

Nebraskan defamation law to be challenged under the South African Constitution

The recent decision of the Eastern Cape High Court in Grahamstown (South Africa) in *Burchell v Anglin* 2010 3 SA 48 (ECG) deals with cross-border defamation in a commercial context. The plaintiff (who runs a game reserve and a hunting safari business in the vicinity of Grahamstown) alleged that the defendant made defamatory statements about him to a booking agent in Sydney, Nebraska (USA). Most of his safari clients originated from this agent. However, the bookings suddenly and dramatically decreased and, according to the plaintiff, this was due to defamatory statements made by the defendant to the agent. Accordingly, he instituted action for general damages and loss of profit.

Crouse AJ decided that the *lex loci delicti* was the law of Nebraska as the defamatory statements were heard and read in that state. However, although “[weighing] heavily in the balancing scale” (par 124), the place of the delict was in final instance “only to be used as a factor in a balancing test to decide which jurisdiction would have the most real or significant relationship with the defamation and the parties” (par 128). Nevertheless, taking into account the other connecting factors (listed in par 124), the judge decided that the law of Nebraska would *prima facie* be applicable.

In the process, the judge rejects the double actionability rule of the English common law (par 113). She refers in some detail to foreign case law (from the UK, Canada and the USA) and to foreign commentators (including Harris and Fridman). Her views are similar to these found in Forsyth’s *Private International Law* (2003) 339-340, the leading textbook on Southern African private international law.

However, according to Crouse AJ, the defamation laws of Nebraska needed to pass constitutional muster to be applied by a South African court: “In South Africa the highest test for our public policy is our Constitution. Just as all South African law is under public scrutiny, so any foreign law which a court intends to apply in South Africa should be placed under constitutional scrutiny. I must therefore decide whether the law of Nebraska passes constitutional muster in South Africa before deciding I can apply [the] same” (par 127). The court is therefore of the

opinion that constitutional norms are always of direct application. (A similar view may be found in the recent judgement of the Supreme Court of Appeal in *Lloyd's v Classic Sailing Adventures* 2010 SCA 89 (31 May 2010) per www.justice.gov.za/sca.) The issue of conflict with constitutional norms was referred to decision at the end of the trial (par 127). This may lead to an interesting decision as US defamation law is perceived to be pro-defendant (the defendant alleges that his statements are protected under the US constitution) (par 121) while South African defamation law is, in comparison, more favourable to the plaintiff, also due to constitutional provisions.