facts, the defence is unjustified.

58. As was held at paragraph [12] of the Delta case[16], once the statement by Van Der Merwe was shown to be *prima facie* defamatory, the onus was on him to show that publication thereof was not wrongful. He sought to do so by relying on the exercise of his right to freedom of expression. His defence was that of fair comment.

59. On the facts in the Delta case, the court found that Van Der Merwe's adaptation of the words "the worst 4x4 by far" (which was based upon the advertisement that Land Rover was the best 4x4 by far) was based on an

[15] 2004 4 ALL SA 365 (SCA)
[16] Ibid

exaggeration, but this did not make the comment malicious or change its nature to something other than a genuine expression of opinion. There was no factual basis to presume that the Respondent was actuated by malice. It was accordingly held that the description of the vehicle as the worst 4x4 by far because its chassis bent on a gravel road, was fair comment within the meaning of that term[17].

60. The court in Delta[18] reiterated that the limits of such criticism are only that the comment must be a genuine expression of opinion, it must be relevant and it may not be expressed maliciously. The words, "worst 4x4 by far", were held by the SCA to be, in the Delta case, an expression of Van Der Merwe's opinion based on the factual allegation, "grondpad knak onderstel". It was also found to be of general interest, particularly to the motoring public and 4 wheel driving enthusiasts.

61. Cell C attempted to distinguish the Delta case by submitting that in that case, Van Der Merwe had set out the facts upon which his opinion was based, whereas this has not happened in this case.

62. The present case deals with the provision of services and whether or not Prokas could be assisted when he sought to obtain service and assistance. The facts, in his opinion, are that the service was of absolutely no assistance, and therefore useless to him. That was his experience at Cell C. One of the reasons was that the executive head refused to assist the customer. He does not have to state every detail as to why he arrived at his opinion. There is sufficient information on the banner to show that, it is his opinion, it is fair comment, it is not malicious and his opinion is based on sufficient facts, which in his view are true. He is permitted to

[17] See also Marais v Richard en 'n Ander 1981 (1) SA 1157 (A).
[18] Ibid

express such opinion in order to get his message across.

Public Interest

63. As was held in the Delta case, the comments made were, as in this case, in the public interest particularly to the users of cell-phones. If the service is so inadequate that it does not render any assistance to a customer, but on the contrary, frustrates and abuses the customer, it is in the public interest that such facts be published and disseminated to the public.

Defamation v Freedom Of Expression

64. There has been much tension between the right to freedom of expression which is protected, *inter alia*, by the defence of fair comment and the rights to dignity, fama and an unsullied reputation, which are protected by the remedies for defamation.

65. The Constitutional Court has held in Khumalo and others v Hollomisa[19] that the principles of the Common Law as recently developed in National Media Limited and others v Bogoshi[20] are consistent with the provisions of the Constitution. They maintain a proper balance between the right to reputation and the right to freedom of expression. "*The common law requires a defendant to establish, once a plaintiff has proved the publication of a defamatory statement affecting the plaintiff, that the publication was lawful because the contents of the statement were true and in the public benefit*"[21] O'Regan J[22] goes on to say: "*Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in Bogoshi's case, a proper application of*

[19] 2002 (5) SA 401 CC at [21] to [28]
[20] 1998 (4) SA 1196 at 1207ff
[21] Khumalo v Holomisa at [37] F-G
[22] Supra at [42] B

constitutional principle would have indeed required the development of our common law to avoid this result". O'Regan J states further "However, the defence of reasonableness developed in that case does avoid a zero-sum result and strikes a balance between the constitutional interests of plaintiffs and defendants. It permits a publisher who can establish truth in the public benefit to do so and avoid liability"[23]

66. In my view, Prokas' defence of fair comment must succeed. Cell C has failed to show that it has any right to the relief that it seeks even on an interim basis. Prokas has discharged the onus of showing that the statements were justified. In the premises, the following order is made:-

The application is dismissed with costs including the costs consequent upon the employment of two counsel.

WEINER J

Counsel for Applicant:	C. Whitcutt
Applicant's Attorneys:	Webber Wentzel
Counsel for Respondent:	S. Symon
1st Respondent's Attorneys:	Raymond Druker Attorneys
Date of Hearing:	10 November 2014
Date of Judgment:	13 November 2014

[23] Supra at [43] C