CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/10
[2011] ZACC 4

In the matter between:

HENDRICK PIETER LE ROUX	First Applicant
BURGERT CHRISTIAAN GILDENHUYS	Second Applicant
REINARDT JANSE VAN RENSBURG	Third Applicant
and	
LOUIS DEY	Respondent
with	
FREEDOM OF EXPRESSION INSTITUTE	First Amicus Curiae
and	
RESTORATIVE JUSTICE CENTRE	Second Amicus Curiae

Heard on : 26 August 2010

Decided on : 8 March 2011

JUDGMENT

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THE COURT:

Introduction

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal, in which that Court upheld an award of damages to the respondent, Dr Dey. This arose from the publication by the applicants, then schoolchildren, of a computer-created image in which the face of Dr Dey, then a deputy principal of the school, was super-imposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture. Further details were occluded by the super-imposition of the school crest over the genital areas of the two men. The Supreme Court of Appeal affirmed the judgment of the North Gauteng Division of the High Court, Pretoria (High Court) that the publication of this image defamed Dr Dey, and confirmed the award of R45 000 in damages to him.

[2] This Court, in the judgments that follow, grants leave to appeal, upholds the appeal, and sets aside the award of R45 000. In its stead, this Court grants Dr Dey R25 000. The High Court costs award the Supreme Court of Appeal granted Dr Dey is left intact. However, this Court sets aside the costs award the Supreme Court of Appeal granted in Dr Dey's favour, and substitutes no order as to costs in that Court. There is also no order as to costs in this Court. The applicants are, in addition, ordered to tender an unconditional apology to him for the injury they caused him.

[3] Five members of the Court concur in the judgment of Brand AJ, which constitutes the judgment of the Court. In this judgment of the Court we indicate the further common areas of principle and the factual findings on which all the members of the Court agree.

[4] Dr Dey instituted action for recompense on the basis of two claims – one based on defamation and the other on the injury to his feelings. The High Court upheld both claims, and granted a composite award of R45 000 in damages. But the Supreme Court of Appeal held that to uphold both claims entailed an impermissible accumulation of actions. The majority of that Court upheld the defamation claim, and found accordingly that the additional claim based on affront to dignity was ill-founded and required no further consideration. The Supreme Court of Appeal nevertheless confirmed the amount the trial court awarded. One member of the Supreme Court of Appeal found that Dr Dey had not been defamed, but that his dignity claim, and so too the amount of damages, should be upheld.

[5] Six members of this Court, in a judgment by Brand AJ in which Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concur, affirm the finding of the majority of the Supreme Court of Appeal that the image was defamatory of Dr Dey. They further conclude that if the defamation claim had not prevailed the image was in any event an injury to Dr Dey's feelings.

[6] The joint judgment by Froneman J and Cameron J concludes that Dr Dey was not defamed, but that his feelings were actionably injured. Yacoob J concludes that Dr Dey's claim should have failed entirely. Skweyiya J concurs with Yacoob J, and sets out his reasons in a separate judgment.

[7] All members of the Court agree with the factual exposition contained in the judgment of Yacoob J (paras 11 to 20), with his exposition of the issues (paras 21 to 28), with his reasoning and conclusion regarding the grant of leave to appeal (paras 30 to 35), and with his decision and reasoning regarding the application to lead further evidence (para 80).

[8] Save for Yacoob J and Skweyiya J, who do not reach these issues, all members of the Court further endorse the exposition regarding the applicable legal principles of the law of defamation in the judgment of Brand AJ (paras 84 to 91) and in the judgment of Froneman J and Cameron J (paras 154 to 157 and 168 to 173). Save for Yacoob J and Skweyiya J, all members of the Court also agree with the exposition in the judgment of Brand AJ regarding wrongfulness (paras 120 to 128) and *animus iniuriandi* (paras 129 to 137).

[9] All members of the Court in addition endorse the exposition in the judgment of Froneman J and Cameron J about apology (paras 195 to 203) and, save for Mogoeng J, regarding expression about constitutionally protected groups (paras 181 to 189). In

addition, all members of Court, barring Yacoob J and Skweyiya J, concur in the order contained in the judgment of Froneman J and Cameron J, which is also set out immediately below.

[10] The following order is granted:

1. The application to lead further evidence is dismissed.
2. The orders granted in the High Court and Supreme Court of Appeal are both set aside and replaced with the following:
   a. The defendants are ordered, jointly and severally, to pay the plaintiff R25 000 as compensation.
   b. In addition, the defendants are ordered to tender an unconditional apology to the plaintiff for the injury they caused him.
   c. The defendants are ordered, jointly and severally, to pay the plaintiff's costs in the High Court.
   d. There is no order as to costs in this Court and in the Supreme Court of Appeal.

YACOOB J:

Introduction

[11] This application for leave to appeal is about the determination of liability of children for defamation or for injured feelings in the light of the values and certain of the

fundamental rights enshrined in our Constitution. The three applicants want to challenge the correctness of a judgment of the Supreme Court of Appeal holding them liable for damages in the sum of R45 000 and costs, consequent upon a finding that they had wrongfully and intentionally published defamatory material concerning the respondent.[1] The Supreme Court of Appeal confirmed the award of damages by the High Court but increased the scale of the High Court's costs award from that of the Magistrates' Court to that of the High Court.[2] I will refer to the first applicant as Mr Le Roux, the second applicant as Mr Gildenhuys and the third applicant as Mr Janse van Rensburg. The respondent will be referred to as Dr Dey.

Factual background

[12] The publication of the alleged defamatory material took place during February/March 2006 at a high school in Pretoria which had more than 2000 learners. Dr Dey was at that time the deputy principal of the school having served in that capacity for 11 years. The applicants were all learners at the school: Mr Le Roux was about 15½ years old while Messrs Gildenhuys and Janse van Rensburg were about 17 years old.

[13] The defamatory material complained of is an image. It is not disputed that the image[3] was created by Mr Le Roux in the following way. At home one Sunday, Mr Le

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[1] *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA).

[2] *Dey v Le Roux en Andere*, Case No. 21377/06, North Gauteng High Court, Pretoria, 28 October 2008, unreported.

[3] It will be convenient to describe the image later.

Roux was surfing the internet and, while on the website of his school, saw pictures of the principal and that of Dr Dey. These pictures brought to mind an audio visual programme he had seen called *South Park* in which the head of a boy was, presumably electronically, placed on the body of a gay bodybuilder by another boy. It was then that he thought that the transposition of the heads and faces of the school principal and that of Dr Dey on to gay bodybuilders might result in an enjoyable spectacle.

[14] He went to a site apparently dedicated to gay bodybuilders and there found a picture of two men naked and sitting next to each other in sexually suggestive and intimate circumstances. They sat close with the right leg of one over the left leg of the other and with their hands evocatively in the region of their genitals. Mr Le Roux attached the head and face of Dr Dey to one of these bodies and the head and face of the principal to the other. Although the evidence is not clear on this, it seems probable from an examination of the image that at least part of the heads and faces that represented the image were first removed. It is clear from the image though, as pointed out by the judge in the High Court, that the heads and faces on the image before manipulation had not been completely cut out. Mr Le Roux then took the school badge from the school website and placed one on each of the bodies on the image so as to obscure the hands and genitals. It took him much less than five minutes to perform this exercise.

[15] Apparently satisfied and amused by his own handiwork, Mr Le Roux felt the need to share his achievement with a close friend and sent it to his friend's cellphone using the

same computer. He went to church later that day and met that friend who, in his presence, sent the image to the cellphone of another learner at the school. When he saw this happen, he implored his friend to desist from distributing the image to anyone else, emphasising that the image should be, as it were, for his eyes only. Mr Le Roux understandably became concerned about the consequences of the wide circulation of the image and in particular, the possible response of the authorities at the school, more especially the responses of the principal and Dr Dey, when they came to know of the production and circulation of the image. Any schoolchild of that age would have foreseen trouble upon the discovery of that image. He had clearly done something wrong as far as school discipline was concerned.

[16] We do not know whether Mr Le Roux's friend further published the image despite Mr Le Roux's entreaties not to do so. But it comes as no surprise that the image was circulated by cellphone amongst many of the schoolchildren against Mr Le Roux's wishes.

[17] Some days later, Mr Gildenhuys, who had received a copy of the image on his cellphone, thought it would be a good idea to print and take it along with him to school for the purpose of showing it to others there. He printed the image which was 14cm broad and 12cm high on the top half of an A4 piece of paper. The image was in colour and slightly bigger than a postcard. He took the printout to school the next day and showed it to several other learners. One of them suggested that the printout be placed on

the school noticeboard. Mr Janse van Rensburg agreed to perform this task. I might mention that he had earlier shown that image on his cellphone to an educator at the school who laughed at it. Messrs Gildenhuys and Janse van Rensburg went together to a noticeboard controlled by learners which advertised social events at school. Mr Janse van Rensburg placed the printout on the board. It remained there for half an hour.

[18] The school authorities disciplined the three applicants for this conduct. The three applicants admitted what they had done. Their punishment was, in effect, that they were prohibited from assuming leadership positions at the school or from wearing honorary colours for the rest of that year. In addition they had to undergo detention at school for three hours for each of five consecutive Fridays.

[19] The three applicants were charged criminally at the instance of Dr Dey. These charges were resolved through a diversion process in terms of the Criminal Procedure Act.[4] They had to clean cages at a local zoo as community service.

[20] The second and third applicants' apology to the principal of the school was accepted. Dr Dey however refused to entertain discussion of the apology apparently because he had legal advice to the effect that he should not discuss the issue with any of the three applicants.

[4] 51 of 1977. It is not clear from the record whether the condition obliging the applicants to go into the diversion process was imposed in terms of section 72(1)(b).

Determining the issues

[21] In determining the issues, I set out in broad outline the conclusions of the Courts below as well as the bases upon which these conclusions are challenged by the applicants.

[22] Dr Dey caused summons to be issued out of the High Court claiming R600 000. Half of this was claimed for an injury to his dignity and the other half for an injury to his good name and reputation.

[23] In so far as the defamation claim was concerned, the particulars of claim alleged that the image had been published by the three applicants and that it was per se defamatory. It was claimed in the alternative that the picture would have reasonably been understood to mean that Dr Dey masturbated either in public or in the presence of another person, was prone to indecent exposure, was of low moral character, was in a homosexual relationship with the other person depicted and was homosexual. The three applicants, in their plea, again admitted their role in the publication but disputed that the photograph was defamatory. The unlawfulness of the publication was also denied. The three applicants pleaded further that they had not known that their conduct was unlawful and that they had intended the publication as a joke.

[24] Both the High Court and the majority of the Supreme Court of Appeal held, in relation to the defamation claim, that:

1. the image was defamatory of Dr Dey;
2. the three applicants had not established, as they were required in law to do, that they did not intend to defame Dr Dey;
3. the applicants were aware of the wrongfulness of their actions; and
4. damages in the sum of R45 000 should be awarded.[5]

[25] The claim based on dignity was made on the basis that the image was insulting to Dr Dey and that his sense of self-worth had been offended. All these allegations were denied. The High Court held that:

1. the conduct complained of was wrongful in the objective sense;
2. Dr Dey's feelings had in fact been injured;
3. the applicants had failed to establish the absence of an intention to injure; and
4. took the insult to dignity into account in determining the award of R45 000.

The minority in the Supreme Court of Appeal dismissed the defamation claim but concluded that Dr Dey was entitled to damages because he was subjectively wounded in his feelings.

[5] It must be remembered though, that the High Court's award was a single lump sum in satisfaction of both claims.

[26] The applicants disputed the correctness of all the findings of the High Court and the Supreme Court of Appeal. Dr Dey gave each finding his support. The majority in the Supreme Court of Appeal, having found that the claim was defamatory, held that it would not be appropriate to consider the dignity claim because this would amount to a duplication of causes of action. It was common cause before this Court that it would amount to a duplication of causes of action to consider both the claims, and that the dignity claim would call for investigation only if the defamation claim were to be found wanting by this Court.

[27] The following issues arise:

1. in relation to the defamation claim, the correctness of the findings of the Supreme Court of Appeal and the High Court listed in paragraph 24 and
2. in relation to the claim based on injury to Dr Dey's self-worth, the correctness of the findings of the High Court and the approach of the minority described in paragraph 25.

[28] But all the issues need not be considered. A finding that the Supreme Court of Appeal was wrong in relation to any one of the first three issues relevant to defamation will result in that claim falling away; a conclusion that the minority in the Supreme Court of Appeal was wrong on any of the first three matters that were held to have been proven in the dignity enquiry will result in the dismissal of that claim.

[29] The applicants' argument was underpinned by certain constitutional elements which, according to their submission, had relevance to the case. They emphasised in particular the right to freedom of expression. The applicants were joined in their effort to highlight the constitutional dimensions of the case by the two amici curiae who were admitted by this Court. The Freedom of Expression Institute was the first amicus. The Institute, not unexpectedly, stresses the rights of children to freedom of expression and, in particular, to satirical expression. The submission is that these rights should be taken into account in the process of balancing these rights against the right to dignity. The Restorative Justice Centre was admitted as the second amicus. The Centre elaborated on the importance of engagement as a dispute resolution mechanism in matters of this kind. This Court is very grateful to both the amici for their thorough and useful arguments.

Should leave to appeal be granted?

[30] Leave will be granted only if the case raises a constitutional matter or an issue connected with a decision on a constitutional matter[6] and if it is in the interests of justice[7] to grant leave. I think that the answer to both questions is yes. I deal first with the jurisdictional issue and then with the interests of justice.

[31] Defamation is aimed at compensating the victim for any publication that injures the plaintiff in his good name and reputation. Its focus is the protection of the

[6] The jurisdictional pre-requisite prescribed by section 167(3)(b) of the Constitution.

[7] Section 167(6)(b) of the Constitution read with Rule 19 of the Rules of the Constitutional Court.

constitutional rights to dignity[8] and privacy[9] of any person.[10] The High Court was correct in concluding that, in assessing whether the publication is defamatory a reasonable observer would look at it through the prism of the Constitution and in relation to its values. This means that a court too must do the same. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.[11] When a court assesses whether a publication is defamatory through the prism of the Constitution, it is concerned with the interpretation, protection and enforcement of the Constitution. In this case the process involves the balancing of the rights to dignity and privacy on the one hand, with freedom of expression,[12] and the rights of children[13] on the other.

[32] The determination of questions relating to intention as well as those concerned with the meaning and determination of the awareness of the wrongfulness of the publication must, in my view, also be decided with an acute appreciation for, and responsiveness to the rights of children in the Constitution. As far as the quantum of

[8] Section 10 of the Constitution.

[9] Section 14 of the Constitution.

[10] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 27-8.

[11] Section 167(7) of the Constitution.

[12] Section 16 of the Constitution.

[13] Section 28 of the Constitution.

damages is concerned, I would refer to the *Dikoko*[14] case in which Moseneke DCJ speaking for the majority said:

> "The extent of sentimental damages for defamation has implications for the properly mediated connection between dignity and free expression. It is plainly so that overly excessive amounts of damages will deter free speech and foster intolerance to it. As it is often said, robust awards will have a 'chilling effect' on free expression, which is the lifeblood of an open and democratic society cherished by our Constitution. On the other hand, as Smalberger JA observed in *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others* 'a person whose dignity has unlawfully been impugned deserves appropriate financial recompence to assuage his or her wounded feelings'. I therefore think there is a very strong argument to be made that the assessment of damages in a defamation suit is a constitutional matter and I will assume in favour of the applicant that it is. However, . . . it is not necessary to finally decide the issue in this case."[15] (Footnote omitted.)

[33] Mokgoro J came to the conclusion that the issue of quantum of damages did indeed raise a constitutional matter.[16] The time has now come to decide that the "strong argument" referred to by the Deputy Chief Justice should be accepted as correct. And there are more powerful reasons for damages being regarded as a constitutional matter in this case than in the case of *Dikoko*. This is because the rights of children were not implicated there. In the course of an analysis on the reach of section 28 in the *Phaswane*[17] case this Court said that "courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by

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[14] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC).

[15] Id at para 92.

[16] Id at para 54.

[17] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at paras 71-80.

their decisions."[18] This must include decisions on the quantum of damages to be awarded. I would hold that the issue of damages in a defamation case does raise a constitutional issue, particularly in this case.

[34] I come to the same conclusion where the dignity claim is concerned. The determination of the degree of injury to feelings, in other words, when the harm reaches a point at which it becomes wrongful and therefore compensable, must be assessed not only in terms of the views of the community but also in accordance with the values of the Constitution. The rights to dignity and privacy are likewise to be balanced in relation to the right to freedom of expression and children's rights in assessment of wrongfulness in the dignity claim. And finally, as in the case of defamation, an award of damages that is too high will have a chilling effect on freedom of expression and adversely impact on the rights and interests of children, while an award that is too low will not have the effect of protecting dignity to the extent mandated by our Constitution. The dignity claim too entails constitutional issues.

[35] This case involves important issues concerning the interpretation and evaluation of material published by schoolchildren in the context of conditions at the school concerning a person in authority at the school. The determination of these issues would help in defining how far children should be allowed to go or, in other words, how offensive and damaging their conduct must be at schools, in the context of this case, before their actions

[18] Id at para 79.

give rise to successful civil proceedings in a court of law at the instance of a person in authority at the school. To the best of my knowledge we have never had a case of this kind in our courts before. What is certain though is that this Court has never determined like issues. I would have thought that the granting of leave to appeal would be in the interests of justice on these grounds alone. However I add that, as will appear from this judgment as well as the judgments of my colleagues Cameron J and Froneman J and of my colleague Brand AJ, there are prospects of success in relation to whether the image is defamatory, whether the conduct of the three applicants impinged sufficiently upon the dignity of Dr Dey and in relation to the quantum of damages to be awarded as well as the relevance of an apology to the quantum of damages.

Defamation: the interpretive approach

[36] It will become necessary to discuss the issues concerning the intention as well as the awareness of the wrongfulness of the publication only if the publication is defamatory in the first place. I therefore address this issue first.

[37] The approaches of the Supreme Court of Appeal and the High Court were similar. I start by pointing to those aspects of these approaches on which I agree without qualification.

[38] I have no difficulty with the approach of the Supreme Court of Appeal which is consistent with the approach of the High Court reflected in the following passage:

> "It is well established that the determination of whether a publication is defamatory and therefore prima facie wrongful involves a two-stage inquiry. (I use the word 'publication' to include a pictorial representation such as a photograph.) The first is to determine the meaning of the publication as a matter of interpretation and the second whether that meaning is defamatory."[19] (Footnote omitted.)

[39] Nor am I (save to the extent that I qualify my position in relation to context and constitutional construction in the sections that follow immediately) troubled by the approach, again similar to the High Court, effectively and accessibly articulated by the Supreme Court of Appeal concerning the way in which the meaning of the image is to be ascertained:

> "To answer the first question a court has to determine the natural and ordinary meaning of the publication: how would a reasonable person of ordinary intelligence have understood it? The test is objective. In determining its meaning the court must take account not only of what the publication expressly conveys, but also of what it implies, ie what a reasonable person may infer from it. The implied meaning is not the same as innuendo, which relates to a secondary or unusual defamatory meaning that flows from knowledge of special circumstances. Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words."[20] (Footnotes omitted.)

Context and construction

[40] It follows from my reservation in the previous paragraph that I need to say more about context. The Supreme Court of Appeal, the High Court and the other judgments

[19] Above n 1 at para 5.

[20] Id at para 6.

written in this case recognise the importance of context in one way or another. The Supreme Court of Appeal accepted that the reasonable observer must be contextualised and that regard must be had to the nature of the audience. It also accepted that regard must be had to the person who was allegedly defamed but expressed itself against the proposition that the image must be assessed taking into account that it had been produced by children. The final matter to which attention must be drawn is that the Supreme Court of Appeal made no distinction between the relevance of context in determining the objective meaning of the image, and its relevance to the decision whether the publication was defamatory on the meaning ascribed to it.

[41] The High Court's approach was somewhat different. Unlike the Supreme Court of Appeal, it acknowledged the fact that schoolchildren had produced the image was also relevant to context. But the approach of the High Court may have been narrower than that of the Supreme Court of Appeal in another respect concerning context. I have already said that the Supreme Court of Appeal made context applicable to both the interpretation of the image and the evaluation of its purpose and effect. The High Court, on the other hand, made no reference to context in that section of the judgment concerned with the interpretation of the image, but referred to it only in the section concerned with determining whether, on its interpretation the image was defamatory. Two questions therefore arise. The first is whether context is relevant only to interpretation, only to the determination whether the statement is defamatory or to both. The second issue that

arises is the precise scope of the circumstances that can be taken into account as part of the context.

[42] In my view both questions are correctly answered in the following passage in the *Torch Printing* case:[21]

> "It was contended that in construing the alleged defamatory statements the Court should have regard to all the circumstances in which they were published. In *Johnson v. Rand Daily Mails Ltd.* (1928, A.D. 190 at p. 204) WESSELS, J.A., quoted with approval the remarks of Lord SELBORNE in *Capital & Counties Bank v. Henty* (7 A.C. at p. 745):
>
> > 'The test according to the authorities is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense.'
>
> Gatley (8th Ed., p. 21) points out that:
>
> > 'the meaning of particular words frequently depends on the circumstances in which they were published. There are no words, however serious on the face of them, which may not be explained away by evidence that in the actual circumstances they were not understood in a defamatory sense but in a way of jest or in a secondary and innocent meaning'
>
> and also:
>
> > 'Not only does the meaning depend on the circumstances in which the words were published; it also depends on the state of public opinion at the time.'
>
> Lord BLACKBURN in *Capital & Counties Bank v. Henty* (*supra* at p. 771) expressed the same view:
>
> > 'The manner of publication and the things relative to which the words were published and which the person knew or ought to have known

[21] *Golding v Torch Printing and Publishing Co. (Pty.), Ltd. and Others.* 1949 (4) SA 150 (C).

> would influence those to whom it was published in putting a meaning on the words are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances and to such persons.'

> (See also *Brill v. Madeley* (1937, T.P.D. 106 at p. 109).)
> 'The circumstances in which the writing was published' do not seem to me to be capable of exact definition. Each case must be decided on its own facts. The alleged defamatory words must not be considered as it were *in vacuo* but as part and parcel of the whole. Thus the manner in which words are spoken—the *prima facie* complimentary statement that a person is 'an honest attorney' may, because of the manner in which it is uttered, be grossly defamatory. In the same way an interjection at a meeting to consider a school feeding scheme that an opponent is a murderer might well, because of the circumstances and in spite of its defamatory meaning, be held to have been used in a non-defamatory sense. What then, in this case, are 'the circumstances' which must be looked at in order to determine whether the statements complained of were capable of being understood in a libellous sense by reasonable men? In my opinion regard must be had to all the facts which would be known to the readers of *The Torch*."[22]

[43] I agree with the substance of the sentiments expressed except to point out that in modern society the concept of "reasonable men" would not be apposite in the application of the test. It is crucial to take into account all the relevant circumstances for the purposes both of interpreting the image and for deciding whether its impact is defamatory. Indeed, in my view, any construction of the image without taking into account all the relevant circumstances would be futile in the sense that the construction arrived at in a vacuum would be as likely to be wrong as to be right. As far as the second question is concerned, it seems clear that all the relevant circumstances must be taken

[22] Id at 159-60.

into account, that it is not possible to determine in advance what the circumstances would be, that each case depends on its own facts and that the test would be whether a reasonable person would take a particular circumstance into account.

Construing constitutionally

[44] I elaborate briefly on the constitutional imperatives that are relevant to an interpretation of the image. I have already indicated that the relevant rights are those of dignity and privacy on the one hand, and freedom of expression and the rights of children on the other.

[45] The importance of the rights to dignity and privacy can never be overstated. It is fundamental to our existence as human beings. But it must be pointed out that:

> "With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."[23] (Footnote omitted.)

[46] But it must be remembered that some attacks on human dignity are more serious than others: the violation of dignity in the context of the violation of other constitutional rights would ordinarily be regarded as more serious than otherwise. Two examples will

[23] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

suffice. The violation of human dignity in the context of unfair discrimination on any of the grounds listed in the Constitution[24] would be unarguably egregious. So would the violation of these rights in the context of an unlawful intrusion into one's home in the process of a criminal investigation involving the seizure of documents, the wrongful arrest and detention of the person concerned and the unlawful destruction of that person's private property. Another factor which, in my view, has relevance to the intrusive character of the violation of the right to dignity would be the power relations between the person who committed the allegedly wrongful conduct in question and the person who was the target of the injury. I would regard the violation of the dignity of a relatively powerless and vulnerable person by a powerful, strong person in authority as more serious than the allegedly wrongful conduct involved here. A factor in the balancing process therefore is the nature of the violation of the rights to dignity and privacy. We must also bear in mind that the right to dignity is not that of Dr Dey alone in this case. At least equally important is the right to dignity of children, for section 28 "protects the dignity of the child and advances the child's equal worth and freedom".[25]

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[24] Section 9(2) and 9(3) provide:

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[25] Per Ngcobo J in *Phaswane* above n 17 at para 72.

[47] The importance of the right to freedom of expression has been repeatedly emphasised by our courts. I need address the topic only briefly.

> "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed."[26]

Freedom of expression is one of a web of mutually supporting rights in the Constitution.

> "It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, <u>even where those views are controversial.</u>"[27] (My underlining.)

Finally, we must always bear in mind that:

[26] Above n 23 at para 37.

[27] *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 8.

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[28] (Footnotes omitted.)

[48] The rights of children are vital to this enquiry. Section 28 of the Constitution provides:

"(1) Every child has the right—
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;

[28] Id at para 7.

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[49] As I said earlier it was emphasised in an analysis of the reach of the right to free expression in the *Phaswane*[29] case that dignity and equal worth must receive appropriate protection.[30] The *Phaswane* case in addition:

1. emphasised that the best interests of the child being paramount does not mean that they are absolute;[31]
2. held that section 28 "imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and protection of children";[32]
3. laid down that courts (and I would suggest reasonable observers) are obliged to give consideration to the effect of their decisions on the rights and interests of children;[33]

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[29] Above n 17.

[30] Id at para 72.

[31] Id.

[32] Id at para 73.

[33] Id at para 74.

4. reiterated the approach in *S v M*[34] that statutes must be interpreted in a manner which favours protecting and advancing the interests of children;[35] and
5. quoted with approval the principles from certain international guidelines[36] to the effect that a child has the right to be shielded from any form of hardship, abuse or neglect including physical, psychological, mental and emotional abuse.[37]

[50] In the *Centre for Child Law*[38] case and in the context of the need for the best interests of the child to be paramount in sentencing, this Court held as follows:

1. Section 28 protects children against undue exercise of authority.[39] There is no reason why the authority should not be that of a school.
2. Children's rights constitute a real restraint on Parliament and an enforceable precept determining how officials and judicial officers should treat children.[40] There is no reason why reasonable observers should not

[34] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 15.

[35] Above n 17 at para 74.

[36] United Nations Guidelines on Justice Matters involving Child Victims and Witnesses of Crime.

[37] Above n 17 at para 78.

[38] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

[39] Id at para 25.

[40] Id.

have the same duty when they interpret the image or any publication by children alleged to be defamatory.

3. There are important reasons for distinguishing between adults and children:

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.
>
> These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.
>
> These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."[41]

Consequences of application of constitutional requirements

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[41] Id at paras 26-8.

[51] These constitutional imperatives have an important consequence for the way in which a court should proceed if it finds that there is more than one reasonable interpretation of the image, one that renders an image or publication defamatory and the other not. The approach authoritatively applied by courts today when there are competing interpretations is that which originated in the *Channing*[42] case and quoted with approval by the Appellate Division in the *Demmers*[43] case:

> "The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action and who are sometimes referred to as the 'ordinary readers'. If, upon a preponderance of probabilities, it is found that to those readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails (see *Gluckman v Holford* 1940 TPD 336)."[44]

This approach was expressed as follows by the same Court in the *SA Associated Newspapers*[45] case:

> "If at the end of the trial the statement is found to be equally capable of an innocent and of a defamatory meaning, the maxim, *semper in dubiis benigniora praeferenda est* is applied, and a plaintiff will fail to discharge the onus. It is unreasonable where there are a number of good meanings that the only bad one should be seized upon to give a defamatory meaning to the statement."[46]

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[42] *Channing v. South African Financial Gazette Ltd. and Others* 1966 (3) SA 470 (W).

[43] *Demmers v Wyllie and Others* 1980 (1) SA 835 (A).

[44] Id at 843A.

[45] *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A).

[46] Id at 27C-E.

[52] This means that, when there is room for a reasonable alternative interpretation that renders an image innocent that interpretation can be accepted by a court and the plaintiff will fail only if the innocent interpretation is as probable as the defamatory interpretation. It follows that if an action is instituted against a child publisher (like in this case) a construction favourable to that child cannot prevail if it is less probable than the interpretation against the child even if the construction in favour of the child is reasonable. The child will be found liable for the publication of an image which could reasonably and without strain be construed in favour of that child. On present authority therefore, the interpretation in favour of the child will not assist if the defamatory interpretation is one that is more probable than not, even if the child-friendly interpretation is reasonable in all the circumstances. A child will therefore be liable, assuming all the other requirements are present, for the publication of an image which is reasonably capable of an innocent interpretation without strain if the defamatory interpretation is more probable. Can this approach be justified in our constitutional order?

[53] I think not. Children who are held liable for defamation for the publication of images which can reasonably be interpreted in their favour merely because the defamatory meaning is probable do not receive adequate protection. The child's vulnerability and weakness are not sufficiently catered for in that approach. A change is necessary to afford children adequate protection and is therefore constitutionally mandated. In my view, the rule applied by this Court when two reasonable constructions

of legislation are available, the one constitutional the other not, points us in the right direction. It will be remembered that in these circumstances, a court would prefer the reasonable interpretation of the legislation that preserves its constitutionality.[47] This principle protects both the Constitution and Parliament.

[54] It can however be appropriately adjusted to provide meaningful protection to vulnerable children consistently with the Constitution. The rule on legislative interpretation may be rephrased to meet our circumstances in the following way. If there are two reasonable interpretations of an image made by a child, one which renders the image defamatory and another which does not have that consequence, courts should prefer that interpretation which does not hold the child liable provided that the construction is not strained.

Construing the image

[55] Two conclusions of the Supreme Court of Appeal are relevant to context before describing the contextual circumstances the reasonable observer will take into account. That Court erred when it rejected the two propositions "that the defendants were

[47] *Van Vuren v Minister of Correctional Services and Others,* [2010] ZACC 17; 2010 (12) BCLR 1233 (CC); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 119; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 22; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4 and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85.

schoolchildren and that the reasonable person would have taken that into account in assessing the meaning of the [image]”.[48] The Court’s doubt about whether the reasonable observer interpreting the picture was expressed in the following terms “[t]he picture was created and distributed anonymously. Its origin down the line would not have been known since it was in the nature of a chain letter. An addressee may or may not have suspected that children were behind it all, but there was no reason for them to have accepted that as a fact.”[49] I disagree. The image was circulated amongst children at the school and was seen on the school noticeboard. It was a clumsy effort at manipulation. In the circumstances it is highly improbable that any reasonable person with knowledge of the surrounding circumstances would have thought that the image had been produced by an adult schoolteacher, an adult member of the staff at the school or a parent of one of the children. A reasonable observer would have had little doubt that the image was a child creation.

[56] The contention that the reasonable person would have taken the fact that the image was a child creation into account in assessing the meaning of the image was rejected: “I have some difficulty in appreciating how the identity of the alleged defamer can determine the objective meaning of a publication.”[50] I do not share the difficulty of the majority of the Supreme Court of Appeal. Taken to its logical conclusion, the position endorsed by the Supreme Court of Appeal would mean that, if we knew that the source of

[48] Above n 1 at para 16.

[49] Id.

[50] Id.

the publication (either as creator or circulator) was a woman involved in a bitter divorce dispute with her husband, it would be impermissible for a court to refer to that source. I would have no difficulty with the proposition that, like in the example given, judicial officers who ignore the source of the publication in a defamation case do so at their peril and buy the prospect of being wrong. Indeed I agree fully with the sentiments expressed by my colleagues Cameron and Froneman JJ when they say:

> "The fact is that, in the school context, the likely childish origins of the image would, without doubt have played a role in, if not determined, the likely viewer's assessment and understanding of the image."[51]

[57] Against this background the circumstances that the reasonable observer would take into account must be described. I set them out below.

1. The image was obviously made by a child on a computer using material from websites.
2. Section 28 of the Constitution would require Ms Reasonable Observer to understand that the applicants had the right to be cared for at the school;[52] to be protected from maltreatment, neglect, abuse or degradation;[53] and that the best interests of the children are paramount in all matters concerning them.[54]

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[51] See the last sentence of [162] below.
[52] Section 28(1)(b) of the Constitution.
[53] Section 28(1)(d) of the Constitution.
[54] Section 28(2) of the Constitution.

3. The factors relating to children are that:

    a. they are vulnerable, immature, and in the process of development both emotionally and intellectually;

    b. children are often prone to giving confused messages particularly in non-verbal communication; have regular access to computers, enjoy experimenting with them, would find the creation of images to be exciting and entertaining however inappropriate, crass or inept the product might be;

    c. children often react, sometimes unreasonably, but spontaneously and without thought to the exercise of authority at any institution;

    d. as found by the High Court, truths that would be taken into account by the reasonable observer were that children traditionally poke fun at teachers and that their jokes are sometimes bland or tasteless and not always regarded as funny by adults;

    e. children like to show off their talents and that an image that children would regard as amusing and exciting might be crass and bland to adults;

    f. expression, even unreasonable reaction to authority, is often vital to the development of society, and even more important for children; and

g. the Constitution requires the freedom of speech of children to be afforded appropriate protection, to the full extent that this contributes to their best interests.

4. The reasonable observer would also try to strike an appropriate balance between defamation and privacy concerns on the one hand and freedom of expression and children's rights on the other hand.
5. The reasonable observer would also recognise that over-sensitive reaction to the conduct of immature children by people in authority at institutions at which the children are, would result in the diminution of sensitivity to the needs and requirements of children. In this sense the lack of sensitivity might be counter-productive.
6. The image represented and related to the school only, as indicated by the use of the school badge. It follows that the image referred to the principal and Dr Dey in their professional work capacities only and was not concerned with their person. They were in the picture because of their position of authority.

[58] This judgment has already endorsed the approach that the process of determining whether an image is defamatory involves two phases: the first being an assessment of the meaning of the image, or the message it conveys; the second essentially concerns determining the effect of that message, in other words finding out whether the message will have a defamatory impact. The difference between the two phases must be kept in

mind. Otherwise there is the possibility, particularly when an image (as distinct from words) is evaluated, that the impact of the message could be confused with its meaning or message. The High Court did keep the two enquiries separate on the face of it but as I will try to show later, there is some doubt about whether the conclusion that the image associates Dr Dey with the bodies in the photograph is the message conveyed by the picture or whether it is the statement of its defamatory effect. The Supreme Court of Appeal, while acknowledging the distinction between the two phases, began its enquiry by answering the interpretation question and referred to the conclusion of the High Court on that issue. Nevertheless the Supreme Court of Appeal came to no express conclusion on the interpretation issue but simply concluded that the image had a defamatory impact. It seems that the Supreme Court of Appeal by necessary implication endorsed the conclusion of the High Court on the meaning of the image.

[59] The High Court's reasoning on the interpretation of the image may be summarised as follows. The image would convey to the reasonable observer that the men depicted on it were engaged in sexual activity. The precise nature of that activity would not be apparent because of the position of the school badge but the position of the school badge makes it clear that the men who sat wide-legged were naked. The High Court found further that because the image contained a photo of the two men it conveys to the reasonable observer a complete impression of men with low, seedy values and of indecent sexuality. It concluded that although it is clear at first glance that the image does not represent photos of the principal or of Dr Dey, the reasonable observer would

conclude that the image associates Dr Dey with the men on the photo in one or other way and therefore also with their conduct. In short the High Court's conclusion was that the placing of the heads of Dr Dey and the principal on the bodies of men with low, seedy morals and of indecent sexuality who are engaged in sexual activity somehow associates Dr Dey with that conduct and that morality in the eyes of the reasonable observer. The Supreme Court of Appeal endorsed this finding in all material respects.

[60] I have some difficulty with this approach. In the first place much of the determination of the message describes the image. The basic difference between the determination of the meaning of words and the meaning of an image is in my view that the words do not have to be described but the image does. There is however a fundamental distinction between describing the image on the one hand and determining its meaning on the other. And the processes should be kept separate. The first step would be to describe the image. The second step would be to decipher the message that the image conveys in words and this is different from describing the effect of the message.

[61] I have grave doubts that the image would convey to the reasonable observer that the men depicted in it were engaged in sexual activity. What the image does show is that the men in the photograph that was used to create the image had been engaged in sexual activity in that photograph. What it also shows is that the heads of two men were put onto the bodies of two other men who had been engaged in sexual activity before the

heads were transposed. It is quite impossible for one man with the head of the third and the second man with the head of the fourth to engage in any sexual activity.

[62] The finding that the reasonable observer would think that the fact that the naked men allowed themselves to be photographed while engaged in sexual activity shows them to be possessed of low, seedy values and of indecent sexuality is also incorrect. On the assumption that the remark applies to the men who were in the photograph before their heads and faces had been coarsely substituted, I would suggest that most reasonable observers in South Africa in 2006 would bear in mind the possibility that the photograph had been taken by someone without their knowledge. The reasonable observer would also know that it is possible, and in fact easy, for people to take photographs of themselves. On the assumption that they had photographed themselves, they were homosexual people engaged in perfectly legitimate homosexual activity. The photo would have shown nothing more, nothing less.

[63] I turn next to the conclusion that the reasonable observer would conclude that the image associates Dr Dey with the men in the photograph in one or other way and therefore also with their conduct. Firstly the word "associated" is of wide import and the words "in some or other way" makes things even more complicated. In any event, the only finding in relation to interpretation is that the image associated Dr Dey with these men. Take away the assumption that they allowed themselves to be photographed and there is nothing left. The explanation by the High Court about the effect of the school

badge is also wanting. The school badge could not have been put there for the purpose of demonstrating that the men were naked. I now proceed to give meaning to the image which has already been fully described. In any event, this is a description of the effect of the picture rather than its message.

[64] The reasonable observer would think the following:

1. "The image does not say that Dr Dey or the principal have the habit of engaging in sexual activity with each other or that either of them were of low morals. This is because the pictures are not of the two men but they are pictures with different heads and bodies. Is it probable that the image says that the principal and Dr Dey are in fact frauds in that they pretend to be highly moral and upright people who pride themselves in their heterosexuality but are in reality homosexual people who have a homosexual relationship with each other. I believe not. This is because I find it difficult to imagine children at a school wanting to convey this. It is highly improbable to me that they would want to spread deliberate lies about the principal and Dr Dey. In any event, if they wanted to do so there were better ways available to them. I do not think the image reflects reality or purports to say what the true position is. Nor do I think that the children wish to peddle lies as the truth. In any event I say to myself that the children at the school would know when they crafted the image that no

other person at the school would even begin to believe that the principal and Dr Dey engaged in any immoral conduct at all.

2. I must remember that this image was made and distributed by children who are learners at the school and that the children are conveying something they feel. I know that most children are vulnerable, weak, find it difficult to express their feelings and often find communication difficult. I also know that children these days enjoy playing with computers and engage in many activities which they should not engage in unsupervised. I also know that the child took these pictures from two different websites and put them together.

3. So what were they expressing their feelings about in the image? The first question I ask myself is whether they were expressing their feelings about the men whose heads had been replaced and who had been engaged in intimate sexual activity, about the principal and Dr Dey personally, or about the exercise of authority and maintenance of discipline at the school. There is little chance that they wanted to attack people personally. I know that children react to authority in strange ways. My friend tells me that this is a challenge to authority. I managed to persuade him that this is too weak a response to be categorised as a challenge. It is no more than a reaction. It is a crude reaction, an immature reaction, a reaction perfectly consistent

with the vulnerability of a child. I am reasonably sure that all children in the school who were sympathetic to this reaction to authority would have found the picture funny.

4. The presence of the school badge is vital. It is a strong indicator that the image expresses children's feelings about the exercise of authority at the school. The identity of the person who exercised that authority would have been immaterial to the children. It is the exercise of authority which was the target."

[65] At the very least, it is a reasonable construction of the image that young children dissatisfied with the way in which authority was being exercised at the school were expressing their dissatisfaction and reacting to the exercise of authority in the image. I think that to expect children to be able to express their reaction to authority in a capable, sophisticated, respectful way is to expect too much of them. Unconsidered and emotional responses to the exercise of authority, even by adults, are not uncommon. The image and its circulation demonstrate the immaturity of the children responsible and that they were unable to consider the consequences of their actions. I do not think that any reasonable observer will lose sight of the distinction between an effort to criticise the person or an effort to criticise the institution or the exercise of authority within it. The focus here was the exercise of authority.

[66] The next question which arises is whether on the meaning that I have attributed to the image it is defamatory. It is at this stage of the enquiry that the balance to be achieved between the rights to dignity and privacy on the one hand and the right to freedom of expression and children's rights become relevant. Children ordinarily express their frustrations, their impatience and how they feel. It is counter-productive to stop this because those in authority at school ought to know what the learners in their schools think and feel. The nature of the expression with which we are concerned is integrally part of the process of their development and the process of their education. Indeed if behaviour of this kind produces a court action with huge damages, it will have a chilling and negative and undesirable impact on their growth, development and education. This is not to say that disciplinary procedures at the school for conduct of this kind are not appropriate. It is indeed the appropriate route to counteract this kind of misconduct at schools. The image represents a legitimate and understandable expression of feeling by a learner at a school in relation to the exercise of authority there and cannot be defamatory. The image certainly does provoke and agitate. It is critical of the way in which authority is exercised and discipline is maintained at the school.

[67] The High Court accepted the evidence of an educational psychologist that children traditionally poke fun at teachers, that their jokes are sometimes tasteless or bland and not always funny, represent truths of which the reasonable person is conscious and which that person will take into account when looking at adolescent behaviour. But the Court did not agree fully with the opinion of this expert that the conduct of the applicants should be

adjudged more leniently because it is not in the interest of the community that courts are unnecessarily burdened with cases concerning the conduct of schoolchildren which must, ideally be addressed and finalised at the school itself. The Court emphasised that there are serious disciplinary problems in our schools and that the reasonable observer would take this into account and consider that the over-emphasis of children's rights at the expense of teachers obliges the reasonable observer of adolescent behaviour in the school to be less lenient. The Court opined that this approach on the part of the reasonable observer was needed because respect for teachers according to the evidence was necessary in order to convey to the children those values essential to their successful adulthood.

[68] I cannot agree fully with this approach. School discipline has little to do with court actions for defamation. The reasonable observer would consider that an over-emphasis on the rights of a good name and reputation of a deputy principal in relation to the rights of powerless children will be counter-productive and will be harmful to the interests of children.

[69] In the circumstances it is not necessary to investigate the issues of intention and awareness of unlawfulness. The defamation claim had to fail.

Dignity

[70] I have already found that the image, properly interpreted, does not constitute an attack on the person of Dr Dey. It was an attack on authority and the exercise of discipline at the school. To succeed on a claim based on an affront to dignity, the act must be wrongful. The test is objective. The conduct of the applicants must be "tested against the prevailing norms of society" to determine whether it is wrongful.[55]

[71] I would suggest that the appropriate test is whether a reasonable deputy principal of a large school, of 11 years experience, would be hurt by the publication. In making this determination, I must test the conduct of Dr Dey against what the prevailing norms of society would require of him. The reasonable deputy principal would, of course, be motivated by the values of the Constitution. In my view a reasonable deputy principal of 11 years experience today would understand that children need to express their feelings. A person in this situation would know that the image was no more than an expression of the feelings of children. It was no more than a reaction to authority; a reaction that was crude but not unexpected. The reasonable deputy principal would have ensured that disciplinary proceedings were instituted against the children and would have excruciated over the steps that could be taken to ensure that he understood why and how this had happened and planned appropriate remedial measures. Yet Dr Dey was admittedly seriously injured in his feelings and seemed preoccupied with his own injured feelings. This response is not reasonable. A reasonable deputy principal is a sensible person who is neither unsensitive nor more highly sensitive than usual. This fictional person would

[55] *Delange v Costa* 1989 (2) SA 857 (A) at 862F.

instinctively achieve the appropriate balance between his own sensitivity or sensitivity about himself, on the one hand, and a sensitivity towards and understanding of how children are. In my view, Dr Dey reacted to the image in a way that did not appropriately reflect this balance. He was, in comparison with the reasonable deputy school principal, somewhat more sensitive than he should have been and somewhat less sensitive than he should have been towards the children. In the circumstances I hold that the reasonable deputy principal would not have been as upset as Dr Dey was.

[72] Before our Constitution came into effect, the right to freedom of expression was frequently violated in our country. Indeed, as I have shown elsewhere in the judgment, thought control was the order of the day and there would not have been the same need in a claim based on dignity to balance the right of freedom of expression with the right to dignity. That balance must mean that there are circumstances in which the right to dignity will be outweighed by the right to freedom of expression.[56] It would be going too far if freedom of expression were to be curbed to such an extent that the slightest injury to feelings would be actionable.

[73] I would commend the rule that people claiming damages consequent upon attacks on their dignity will succeed only if, in all the circumstances of the case, the injury is sufficiently serious to limit freedom of expression or any other right in the Constitution. Each case must depend on its own circumstances, and courts must ensure that they effect

[56] Above n 10.

the appropriate balance. In this case, even if Dr Dey was hurt to some extent, I do not think that the extent of the hurt justifies a claim for damages in all the circumstances for several reasons. The expression was essentially that of a child in the process of growth and development in reaction to the exercise of authority at the school. The expression did not amount to an attack on Dr Dey's sense of equal self-worth nor was the expression so serious that it impacted on any of Dr Dey's other rights in the Constitution. Most importantly, the expression was by a relatively powerless child in relation to the exercise of authority by a more powerful older man. The reasonable deputy principal would probably not have instituted the proceedings.

[74] The fact that Dr Dey was somewhat more sensitive than the ordinary reasonable deputy principal is borne out by the record. During his evidence, given at the trial two and a half years after the publication had taken place,[57] he became so emotional on six occasions that the fact was noted on the record by the transcriber. Indeed, the Court had to adjourn for some time on one of these six occasions.

[75] In my view, the fact that Dr Dey instituted action against these children taken together with the way in which the proceedings were conducted is a further demonstration of lack of the required sensitivity towards children in the circumstances. Dr Dey claimed R600 000. This was almost 14 times the amount in fact awarded. Dr

[57] The image was created and published during February/March 2006 and Dr Dey gave evidence on 9 and 10 October 2008.

Dey was awarded 7.5% of his claim by the High Court, an award which was confirmed by the Supreme Court of Appeal. This Court has reduced the claim even further. The size of the claim, large by any standards, indicates that there was something punitive about this action. I have already said that a reasonable deputy principal would probably not have instituted the action; a reasonable deputy principal would never have claimed R600 000.

[76] I do not think it is ordinarily appropriate for civil claims to be brought to court to punish children, especially where, like in this case, criminal proceedings and school disciplinary processes are available and have been used. The service of the summons on the children would probably have been far more painful to them than the publication of the image should have been to Dr Dey.

[77] The upshot of all this is that the conduct of the three applicants was not wrongful. I disagree with the reasoning and conclusion of the minority in the Supreme Court of Appeal. It is again not necessary for me to go into the question of intention.

[78] I would therefore hold that the image is neither defamatory of nor injurious to Dr Dey's dignity. Wrongfulness has not been established in relation to both claims. It is accordingly unnecessary for me to consider the quantum of damages or the argument of the Restorative Justice Centre concerning the necessity for engagement in these circumstances.

[79] I would add that the finding that Dr Dey was somewhat more sensitive than the reasonable deputy principal by no means represents a criticism of him personally. It is a fact of life that we find in all professions, people with sensitivities that differ from those of the reasonable standard and it is that standard that I am obliged to employ in this case.

Application to lead further evidence

[80] As a result of a discussion between the members of the Bench and counsel, and after we heard argument in the case, some kind of effort was made by the three applicants to apologise. The applicants sought to put this evidence before the Court in an effort to demonstrate that an apology had been given. Dr Dey was of the view that the apology was not good enough. In light of the conclusion to which I and other members of the Court have come on the merits, the application to lead further evidence falls to be dismissed.

[81] I would therefore grant leave to appeal, uphold the appeal and set aside the decisions of the High Court and the Supreme Court of Appeal.

Skweyiya J concurs in the judgment of Yacoob J.

BRAND AJ:

Introduction

[82] I have had the benefit of reading the judgment of my colleague, Yacoob J, as well as the joint judgment of my colleagues Froneman J and Cameron J (the joint judgment). I share the appreciation expressed in the joint judgment for the clear exposition by Yacoob J of the facts, the history and the issues to be determined. As will appear from what follows, we are in broad agreement on these aspects and any possible differences between us relate to no more than matters of inference, nuance and emphasis. Under the heading "[c]onstruing constitutionally", Yacoob J sets out the constitutional considerations that he regards as relevant to a proper determination of the issues in this case. I agree that these considerations are not irrelevant. However, where I differ is on the role these considerations should play and how they impact on the outcome of this case.

[83] Lastly, I agree with Yacoob J that the application for leave to appeal should be granted. As will presently emerge, I also agree with the joint judgment on various issues pertaining to quantum and costs. I believe, however, that the trial court[1] and the Supreme

[1] *Dey L v Le Roux H and 2 Others*, Case No. 21377/06, 28 October 2008, unreported (High Court), per Du Plessis J.

Court of Appeal[2] were right in finding that Dr Dey had been defamed. In so far as my colleagues hold otherwise, I am therefore constrained to disagree.

The applicable legal principles

[84] I must confess that I found the arguments raised in this matter somewhat confusing. What assisted in the improvement of my own understanding was a return to the basic principles of the law of defamation. At the risk of stating the obvious, I therefore propose to start from there. In *Khumalo and Others v Holomisa*[3] this Court stated that the elements of defamation are:

> "(a) the wrongful[4] and
> (b) intentional
> (c) publication of
> (d) a defamatory statement
> (e) concerning the plaintiff." (Footnote added.)

[85] Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to

[2] *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) (Harms DP writing for the majority with Mlambo and Malan JJA and Majiedt AJA concurring, Griesel AJA dissenting).

[3] [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 18.

[4] A synonym for "wrongfulness" is "unlawfulness" and the two terms are often used interchangeably – see for example *Khumalo* id – though the former seems to be the preferred term, at least in the field of delict (see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 13).

avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent.[5] Until recently there was doubt as to the exact nature of the onus.[6] But it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities.[7] A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence.[8]

[86] "Publication" means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures.[9]

[87] Statements may have primary and secondary meanings. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as an

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[5] See for example *Joubert and Others v Venter* 1985 (1) SA 654 (A) at 696A-B.

[6] See for example *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590J-591C.

[7] See *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 709H-I and *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 14.

[8] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1202H and *Hardaker* id.

[9] See for example *Golding v Torch Printing & Publishing Co. (Pty.) Ltd. and Others.* 1948 (3) SA 1067 (C) at 1087; Burchell *The Law of Defamation in South Africa* (Juta, Cape Town 1985) at 82; and Visser "Compensation for Harm to the Personality – the Actio Iniuriarum" in Du Bois et al (eds) *Wille's Principles of South African Law* 9 ed (Juta, Cape Town 2007) 1165 at 1168.

innuendo, derived from special circumstances which can be attributed to the statement only by someone having knowledge of the special circumstances.[10] A plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statement derives its secondary meaning. But an innuendo must not be confused with an implied meaning of the statement which is regarded as part of its primary or ordinary meaning.[11]

[88] To add to the confusion that sometimes arises from all this, plaintiffs often wish to point out the sting of a statement which is alleged to be defamatory per se. The particular defamatory meaning contended for is then emphasised by a paraphrase of the statement which is referred to as a "quasi-innuendo". "Quasi" because it is not a proper innuendo or secondary meaning. Background circumstances need not be pleaded. The disadvantage of relying on a quasi-innuendo, as opposed to the contention that the publication is defamatory per se, is that the plaintiff is bound by the selection of meanings pleaded.[12] In this regard reference was made with approval in *Demmers v Wyllie and Others*[13] to the following statement in *HRH King Zwelithini of Kwa Zulu v Mervis and Another*:[14]

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[10] *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 21A-B.

[11] Id.

[12] See for example *Sachs v Werkerspers Uitgewersmaatskappy (Edms.) Bpk* 1952 (2) SA 261 (W) at 272G-273B and *HRH King Zwelithini of Kwa Zulu v Mervis and Another* 1978 (2) SA 521 (W) at 524G.

[13] 1980 (1) SA 835 (A) at 845E-G.

[14] Above n 12.

> "[O]nce a plaintiff has selected the meanings of the offending words upon which he relies, he is bound by that selection and, if he should fail to establish that the words bore or bear such meaning or meanings, he cannot then fall back on any other defamatory meaning or meanings which he contends that the words bear per se, unless he has pleaded the selected meanings as an alternative to a general allegation that the words are defamatory per se."

[89] Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory.[15] In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff.[16] The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.[17]

[15] See for example *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A) at 30F-G and *Sindani v Van der Merwe and Others* 2002 (2) SA 32 (SCA) at paras 10-1.

[16] See for example *Basner v Trigger* 1945 AD 22 at 32; *Pienaar and Another v Argus Printing and Publishing Co. Ltd.* 1956 (4) SA 310 (W) at 322A-B; and Visser above n 9 at 1173.

[17] See for example *Demmers* above n 13 at 842A-C; *Sindani* above n 15 at para 11; *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at paras 25-6; and Burchell above n 9 at 84.

[90] The reasonable reader or observer is thus a legal construct of an individual utilised by the court to establish meaning. Because the test is objective, a court may not hear evidence of the sense in which the statement was understood by the actual reader or observer of the statement or publication in question.[18]

[91] At the second stage, that is whether the meaning thus established is defamatory, our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published.[19] In the present context this succinct exposition attracts three annotations:

(a) Because we are employing the legal construct of the "reasonable", "average" or "ordinary" person, the question is whether the statement was "calculated [in the sense of likelihood] to expose a person to hatred, contempt or ridicule".[20] Evidence of whether the actual observer actually thought less of the plaintiff is therefore not admissible.[21] The test is whether it is more likely, that it is more probable than not, that the statement will harm the plaintiff. The view of

[18] See for example *Mangope v Asmal and Another* 1997 (4) SA 277 (T) at 284I-286H.

[19] In this regard the test proposed by Lord Atkin in *Sim v Stretch.* 1936 (2) All ER 1237 (HL) at 1240, that a statement is defamatory if it would "tend to lower the plaintiff in the estimation of right-thinking members of society generally" has often been referred to with approval in our courts. In *Mohamed* above n 7 at 706H-707A it had been recognised, however, that the "right thinking members of society in general" is no different in the context of a criterion for defamation than the legal construct of the "reasonable", "ordinary" or, "average" observer.

[20] Per De Villiers JP (Fischer J concurring) in *Pitout v Rosenstein.* 1930 OPD 112 at 117, referred to with approval in *Johnson v Beckett and Another* 1992 (1) SA 762 (AD) at 774C.

[21] See for example *Demmers* above n 13 at 842A-H; *Botha en 'n Ander v. Marais.* 1974 (1) SA 44 (A) at 48E-F; and *Mangope* above n 18 at 286C-D.

Neethling[22] that a mere tendency or propensity – as opposed to a likelihood – of harm would suffice, does not appear to be supported by any authority in our law.

(b) If it is found that the statement is ambiguous in the sense that it can bear one meaning which is defamatory and others which are not, the courts apply the normal standard of proof in civil cases, that is, a preponderance of probabilities. If the defamatory meaning is more probable than the other, the defamatory nature of the statement has been established as a fact.[23] If, on the other hand, the non-defamatory meaning is more probable, or where the probabilities are even, the plaintiff has failed to rebut the onus which he or she bears. Consequently it is accepted as a fact that the statement is not defamatory. Or, as stated somewhat more succinctly in *Channing v South African Financial Gazette Ltd. and Others*:[24]

> "If, upon a preponderance of probabilities, it is found that to those [ordinary] readers the article bore a defamatory meaning, then (subject to any defences which may be established), the plaintiff succeeds, even though there is room for a non-defamatory interpretation: if not, the plaintiff fails."

(c) Examples of defamatory statements that normally spring to mind are those attributing to the plaintiff that he or she has been guilty of dishonest, immoral or otherwise dishonourable conduct.[25] But defamation is not limited to statements of

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[22] Neethling et al *Neethling's Law of Personality* 2 ed (Butterworths, Durban 2005) at 135-6, referred to with approval by Harms DP in the Supreme Court of Appeal judgment above n 2 at para 8.

[23] Burchell above n 9 at 89-90.

[24] 1966 (3) SA 470 (W) at 473E, referred to with approval in *Demmers* above n 13 at 842H-843B and 843D-E.

[25] See for example Neethling above n 22 at 140-3 and Burchell above n 9 at 103-14.

this kind.[26] It also includes statements which are likely to humiliate or belittle the plaintiff; which tend to make him or her look foolish, ridiculous or absurd; and which expose the plaintiff to contempt or ridicule that renders the plaintiff less worthy of respect by his or her peers.[27] Everyday experience demonstrates that a caricature or cartoon can be more devastating to the image of the victim than, say, an accusation of dishonesty.

[92] Against this background I now turn to the crucial question in this case: did Dr Dey establish that he had been defamed by the manipulated picture?

Has defamation been established?

[93] What appears to be incontrovertible is that the picture communicated a statement. To the meaning of that statement I shall soon return. But, whatever the content of that statement, it was clearly communicated by wide publication of the picture at the school. Equally obvious to my way of thinking is that the statement concerned Dr Dey and the principal of the school. Though the bodies depicted plainly did not belong to them, the faces clearly did.

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[26] Or, as De Villiers JP said in *Pitout v Rosenstein* above n 20 at 117 "the word 'contempt' as used in the definition of defamation does not mean virulent scorn or dispisal."

[27] See for example *Marruchi v Harris.* 1943 OPD 15 at 22; *Holdt. v Meisel.* 1927 SWA 45 at 49; *Pitout* id; Burchell above n 9 at 115-6; Neethling above n 22 at 135; and Burchell *Personality Rights and Freedom of Expression* (Juta , Cape Town 1998) at 196.

[94] In his particulars of claim Dr Dey contended that the manipulated picture was per se defamatory. Alternatively he pleaded, in the form of a quasi-innuendo, that the picture would be reasonably understood to mean, inter alia, that he was a homosexual person or that he was in a homosexual relationship. Despite these allegations, the majority of the Supreme Court of Appeal endorsed the following factual findings by the High Court:[28]

> "The publication raises questions about the plaintiff's sexuality and sexual orientation, he [the learned judge *a quo*] said. It ridicules the plaintiff's moral values and disrespects his person. However, the sexual orientation itself, he said, is of little moment because the ridicule would not have been different if the other person had been a female member of staff."

[95] In this Court the applicants' counsel contended that both courts had erred in these findings. In support of this contention they advanced two arguments. Their first argument departed from the premise that the core part of Dr Dey's case remained, at all stages, that the picture was defamatory of him because it portrayed him as being homosexual. Accordingly, so the argument went, it was not permissible for him to shift ground on this issue. The second argument was that, as a matter of law, Dr Dey was bound by the selected meanings of the picture that he pleaded and that he could not fall back on any other defamatory meaning.

[28] Above n 2 at para 14. See also para 19.

[96] As I see it, these arguments miss the point that the main case advanced in Dr Dey's pleadings was that the picture was defamatory per se. The allegations of quasi-innuendos were pleaded in the alternative. This is the type of pleading specifically approved by the authorities to which I have referred earlier.[29] As to his main case, which relies on a statement being defamatory per se, it matters not how Dr Dey understood the picture or what he said in his pleadings or in his evidence. The primary or ordinary meaning of the picture is something for the court to decide. The Supreme Court of Appeal can therefore not be faulted when it held that the ordinary meaning of the picture, express or implied, is not a matter for evidence, because interpretation is an objective issue.[30]

[97] I therefore turn to the first phase in the two-stage enquiry, which involves an investigation into the ordinary meaning of the picture. As we know, the question at this stage is what meaning the reasonable observer would attribute to the picture in its proper context. As I see it, this raises two antecedent questions: (a) what does the picture show, both expressly and by implication; and (b) what is the proper context in which it must be understood?

[98] What the picture explicitly shows is a frontal image of two men, both naked, sitting very close together on a couch. Their legs are wide open and the leg of the one is resting across the leg of the other. The hands of both are obviously in the region of their own

[29] See for example *Demmers* above n 13 at 845E-G and *HRH King Zwelithini of Kwa Zulu* above n 12 at 524E-G.

[30] Above n 2 at para 15.

genitals, but both the hands and the genitals are covered by an image of the school crest. The position of the hands behind the crest is suggestive of sexual stimulation or some other sexual activity. In short, the vision created is one of two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality, which would be embarrassing and disgraceful to the ordinary members of society. The faces of the two men are electronically cut out and replaced by those of the school principal, on the one figure, and that of Dr Dey, on the other. The manipulation of the picture in this way is obvious and crude. No reasonable person could ever think that the bodies on which the faces are pasted were actually those of the principal and Dr Dey.

[99] This leads us to the context in which the picture would probably have been understood. As a starting point we know that the picture was distributed and shown amongst the teachers and learners of a particular school. As I have already pointed out in describing the picture, we know that the two faces are those of the school principal and one of his deputies, Dr Dey, while the crest in the picture is that of the same school. What also appears from the uncontroverted evidence at the trial is that the school had about 2 000 learners and that Dr Dey was one of five deputy principals who each had certain areas of special responsibility. Areas for which Dr Dey took special responsibility included discipline at the school, motivating learners and the conduct of formal opening ceremonies at the beginning of every school week. In sum, as Dr Dey testified, he was the symbol of authority and discipline at the school.

[100] What Dr Dey also testified was that in his experience of about 20 years as a teacher and about 10 years as a deputy principal, discipline at a school could only be ensured through mutual respect between teachers and learners. Once learners lose their respect for a teacher, so he testified, that teacher loses both credibility and control. In consequence, so he said, it was of cardinal importance to him to nurture that mutual respect. None of this was disputed by or on behalf of the applicants. On the contrary, it accords with their evidence that Dr Dey was a well-respected teacher at the school. This, I believe, must also be regarded as part of the context. Another part of the context would be that the picture was in all probability created and published by learners at the school.

[101] How would the picture, in this context, be understood by the reasonable observer? The nub of the High Court's finding in this regard was that the reasonable observer would understand the picture to associate the two teachers with the bodies and their behaviour, and this association would render Dr Dey (who is the only one of concern) the object of ridicule and disrespect for his person.[31] In the main, the majority of the Supreme Court of Appeal agreed with these findings.[32]

[102] In challenging the correctness of this evaluation by both courts, the applicants made much of the fact that, since the picture was an obvious and crude manipulation, it

[31] Summarised by the SCA id at paras 13-4.

[32] Id at para 19.

would be equally plain to the reasonable observer that the principal and Dr Dey were not actually the persons in the picture. In this light, so they contended, the majority of the Supreme Court of Appeal had failed to explain how Dr Dey could be subjected to ridicule and disrespect by a picture which clearly did not attribute any conduct to him. For their further contention that both courts erred in their evaluation of the picture, the applicants relied on the premise that the reasonable observer would have recognised the picture as a joke or a schoolboy prank. I propose to deal with these contentions separately.

[103] As to the first, I agree that it would be clear to the reasonable observer that in reality Dr Dey was not one of the persons in the picture and that he did not, in reality, partake in whatever it is that they were doing. But, at the same time, I share the view of the High Court, as endorsed by the majority of the Supreme Court of Appeal, that the reasonable observer would infer some association between the two teachers, on the one hand, and the situation described in the picture, on the other. After all, their faces were directly linked to the bodies. In my view that renders the picture difficult to distinguish from a caricature or a cartoon: in all these cases it is obvious that the person identified is not an actual depiction of that person, but that there is some association between that person and what the picture conveys.

[104] What the applicants' contention therefore amounts to is that a caricature or a cartoon can never be defamatory. But that is not our law. On the contrary, our courts have accepted, in principle, that cartoons, caricatures and sketches may well be

defamatory.[33] Whether or not a particular cartoon or caricature is defamatory will again depend on the outcome of the two-stage test. But cartoons and caricatures are not excluded from the realm of defamation merely because they are clearly not true depictions of the persons concerned.

[105] So, to recapitulate, the reasonable observer would, in my view, understand the image or statement conveyed by the picture as associating or connecting Dr Dey and the principal with the indecent situation that the picture portrays.

[106] That takes us to the second step in the two-stage enquiry: should the picture, thus understood, be regarded as defamatory of Dr Dey? That in turn, as we know, depends on the outcome of a further investigation, to wit whether the message conveyed by the picture would probably undermine the esteem in which Dr Dey is held by others. Or, stated in somewhat more plain language, whether the reasonable person would regard the picture as likely to undermine the respect enjoyed by Dr Dey.

[107] In considering this question, the reasonable person would, in my view, immediately wonder "why"? Why are the principal and his deputy, Dr Dey, associated with persons behaving in a lewd and indecent way? Why are their faces not pasted on, say, the bodies of ballet dancers, or for that matter, coupled with some other comical but

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[33] See for example *Lewison v Philips* (1842) 3 Menz 37; *Golding* above n 9; and Burchell above n 99 at 115-6.

innocuous situation? The answer to these questions that, in my view, instinctively springs to mind is this: the whole purpose and effect of the association created by the picture is to tarnish the image of the two figures representing authority; to reduce that authority by belittling them and by rendering them the objects of contempt and disrespect; and to subject these two figures of authority to ridicule in the eyes of the observers who would predominantly be learners at the school. This means that the average person would regard the picture as defamatory of Dr Dey.

[108] In the main, I therefore agree with the evaluation of the picture by the High Court and the majority of the Supreme Court of Appeal, albeit through a slightly different process of reasoning. Significantly, the Freedom of Expression Institute (FXI) interpreted the picture thus:

> "In short, . . . the image was a clear attempt to subvert the central figures of authority in the school by means of deploying satirical strategies, however inexpertly executed."

And that:

> "The evidence given at the hearing of this matter bears out the fact that the respondent represented authority in the school and that the effect of the image upon other learners was one of shocked laughter. If the Supreme Court of Appeal had properly considered these factors it would have reached the conclusion that the image went no further than to subvert the central figures of authority in the school by turning the values which they represent rudely and clumsily on their head."

[109] What all this means in plain language, as I understood it, is exactly the same as the conclusion I arrived at, namely, that both the purpose and the effect of the picture were to subvert the central figures of authority in the school by belittling them and by subjecting them to ridicule. In so far as the argument may seek to draw a distinction between Dr Dey as a person, on the one hand, and a figure of authority, on the other, it would, in the present context, come across as a distinction without a difference. The aim might have been to destroy Dr Dey's image as a figure of authority but the net effect was to belittle and humiliate him as a person, to represent him as unworthy – or at least less worthy – of respect by the learners of the school, which is a classic example of defamation.

[110] This brings me to the applicants' further contention that the reasonable observer would not have taken the picture seriously because he or she would have regarded it as a joke. During argument applicants' counsel also referred to it as a schoolboy prank and as schoolboys poking fun at their teachers. The concept of a joke or jest is usually cast in the role of a defence excluding *animus iniuriandi*, an instance in which the defendant bears the onus.[34] In this case the applicants also sought to assign it to that role. I will come to that. But the concept of a joke may also come in at the earlier stage of determining whether a statement is defamatory.[35] If the conclusion is that the reasonable

[34] See for example Burchell above n 9 at 285-6; Visser above n 9 at 1189; Neethling above n 22 at 181; and *Masch v Leask* 1916 TPD 114 at 116.

[35] In *Masch* above n 34 the difference became somewhat obscure.

observer would understand the statement as good clean fun which simply caused amusement, it will not be regarded as defamatory.[36]

[111] Yet, the mere fact that a statement raised a laugh does not mean that it is not defamatory. Writing for the majority of the Supreme Court of Appeal in this case, Harms DP formulated the principle as follows:[37]

> "It appears to me that if a publication is objectively and in the circumstances in jest it may not be defamatory. But there is a clear line. A joke at the expense of someone – making someone the butt of a degrading joke – is likely to be interpreted as defamatory. A joke at which the subject can laugh will usually be inoffensive." (Footnote omitted.)

[112] In the same vein, Harms DP also referred[38] to the distinction drawn by the author, Melius de Villiers,[39] between "legitimate jest and jest that is not legitimate". Latching on to this distinction, both the applicants and the FXI maintained that the majority of the Supreme Court of Appeal set themselves up as arbiters of what is a "legitimate joke" in the sense of whether or not a joke is in good taste, unwholesome, objectively funny, and so forth. They further argued, with particular reference to certain passages from the

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[36] See for example *Peck v Katz* 1957 (2) SA 567 at 572H-573A (T) and *Masch* above n 34.

[37] Above n 2 at para 10.

[38] Id at para 9.

[39] De Villiers *The Roman and Roman-Dutch Law of Injuries* (Juta, Cape Town 1899) at 195.

judgment of Sachs J in *Laugh It Off Promotions*,[40] that the majority of the Supreme Court of Appeal had erred in doing so.

[113] But I do not believe that is what the majority of the Supreme Court of Appeal set out to do. What they did was to differentiate between jokes which are defamatory and those which are not. This becomes particularly clear when proper note is taken of the substance of the distinction by Melius de Villiers to which Harms DP referred. What De Villiers describes as jest which is not legitimate, is a joke which would be insulting, offensive or degrading to another. Or, to apply the test formulated by Harms DP, a joke in which the subject cannot share because it is hurtful and defamatory to the subject. I believe that is essentially the same distinction that Innes CJ sought to draw in *Kimpton v Rhodesian Newspapers Ltd*[41] when he said that a statement which raises a laugh is defamatory when there is an element of *contumelia* in the joke, that is when it is insulting or degrading to the butt of the joke.

[114] What I distil from all this is that in the present context, the question is not so much whether the attempt at a joke is objectively funny or not. Nor is it of any real consequence whether we regard the joke as unsavoury or whether we think that those who may laugh at it would be acting improperly. The real question is whether the reasonable observer – perhaps, while laughing – will understand the joke as belittling the

[40] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 88.

[41] 1924 AD 755 at 757-8.

plaintiff; as making the plaintiff look foolish and unworthy of respect; or as exposing the plaintiff to ridicule and contempt. Everyday experience tells us that jokes are often intended to and are frequently more effective in destroying the image of those at whom they are aimed. If the joke then achieves that purpose, it is defamatory, even when it is hilariously funny to everyone, apart from the victim.

[115] Reverting to the facts, this is precisely how the reasonable observer would, in my view, have evaluated the picture, namely, that it was aimed at challenging Dr Dey's authority through tarnishing his image and diminishing the respect that he enjoyed amongst the learners of the school. That renders the picture defamatory. I am prepared to accept that most of the learners at the school found the picture funny or even hilarious. But that does not detract from my conclusion. In fact, as I see it, the very reason why they would probably be laughing was that the two figures of authority were belittled and reduced to ridicule.

[116] Ironically enough, support for my conclusion as to how the reasonable observer would evaluate the manipulated picture, comes from inadmissible evidence which the applicants sought to introduce in their favour at the trial. It happened when the applicants' friend, Ms Marzaan Griesel, was called to testify on their behalf. The tenor of her – inadmissible – evidence was that when she saw the picture, she regarded it as a joke. Yet, she conceded under cross-examination that she would not like to see the photograph of one of her parents used in the same way, because "dit sou hulle verneder",

which, directly translated, means that it would have humiliated or demeaned them. Lest I be misunderstood: I do not rely on the concession by Ms Griesel as part of the reasoning which led me to the finding that the picture is defamatory. I do believe, however, that it is an answer to the applicants' contention during argument that to regard the picture as defamatory would be to lose touch with the ways of schoolchildren and schoolboy pranks. In short the answer is that a schoolchild called as a witness for the applicants came to exactly the same conclusion; that even though it could be called a schoolboy prank, it humiliated and demeaned the victims of the prank.

[117] Much was made by the applicants' counsel of the fact that the picture was plainly created by schoolchildren. I agree that this is how the reasonable observer would probably see the situation. I also agree that it is not an irrelevant consideration. The reasonable observer would, to an extent, take the statement from whence it cometh. Accordingly, the reasonable observer would accept that teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously.

[118] Yet there is a line that may not be crossed. That must be so because teachers are entitled to protection of their dignity and reputation; no less than to the protection of their bodily integrity. Conversely, learners are not exempted from delictual liability. In the case of bodily integrity and damage to property the line is usually bright and clear. If a schoolboy, as part of a prank, pulls a chair from under a teacher sitting down, the

schoolboy will be liable for the damages resulting from the injuries the teacher may suffer. Or if he damages the teacher's car, the result will undoubtedly be the same.

[119] In the case of defamation the line might not be so bright and sometimes it might even be wavering. Nonetheless, it is there. In principle it is crossed when the joke becomes hurtful; when it represents the teacher as foolish, ridiculous and unworthy of respect. In the end it comes down to a value judgment. In this case I share the value judgment of the High Court, and the majority of the Supreme Court of Appeal, that the applicants had crossed the line.

Wrongfulness

[120] The FXI also sought to build an argument on the fact that the picture was obviously created by schoolchildren. Its argument, however, went down an entirely different road. What it amounted to was that, even if the picture was found to be defamatory, its publication should be held to be justified by an extension of the reasonable publication defence developed by the Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*,[42] as endorsed by this Court in *Khumalo.*[43] In developing this argument the FXI contended that children should be allowed, as part of their right to freedom of expression under section 16 of the Constitution, to experiment with satire. The very point of satire, the argument proceeded, is to ridicule those in

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[42] Above n 8 at 1212G-H.

[43] Above n 3 at para 43.

authority, even when it results in some hurt to the victim, particularly since hurt to the victim is often necessary to render the expression poignant. Yet, so the argument concluded, satire is part of the functioning of democracy and children should, therefore, be allowed to develop their skills through experimentation.

[121] By raising the defence of justification, the FXI entered the domain of wrongfulness. This is so because grounds of justification customarily describe defences excluding wrongfulness. As we know, a defendant who seeks to rely on a ground of justification bears the onus to raise and establish this ground. Traditionally these grounds include, for example, that the statement was true and published for the public benefit, that it was published on a privileged occasion, that it constituted fair comment on facts which are true, and so forth.[44]

[122] In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct;[45] and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in

[44] For a more detailed exposition of these defences, see Burchell above n 9 at 206-79 and Visser above n 9 at 1177-86.

[45] See for example *Argus Printing* above n 6 at 588H-I.

accordance with constitutional norms.[46] Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.[47]

[123] In the constitutional context, grounds of justification play a pivotal role. Shortly after the advent of the new constitutional dispensation, some decisions of the high courts held that our common law was not sufficiently even-handed in its protection of the right to freedom of speech when it came into conflict with the right to reputation.[48] Because of the more recent approach by our courts that there is no *numerus clausus* of justification grounds, it was open to the Supreme Court of Appeal in *Bogoshi*[49] to create a new ground of justification, subsequently referred to as "reasonable publication".[50] In the light of this new development, this Court was able to find in *Khumalo*[51] that the common law allows the courts to strike a proper balance between the often conflicting fundamental rights of freedom of speech, on the one hand, and the right to dignity, including reputation, on the

[46] Id at 588I-J. See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at paras 32-4; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at para 12; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paras 12 and 22; and *Bogoshi* above n 8 at 1204D-E.

[47] See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at para 11.

[48] See for example *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

[49] Above n 8 at 1212G-H.

[50] Perhaps, with the wisdom of hindsight, it might have been better, as was pointed out in *Mthembi-Mahanyele* above n 17 at para 44, to talk about "justifiable", rather than "reasonable", publication so as to avoid possible confusion between wrongfulness and negligence.

[51] Above n 3 at paras 43-4.

other. Yet the categories of grounds of justification are still not closed. Courts may in appropriate cases thus recognise new grounds or adapt existing grounds to give effect to considerations of legal policy and constitutional norms.

[124] In the context of defamation the result of all this was summarised as follows in *Hardaker v Phillips*:[52]

> "The element of unlawfulness [or wrongfulness] is more often than not sought to be rebutted by the defendant attempting to establish one or other of the well-established defences which either owe their origin to or bear the influence of English law. These typically include qualified privilege in relation to judicial proceedings and fair comment. But the defences available to rebut unlawfulness do not constitute a *numerus clausus*. . . . In the final analysis, whether conduct is to be adjudged lawful or not depends on a balancing of the constitutionally enshrined right of dignity, including as it does the right to reputation on the one hand, and the right to freedom of speech, on the other. . . . But, the above notwithstanding, the well-established defences and the rules relating to each are both useful and convenient and in addition have the advantage of affording litigants a degree of certainty. Nonetheless, in their application and development, sight should not be lost of the constitutional values underlying their true object which is the rebuttal of unlawfulness."

[125] Needless to say, in applying these principles, dignity and freedom of speech are not the only constitutional norms that may come into play. Notionally it is conceivable that a court may find an admittedly defamatory statement justified in order to give effect to some other constitutional value. But the balancing act between potentially conflicting fundamental rights can be performed only after all pertinent facts have been established.

[52] Above n 7 at para 15. See also *Khumalo* above n 3 at paras 26-7.

And, in the light of well-established authority,[53] the defendant who invites the court to perform that balancing act bears the onus of pleading and establishing the defence.

[126] As I have said earlier, satire expressed by way of cartoons, caricatures or sketches may in principle well be found to be defamatory. Yet, it will not attract liability if the defendant succeeds in raising some ground of justification. Grounds that come to mind in this context as being potentially available include, for example, fair comment, privileged occasion, and justifiable publication.

[127] In this case no justification ground was pleaded or relied upon by the applicants. As I have said, justification as a potential defence was raised for the first time during argument in this court by the FXI. It will be remembered that it relied on the rather radical ground based on the alleged right of children to develop their satirical skills. I find it unnecessary to deal with the proposed ground of justification at any great length. Apart from the fact that it derives no support from our law as it stands, I find the major obstacle to its acceptance in the fact that it was never pleaded and never raised in any manner or form at the trial. The probable reason for this is that the applicants were never prepared to admit that the picture was defamatory of Dr Dey or, for that matter, that it constituted an infringement of his dignity. But, be that as it may, because it has never been raised, the defence had not been canvassed or investigated at all. Had it been so canvassed, the court would have had to perform the balancing act between the freedom of

[53] *Hardaker* above n 7; *Khumalo* above n 3 at paras 37-44; and *Bogoshi* above n 8 at 1215-8.

expression of schoolchildren, on the one hand, and the dignity of teachers – including their reputation – on the other.

[128] To facilitate this balancing act, there would have to be an investigation into what the effect of such free-reigning experimentation by schoolchildren with satire would be. Would it not result in a general destruction of respect for teachers? And, if so, what would be the effect on discipline in our schools? Apart from his own evidence, Dr Dey also presented the evidence of Dr Pieter Edwards at the trial. He is the principal of a well-known school in Pretoria. What we learn from his evidence, and that of Dr Dey himself, is that, in their experience, respect for teachers is an essential precondition for discipline; that discipline in turn is an essential requirement for the functioning of the school system; and that there is a growing tendency in our schools to challenge the status and authority of teachers with a concomitant breakdown in discipline. In this light it would, in my view, frankly be irresponsible to allow the extension of the reasonable publication defence contended for by the FXI without any proper investigation into the potential repercussions.

Animus iniuriandi

[129] This brings me to the defence raised by the applicants that they lacked *animus iniuriandi* or intent. Broadly stated for present purposes, *animus iniuriandi* is the subjective intent to injure or defame. It is the equivalent of *dolus* in criminal law. It does

not require that the defendant was motivated by malice or ill-will towards the plaintiff. It includes not only *dolus directus* but *dolus eventualis* as well.[54]

[130] As we know, a defendant who raised absence of *animus iniuriandi* as a defence, bears the onus of establishing that defence on a preponderance of probabilities. In their endeavour to do so, the applicants relied on two grounds. First, that they intended the picture as a joke and therefore had no intent to injure or defame. Second, that they did not appreciate the wrongfulness of their conduct. I propose to deal with these two grounds separately.

[131] As to the first ground, established principles of our law dictate that motive to raise a laugh and not to injure, in itself, would not exclude *animus iniuriandi*. This is so because in our law motive does not necessarily correlate with intent. A defendant who foresaw the possibility that his attempt at humour might be defamatory of the plaintiff, but nonetheless proceeds with the attempt, will have *animus iniuriandi* or intent in the form of *dolus eventualis.*

[132] I believe that, at best for the applicants, this is what happened in this case. On the assumption, in the applicants' favour, that they intended to amuse their fellow learners through wit, they knew at the same time that an inherent element of the joke was to

[54] See for example *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402H and 409G-H and *Marais v Groenewald en 'n Ander* 2001 (1) SA 634 (T) at 644B-C and 645F-G.

humiliate Dr Dey and the principal. Stated somewhat differently, I believe the applicants appreciated that the very reason why fellow learners may find the joke funny, was that it subjected the two figures of authority at the school to humiliation and ridicule.

[133] I say this because two of the applicants conceded in cross-examination that they would not paste the face of their *dominee* (church leader) on the same picture because one does not "mess" with the *dominee*. They also admitted that they would not like to see their own faces or the faces of their parents in that position. The only sensible inference I can draw from all this is that they knew that any person whose face was pasted on that picture would be humiliated and suffer harm through degradation. In short, they knew that they were "messing" with Dr Dey's image and carried on regardless of the consequences.

[134] The second basis on which the applicants rely for their alleged lack of intent, is absence of knowledge of wrongfulness. I must admit that, in the circumstances I found their reliance on this basis rather peculiar. Lack of knowledge of wrongfulness is generally advanced in the context of a subjective belief in some ground of justification which is then found, objectively, not to exist. So, for example, it would be contended by a defendant that he or she thought the defamatory statement was privileged,[55] or that the defamatory statement was true and its publication for the public benefit,[56] or that the

[55] See *Maisel v Van Naeren.* 1960 (4) SA 836 (C).

[56] See *Nasionale Pers, BPKT., v Long,* 1930 AD 87 and *O'Malley* above n 54.

plaintiff had consented to publication.[57] But this was not the defence raised by the applicants. Nor did they contend that they were unaccountable or *culpae incapax* because their emotional and intellectual development had not reached the stage that enabled them to distinguish between right and wrong and to act accordingly.[58] They simply denied that they were aware that what they were doing was wrong.

[135] The trial court held that on the applicants' own evidence they indeed knew that what they did was wrongful. In support of this finding the court referred, inter alia, to their admission that they would not paste the face of their *dominee* or their parents in the same position and that one of the applicants tried to stop further publication of the picture. The finding that the applicants knew that what they were doing was wrongful is well-supported.

[136] Harms DP also agreed with that factual finding. But he had "some difficulty with the conclusion because it could confuse moral and legal blameworthiness."[59] This difficulty seems to derive from the applicants' testimony that they were unaware of the concept of defamation.[60] This led Harms DP to enquire whether knowledge of

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[57] See *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC).

[58] As to the accountability of children see for example Van der Walt and Midgley *Delict: Principles and Cases, Volume 1: Principles* 2 ed (Butterworths, Durban 1997) at 139-42 and Himonga "Children (minors)" in Du Bois et al above n 9 170 at 176-7.

[59] Above n 2 at para 41.

[60] Id at para 26.

wrongfulness should still be part of our law.[61] In the event, he concluded that it should not and that so-called colourless intent is enough to establish *animus iniuriandi*.[62]

[137] But, with due respect, I fail to share the difficulty. I do not believe that knowledge of wrongfulness requires familiarity with the existence of a particular delict. Just as much as it will be no defence in a criminal trial to plead ignorance of a crime called *crimen iniuria*, ignorance of the name of the particular delict is simply no answer to delictual liability. What is more, it was never suggested by or on behalf of the applicants that their knowledge of wrongfulness, which was found to exist, only pertained to issues of morality. Ultimately, it must be borne in mind that the applicants bore the onus to establish their defence of absence of knowledge of wrongfulness on a preponderance of probabilities. In my view, they simply failed to rebut this onus. It was therefore not necessary for the Supreme Court of Appeal to embark upon the enquiry as to whether our law should still require knowledge of wrongfulness as part of *animus iniuriandi*. Nor do I find it necessary for this Court to do so.

Dignity claim

[138] In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's

[61] Id at paras 27-38.

[62] Id at para 39.

right to reputation and his or her right to a sense of self-worth.[63] But under our common law "dignity" has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect. In the present context the term is used in the common law sense. It is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation.

[139] In his pleadings, Dr Dey relied on defamation and impairment of his dignity as separate causes of action, arising from the same facts. The High Court held in his favour on both counts but made only one award of damages. But, in the Supreme Court of Appeal the majority,[64] and Griesel AJA in his minority judgment,[65] agreed that the same conduct cannot give rise to two actions under the *actio iniuriarum*. Consequently, the majority held that, because Dr Dey was successful in his defamation claim, his claim based on impairment of dignity did not require further consideration.[66] The minority, on the other hand, found that Dr Dey had failed to establish defamation but that his claim for impairment of dignity should succeed.[67]

[63] See *Khumalo* above n 3 at para 27.

[64] Above n 2 at paras 22-5.

[65] Id at para 64.

[66] Id at para 25.

[67] Id at para 64.

[140] I find myself in respectful agreement with the principle that the same conduct should not render a defendant liable by dint of more than one *actio iniuriarum*. I say that for the reasons that follow.

[141] Traditional learning generally defines *iniuria* as the wrongful and intentional impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*).[68] Academic authors are in agreement, however, that although the time-honoured three-fold distinction is a useful classificatory device to highlight the different interests involved, these interests often overlap.[69] Thus, for example, although assault is classified as an infringement of physical integrity it will also often infringe the victim's sense of dignity; malicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity or both while the infringement of reputation will almost always be accompanied by an affront to dignity.

[142] In view of this constant overlapping of manifestations of *iniuria*, duplication of *actiones* would therefore have been expected as a matter of common occurrence, if it were allowed in principle. Yet, like Harms DP,[70] I am unaware of a single case where two actions for *iniuria* were allowed on the same facts. On the contrary, as pointed out

[68] A distinction ascribed to Voet *Commentarius ad Pandectas* (1829) at 47.10.1. On this see Visser above n 9 at 1166.

[69] See Visser id and Neethling above n 22 at 85-6.

[70] Above n 2 at para 23.

by the majority in the Supreme Court of Appeal,[71] it is recognised that an award of damages for defamation should compensate the victim for both wounded feelings and the loss of reputation.[72] I see that as an implicit endorsement of the principle that the plaintiff will not be able to succeed in separate claims for both defamation and infringement of dignity, arising from the same facts. In the same way as the majority of the Supreme Court of Appeal did, I therefore conclude that the corollary of Dr Dey's success in his defamation claim is that his claim based on dignity must fail.

[143] To complete the picture I may add that, if the defamation claim were to fail, Dr Dey should, in my view, succeed in his dignity claim. Broadly stated, the claim for impairment of dignity comprises both a subjective and an objective element. The subjective element requires that the plaintiff must in fact feel insulted. To satisfy the objective element our law requires that a reasonable person would feel insulted by the same conduct.[73]

[144] As to the subjective element, Dr Dey testified that he was deeply hurt by the applicants' conduct; that he felt belittled and humiliated; that in his perception he had lost the image he had worked so hard to achieve as the upholder of values at the school; that

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[71] Id.

[72] See for example *SA Associated Newspapers* above n 15 at 39F-G read with 40B and the other authorities cited by Harms DP id. Compare increased awards for infringement of physical integrity in compensation for the infringement of dignity accompanied by assault, for example in *G Q v Yedwa and Others* 1996 (2) SA 437 (Tk) at 438A-439G and *Jooste, N.O. v Minister of Police and Another.* 1975 (1) SA 349 (E) at 355B-E.

[73] See for example *Delange v Costa* 1989 (2) SA 857 (A) at 862A-I and Neethling above n 22 at 195.

in his mind, the majority of the children saw him as a laughing stock; and that he had therefore lost the respect of the schoolchildren which was vital for his continued functioning as a teacher at the school. No-one suggests that this evidence should not be believed or that his feelings were not genuine. In this light the subjective element of the dignity claim was clearly established.

[145] As to the objective element I have already found the picture defamatory because in the eyes of the reasonable observer it was likely to make Dr Dey look foolish and ridiculous. By the same token, the reasonable observer would, in my view, also have felt humiliated and belittled if his or her face were to substitute that of Dr Dey. After all, the applicants themselves admitted that they would not like to see their own faces or those of their parents in the same position. And their friend, Ms Griesel, gave the reason: it would humiliate them.

[146] But at the same time I feel constrained to state the converse: if I were to hold the picture non-defamatory, I would dismiss the claim based on dignity as well. The minority judgment in the Supreme Court of Appeal came to the contrary conclusion. Though he found the picture not defamatory, essentially because the reasonable observer would, in his view, regard it as a schoolboy prank,[74] he held that the claim based on impairment of dignity should succeed.[75]

[74] Above n 2 at paras 61-4.

[75] Id at paras 64-5.

[147] The applicants submitted, however, that the minority judgment cannot be sustained because it focussed solely on how Dr Dey subjectively experienced the picture and completely negated the objective element of the action. In view of the way in which the findings of the minority on this aspect are formulated,[76] I am constrained to agree with this submission.

[148] Once the objective element is introduced, I find it hard to understand why the same reasonable observer, who would regard the picture as a schoolboy prank, would feel insulted by the prank. Why would the picture suddenly change its nature when it pertained to the reasonable observer herself? Stated somewhat differently, if the reasonable observer would not think that the picture humiliated Dr Dey by rendering him the object of disrespect – as I believe it did – why would he or she think that Dr Dey was right in feeling humiliated?

[149] In short, if a reasonable observer would agree with Dr Dey that he had been humiliated, infringement of dignity has been established. But by the same token Dr Dey would have been humiliated in the eyes of a reasonable observer to whom the statement had been communicated, which means that defamation had been established as well. If, on the other hand, the reasonable observer did not find the picture humiliating of Dr Dey,

[76] Id.

defamation would not have been established, but neither would infringement of dignity. And so I believe that we land ourselves in the same never-ending circle of logic.

Quantum and costs

[150] With regard to quantum I agree with the general approach adopted in the joint judgment by my colleagues Froneman J and Cameron J and particularly with their view on the import and the role of an apology. Ultimately I agree with the order they propose to make. Overall, I agree with paras 154 to 157, 168 to 173, 181 to 189 and 195 to 203 of their judgment.

[151] According to established principle, an award of damages for defamation should compensate the plaintiff for both wounded feelings and loss of reputation. It is also accepted that in some cases the former may outweigh the latter.[134] I believe this is one of those cases. That is the reason why, despite our differences on the cause of action upon which Dr Dey should succeed, I can agree with my colleagues on quantum.

[152] I am mindful that I am interfering with the award that both the High Court and the Supreme Court of Appeal made for defamation. Where I respectfully differ with the approach adopted by the two courts is that, as I see it, too little was made of the fact that the defendants were schoolchildren, as well as the fact that they had already been

[134] See for example *Gelb v Hawkins.* 1960 (3) SA 687 (A) at 693H. Compare also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at 260H.

subjected to other forms of punishment for the same act in more than one way. I appreciate that we are not dealing with sentencing in a criminal case or with an award of punitive damages. Yet, Dr Dey should, in my view, have taken substantial consolation from the fact that he had to some extent been vindicated in the eyes of members of the school community – who observed the picture – by the punishment that the wrongdoers had already endured.

Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concur in the judgment of Brand AJ.

FRONEMAN J AND CAMERON J:

Introduction

[153] In his judgment Yacoob J concludes that the respondent (Dr Dey) must fail in both his defamation and dignity claim. We agree that the defamation claim should be dismissed, but we consider that the dignity claim should be upheld. The facts, history of the matter and the issues to be determined are clearly and admirably set out in his judgment. If we have any difference in that regard it is merely in emphasis. In this same spirit we endorse our colleague's treatment of the context in which the impugned image should be assessed. We agree that leave to appeal should be granted for the reasons

given in our colleague's judgment and that the application to lead further evidence should be dismissed. Whilst we value his approach to the weighing up of the right of freedom of expression in a situation where children are involved because it is thought-provoking, we consider that in the particular circumstances of this case a more conventional approach accords with the dictates of the Constitution. We are also indebted to the comprehensive treatment of the law of defamation in the judgment of Brand AJ. We do not consider our treatment to differ materially from his general exposition of the law, except in its application.

[154] Our common law recognises that people have different claims for injuries to their reputation (*fama*) and to their own sense of self-worth (*dignitas*).[1] Both are affronts to the rights of personality, and although the Bill of Rights does not always draw sharp lines between the two,[2] the distinction is important to our new constitutional order. It illuminates the tolerance and respect for other people's dignity expected of us by the Constitution in our public and private encounters with one another. We may be deeply hurt and insulted by the actions of others, in calling or portraying us as what we have chosen, freely, not to be, or to keep private, even though we are not defamed. It may be that the personal insult or injury may not be considered, in the public eye, as something that harmed our reputation. But within limits our common law, and the Constitution, still value and protect our subjective feelings about our dignity. It is this difference between

[1] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27.

[2] Id.

private and public esteem that explains, in our view, why Dr Dey cannot succeed in his defamation claim, but must do so in his dignity claim.

[155] As the judgment of our colleague Yacoob J related, the applicants caused an electronically manipulated image to be distributed at the school they attended. It showed the bodies of two naked men sitting close together on a couch, their legs suggestively apart, with the leg of one crossing that of the other. The men's hands are in the area of their genitals, but both hands and genitals are strategically covered by the school crest. On the faces of the two naked men the "creator", the first applicant, Hendrick Pieter Le Roux, electronically superimposed the facial images of the school principal and of Dr Dey. The idea to do so came to him after watching an episode of *South Park*, an adult cartoon series on television.

[156] For the purposes of his defamation claim, Dr Dey's personal understanding of this image is not decisive or even relevant. Nor is the way in which others actually understood it. Hence evidence of what those who saw the image thought it meant or conveyed, if anything, is not admissible in a defamation claim. Our law of defamation decrees that the "ordinary", or "primary", meaning conveyed by the image is an objective matter of interpretation by the courts, on which direct evidence of how it was actually understood is not admissible.[3] What matters is thus not what any particular individual

[3] *Sutter v Brown* 1926 AD 155 at 167 and *Botha en 'n Ander v Marais* 1974 (1) SA 44 (A) at 48E. See also Joubert et al (ed) *The Law of South Africa (LAWSA)* (2 ed) vol 7 at para 242.

who saw the image thought, but the court's objective interpretation of the meaning it conveyed to the reasonable average viewer of the image, and whether that meaning would probably lower Dr Dey's esteem in the eyes of the public.[4]

[157] This does not mean that how Dr Dey understood what the image conveyed is irrelevant, since his understanding is crucial to his dignity claim. But first we must explain why we consider that Dr Dey was not defamed.

Defamation claim

[158] As far as we have been able to establish there is no reported case in this country where schoolchildren have been held liable for defaming their schoolteachers in a school setting. That is no accident. What the applicants did here is not exceptional. Every generation of schoolchildren includes individuals who try to make fun of their teachers, who attempt to ridicule them and who attempt to undermine their authority. Some of their peers may laugh at their jokes, or guiltily enjoy the attempt to ridicule and undermine authority; many others will disagree. But for none of them, we suggest, would the jokes, the attempted ridicule or undermining of authority made by the few, in the eyes of the reasonable observer, imply that the teacher is now somehow someone different to the person they knew, diminished by the attempted joke, ridicule or subversion of authority. And that, we think, will also be the reaction of teachers, parents and outsiders who come to know of it. The children's conduct will be recognised as

[4] *LAWSA* id at para 237.

naughty, or worse, but hardly ever as lowering the public esteem of the teacher. In most, if not all, cases the converse will be true: the offending children will be thought less of, not the teacher. Everybody would accept that the conduct was wrong and that the offenders need to be punished, not because the teacher's public esteem was probably diminished, but because the children did not measure up to the public standard expected of them at the school.

[159] We see no material difference between that general situation and the particular facts of this case. The applicants distributed the manipulated image at school and it was seen by schoolchildren and teachers there. Dr Dey was a well-respected teacher and authority figure at the school. He was known not to be sexually promiscuous or exhibitionist. That was why the perpetrators thought what they were doing was funny. Nobody would have thought that Dr Dey and the school principal actually indulged in lewd, camera-loving nakedness. Some might have thought it funny, some less so and for others it may have seemed insulting. But it seems common sense that everyone would have accepted that the applicants' conduct was wrong and that they would be punished for it, not because Dr Dey's reputation had suffered, but because the applicants' own behaviour did not come up to scratch. In fact, the applicants were punished at school for their transgression and that, normally, would have been that. In addition, because Dr Dey laid a criminal charge against them, the weight of our criminal justice system came to bear upon them, but they were "diverted" into a juvenile programme that permitted them,

on admitting guilt, to perform community service at the Pretoria Zoo instead of being convicted.

[160] As we indicated earlier, for a statement or image to defame another, it must in the eyes of a reasonable observer undermine the status, good name or reputation of that person. The standard of proof is probability of injury. This means that the plaintiff must prove that a reasonable person would have thought less of the plaintiff because of the image. Whether a statement or image is defamatory thus involves a two-stage enquiry. The first is to establish the natural or ordinary meaning of the statement or image in its localised factual context. The second is whether that meaning is defamatory.[5]

[161] The majority of the Supreme Court of Appeal held that the image defamed the plaintiff because "[i]t ridicules him, his moral values and disrespects his person."[6] It rejected the defence of jest and refused to find that the viewer of the image would have accepted that its creator was a child.

[162] With respect, we do not share the view that the image is defamatory. The Supreme Court of Appeal found as a fact that the viewer would not have known that the authors of the image were schoolchildren. There was "no reason", the court found, for the likely viewer to have accepted "that children were behind it all". This finding seems to have

[5] *Sindani v Van der Merwe and Others* 2002 (2) SA 32 (SCA) at paras 10-1 and *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A) at 30F-G.

[6] *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) at para 19.

been pivotal to its conclusion as to the nature of inference the reasonable viewer would have drawn from it. The majority pointed out that it cannot be that "the identity of the alleged defamer can determine the objective meaning of a publication."[7] That is right, but it is not the point. The fact is that, in the school context, the likely childish origins of the image would, without doubt have played a role in, if not determined, the likely viewer's assessment and understanding of the image.

[163] Counsel for Dr Dey conceded that the Supreme Court of Appeal's finding that the likely viewer would not have accepted that the image was the handiwork of children was wrong. That concession was in our view correct. The school setting is pivotal to determining the meaning of the image, defamatory or otherwise, because it is overwhelmingly likely that the reasonable viewer would have seen it as a childish, if tasteless or cruel, prank.

[164] In addition to the school setting, which pointed to the prank's likely origin, the fact was that the image was a crude pastiche: the heads are misaligned with the bodies, and wrongly sized; the two faces are different in size; the cut and paste job is evident from the edging of the inset; and indeed Dr Dey's face is pasted over the remnants of the hair of the person in the original: he is invested with a fuzzy halo of another's hair.

[7] Id at para 16.

[165] All this bears on how the reasonable viewer would have assessed the image – in other words, on the meaning the image would have conveyed to that viewer or reader. She may have been offended or shocked by it or disapproved it, but she would certainly not have taken it seriously. Differently put, she would not have thought that the image conveyed, or was intended to convey, any factual averment about the plaintiff or his sexuality or sexual lifestyle.

[166] We accept that the manipulated image depicted two people in a sexually compromising position and that the crude pasting of the faces of Dr Dey and the school principal onto the bodies of the men sought to create some association between Dr Dey and the indecent situation that the image portrays. We also accept that the manipulation was an attempt by its creators to ridicule and undermine the authority of Dr Dey and the school principal (although we have sympathy with those whose sense of humour declines to accept that these deeper, darker forces were really at work).

[167] But an acceptance of all this does not, in our view, mean that the average reasonable person viewing the image in the school context, where it was published, would regard the picture as defamatory of Dr Dey by countenancing the indecent association or attempted ridicule. That contextually average reasonable school viewer, learner or teacher, knew better: Dr Dey and the school principal were not promiscuous, they were respected teachers, and the offenders would get their just disciplinary deserts for their crude joke – as indeed they did. They were formally punished at school, as well

as in a "diversion programme" under the Criminal Procedure Act,[8] after Dr Dey laid charges against them, which resulted in their performing community service by cleaning cages at the local zoo. Any diminution in public esteem would affect the applicants, not Dr Dey or the school principal.

[168] The conventional test for determining whether a statement is defamatory is if it would probably lower the plaintiff in the estimation of right-thinking members of society generally.[9] This test has been widely applied in our courts,[10] subject to the qualification that the reference to "right-thinking persons" is no more than a convenient description of a reasonable person of normal understanding and development,[11] and that the reference to the views of society "generally" includes views held by a substantial section of the community.[12]

[169] This test is useful and practically expedient if it is understood properly as an objective test to determine whether the reputation of a person has been objectively infringed,[13] on a balance of probabilities.[14] The Supreme Court of Appeal appears to

[8] 51 of 1977.

[9] See *Sim v Stretch.* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.

[10] *Independent Newspapers Holdings Ltd and Others v Suliman* 2004 3 All SA 137 (SCA) at paras 29-30; *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at para 25; *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at para 10; *Botha* above n 3; *Hassen v Post Newspapers (Pty.) Ltd. and Others.* 1965 (3) SA 562 (W) at 564E-G and *Conroy v Stewart Printing Co., Ltd.* 1946 AD 1015 at 1018.

[11] *Mohamed and Another v Jassiem* 1996 (1) SA 673 (AD) at 706H-J.

[12] Id at 709A-F and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391(A) at 403G-I.

[13] *Botha* above n 3 at 48E-F.

have taken this test to mean that likelihood is not a requirement, but that it is sufficient if a statement merely has the "tendency" to undermine the status, good name or reputation of a person, to qualify as defamatory.[15] In our view this approach does not take sufficient account of constitutional values and norms, nor the practice in our courts even before the advent of the Constitution.

[170] The suggestion that a person may be defamed without probable impairment of his right to reputation is inconsistent with the decisions in *Botha v Marais*[16] and *Demmers v Wyllie*.[17] These state that the determination of impairment of the right to reputation should be done objectively and should be proven on a balance of probabilities. It is also inconsistent with the requirement of publication of a defamatory statement and the concomitant requirement that the ordinary or reasonable reader of the published statement must have understood the statement as defamatory.[18]

[171] Defamation law involves the consideration and weighing up of competing fundamental constitutional rights against each other, normally those of freedom of expression against those of dignity and privacy.[19] Once a defamatory statement is proven to have been published our law presumes that its publication was unlawful and done

[14] *Demmers v Wyllie and Others* 1980 (1) SA 835 (AD) at 842A-843E.

[15] Above n 6 at para 8.

[16] Above n 3.

[17] Above n 14.

[18] See Burchell *The Law of Defamation in South Africa* (Juta, Cape Town 1985) at 68-70 and 86.

[19] Above n 1 at para 28.

intentionally, and the onus is then on a defendant to prove otherwise.[20] The normal constitutional practice and requirement is that the onus is on a plaintiff to prove the infringement of a fundamental right and for the defendant to justify that infringement.[21]

[172] If the current state of our law of defamation is properly understood as requiring objective proof, on a balance of probabilities, that a plaintiff's reputation has been impaired, the onus on a defendant, once the requisite proof of impairment of reputation has been offered, to rebut the presumption of unlawfulness and *animus iniuriandi*, fits well with accepted constitutional practice and requirements. The contrary is the case were there to be defamation without actual impairment of the right to reputation. It seems clear that pronouncements suggesting that statements may be defamatory, even though no impairment of a plaintiff's reputation has been established, do not correctly reflect our law. This affirmation entails no reformulation of the rules of evidence relating to the determination of the meaning and defamatory content of a publication or image. The test to determine infringement is the same objective test as it has always been.

[173] Once it is clear that our law requires probable impairment of the right to reputation (the public aspect of the constitutional right to dignity)[22] before a statement or image may

[20] Id at para 18.

[21] Currie and de Waal *The Bill of Rights Handbook* (5 ed) (Juta, Lansdowne 2005) at 166-7 and Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* (2 ed) vol 2 at 34–42 - 34–43. See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 44 and *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae*) [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at paras 18-9.

be considered defamatory, general pronouncements that statements or images that arouse hatred, contempt or ridicule are defamatory[23] are better understood. It then becomes clear that statements or images that were "*calculated or had the tendency* or *propensity* to defame"[24] are defamatory only if they objectively and as a matter of probability cause impairment of a plaintiff's good name. If they do not, there is no defamation: but there may be impairment of dignity.

Dignity claim

[174] And that is what happened here. Objectively, the prank did not impair Dr Dey's reputation. But he experienced it as a deep affront to his personal dignity. The question is whether, in law, his right to dignity, coupled with his right to privacy, was impaired. For the purposes of this claim, what Dr Dey understood the image to convey is highly important, since wounded feelings are indispensable to the claim. But they are not enough. What the common law requires for a dignity claim to succeed are three elements: a deliberately inflicted, wrongful act, that impairs the plaintiff's dignity.

[175] Apart from the intention to injure him (or *animus iniuriandi*), Dr Dey therefore had to establish that subjectively his feelings were violated by what he understood to be portrayed by the image, but also, objectively, that the way the image portrayed him was

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[22] Compare *Khumalo* above n 1 at para 27.

[23] Burchell above n 18 at 103. Compare also *De Wet v Morris.* 1934 EDL 75; *Pitout v Rosenstein.* 1930 OPD 112 and *Kimpton v Rhodesian Newspapers, Ltd.* 1924 AD 755.

[24] Neethling et al *Neethling's Law of Personality* (Butterworths, Durban 1996) at 146.

wrongful.[25] These common law requirements are in conformity with our Constitution's protection of everyone's inherent right to dignity.

[176] Dr Dey testified at length, and with some emotion, that the portrayal of him as somehow involved in homosexual activities was deeply hurtful and that he considered this imputation as an affront to his personal dignity. Dignity and privacy are closely linked in our constitutional order.[26] There can be no doubt that subjectively he was deeply affronted by the superimposition of his face not only on to naked bodies, but on to an image that evoked same-sex sexuality. The subjective component of wounded dignity was undoubtedly established.

[177] But Dr Dey also had to establish that this depiction was wrongful. The injury he suffered should be one of which the law takes cognisance. Not every subjective slight has legal impact. Counsel for the applicants seized upon Dr Dey's anguish at the homosexual dimension of the image. He suggested that this created a problem for Dr Dey's dignity claim. Counsel contended that the objective requirement of unlawfulness had not been established.

[178] In *Delange v Costa*, Smalberger JA explained that in determining objective wrongfulness the criterion is one of reasonableness:

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[25] *Delange v Costa* 1989 (2) SA 857 (A) at 861D-862G.

[26] O'Regan J in *Khumalo* above n 1 at para 27.

> "This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria." [27]

[179] The reason why an objective standard was necessary, Smalberger JA explained, was to avoid the courts "being inundated with a multiplicity of trivial actions by hypersensitive persons."[28] It may be noted that here, in determining whether Dr Dey's dignity was unlawfully infringed, as in determining whether the publication of the image defamed him, an objective test of reasonableness is applied. This raises the question: can one find that the reasonable observer would not have taken the image so seriously as to have thought less of Dr Dey, yet still have considered Dr Dey's sense of injury in finding the image insulting reasonable? The answer is Yes. It must be emphasised that the two inquiries are different, and hence that their outcomes may differ. The one reflects inwardly, the other outwardly. In dignity claims, the injured interest is self-esteem, or the injured person's feelings. In defamation, it is public esteem or reputation. And the objective reasonableness in a dignity claim is assessed in relation to feelings of individual affront, not in relation to the audience that sees the image or reads the statement as in a defamation claim. It is in our view plain that the reasonable observer may conclude that, objectively seen, an affront did not damage a person's reputation, while at the same time

[27] Above n 25 at 862E-F. `

[28] Id at 862C-D.

concluding that, objectively seen, the injury to that person's feelings was palpable and reasonably felt, and hence actionable.

[180] The test of objective reasonableness to determine wrongfulness enunciated in *Delange* must incorporate constitutional values and norms and give effect to them.[29] Here the submission by counsel for the applicants becomes pertinent. Are there constitutional values and norms that would deny Dr Dey his dignity claim? More specifically, are there constitutional values and norms that preclude him from claiming compensation for being portrayed as associated with camera-happy naked sexuality?

[181] It is correct, as counsel for the applicants emphasised, that Dr Dey found it objectionable that the image associates him with two men portrayed as engaging in same-sex conduct. Counsel also emphasised that the Constitution discountenances anti-gay sentiments. He suggested that Dr Dey's claim should for this reason fail.

[182] The submission embodies a germ of truth but the basis of the injury must be carefully delineated. It is not, and should not be considered to be, an actionably injurious slight to offend someone's feelings by merely classing them in a condition the Constitution protects – be it religious, racial, age, birth or sexual. To simply call

[29] See for example *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 43. See also *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at para 12; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paras 12 and 22; *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) and *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 588H-I.

someone Muslim, Christian, gay, black, white, lesbian, female, male, an old-age pensioner, atheist, Venda, or Afrikaans-speaker is not actionably injurious. Something more is needed.

[183] The Bill of Rights, while respecting sexual orientation, and protecting gay and lesbian people against unfair discrimination, also protects autonomy of choice in relation to sexual orientation. Many of the Constitution's provisions protect the right to choose to live in a certain way – the rights to language, culture, religion and equality embody protection of autonomous choices, which should be constitutionally protected.

[184] But it does not follow that Dr Dey's choice to lead a heterosexual lifestyle, and to be known as heterosexual, should be protected by legal action. An actionable injury cannot be based solely on a ground of differentiation that the Constitution has ruled does not provide a basis for offence. The Constitution does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth. These are unfair grounds for differentiation and the equality provision of the Bill of Rights protects against discrimination based on them.

[185] It therefore cannot be actionable simply to call or to depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay – and even though stigma may still surround being gay. To hold actionable an imputation based on a

protected ground of non-discrimination would open a back-door to the enforcement by the law of categories of differentiation that the Constitution has ruled irrelevant.

[186] Here counsel for the applicants was correct in pointing out that the injury in such a case would have to be located in some further overlay or imputation – for example that a member of a close-knit conservative religious community attended a different place of worship, and was thus a hypocrite, or untruthful, or disloyal to the community, or unworthy of trust within the community, or inconsistent. The mere fact of falsely stating that a person has made a particular constitutionally protected personal choice, different to that person's actual constitutionally protected personal choice, is insufficient to found an actionable injury in the absence of some further imputation of indignity associated with it.

[187] In objecting to the same-sex depiction, Dr Dey did not make out such a case. Nor is that what he pleaded. He pleaded simply that it was defamatory and injurious to convey that he was, inter alia, in a homosexual relationship or that he himself was homosexual. This, by itself, cannot found an action in law, and if that had been his entire pleading, it would have had to fail.

[188] But Dr Dey's pleadings went further. He pleaded, in addition, that the image conveyed that he masturbated in public, or in the presence of another person, or engaged

in indecent exposure, or that he was a person of low moral character. None of these grounds of complaint invoke constitutionally proscribed objections.

[189] The image showed Dr Dey's face on a naked body in a sexually compromising position, being photographed. The affront this caused to his feelings is in our view actionable. The wounded feelings relate to constitutionally sanctioned and protected personal choices, and are legally compensable.

[190] This is because a reasonable person in Dr Dey's position, whether gay or straight, is understandably affronted by being depicted in, or aligned to, a naked, indecent and probably lewd picture. In our view those affronted feelings should be protected. The superimposition of Dr Dey's face on the naked body in proximity to another, even when so crude as not to injure his reputation by conveying a defamatory meaning, is actionably injurious.

[191] Both the High Court and the Supreme Court of Appeal held that the same-sex sexual orientation depicted in the photograph, and the orientation of the plaintiff, were irrelevant. Both courts took care not to relate the insult or injury to specific sexual orientation, because "the sexual orientation itself . . . [was] of little moment because the ridicule would not have been different if the other person had been a female member of

staff."[30] And whether straight or gay the image "deals with his sexual orientation in a derogatory manner."[31] For "sexual orientation" in this last statement we would substitute only "sexual conduct", but otherwise we agree. In fairness to Dr Dey, it is necessary to make the point that his distress at the image may have focused on the same-sex depiction simply because it was a same-sex depiction. There is little reason to believe that he would have responded much less acutely to a depiction showing his face on that of a naked male body alongside a female body in a sexually suggestive posture.

[192] The applicants were aware that their manipulation of the image was wrong, even though they regarded it as a joke. We accept that they attempted to ridicule Dr Dey and the school principal and, to the extent that Dr Dey's subjective understanding of the manipulation was genuinely held and objectively reasonable, they succeeded in their attempt at that private, individual, level. Intention has been proven.

[193] For that, they were punished in a formal disciplinary process at school, and performed community service under the Criminal Procedure Act.[32] Their punishment in these forms indeed counters the suggestion, raised during argument, that this case concerns the maintenance of discipline at schools, and that a decision adverse to Dr Dey, or one diminishing his recompense, would undermine teachers' authority. That is not so. The school effectively asserted its authority, and vindicated that of Dr Dey. Dr Dey's

[30] Above n 6 at para 14.

[31] Id at para 19.

[32] Above n 8 at section 72(1)(b).

determination to seek civil redress from the applicants, beyond the school setting, led to his instituting action. His choice of a civil claim must be adjudged in the arena in which it was brought, without being freighted with the need to shore up teachers' disciplinary authority in general.

[194] Dr Dey's dignity claim should thus, in our judgment, succeed. That brings us to the appropriate remedy.

Development of the Roman Dutch common law

[195] The present position in our Roman Dutch common law is that the only remedy available to a person who has suffered an infringement of a personality right is a claim for damages. One cannot sue for an apology and courts have been unable to order that an apology be made or published, even where it is the most effective method of restoring dignity.[33] A person who is genuinely contrite about infringing another's right cannot raise an immediate apology and retraction as a defence to a claim for damages. At best it may influence the amount of damages awarded.[34] This is an unacceptable state of affairs, illustrated by what happened in this case.

[196] Counsel for Dr Dey informed us that for Dr Dey this case is not about money, but about restoration of his dignity. Counsel for the applicants indicated that they were

[33] *Kritzinger v Perskorporasie van Suid-Afrika (Edms) Bpk en 'n Ander* 1981 (2) SA 373 (O) at 389G-H.

[34] *SA Associated Newspapers Ltd* above n 5 at 41G.

prepared to participate in a process under the auspices of the second amicus, the Restorative Justice Centre, to engage with Dr Dey in order to apologise to him for their conduct. But a long road has already been travelled through the courts. Soon after the incident the applicants apologised to the school principal (who accepted the apology) and attempted to apologise to Dr Dey, but he waved them away because of legal advice he had received. The matter proceeded to trial after that, with attitudes hardened. Dr Dey initially claimed R600 000 for defamation and *iniuria* and the applicants defended the claim. In the High Court, Dr Dey was awarded R45 000 as damages, an award confirmed by the Supreme Court of Appeal. The Supreme Court of Appeal expressed some doubt about the genuineness of the apology proffered by the applicants to Dr Dey and commented adversely on the manner in which their case was presented in the trial court. That appeared to play some role in accepting that the award made by the trial court should not be reduced on appeal.

[197] Had our Roman Dutch law given due recognition to the value of an apology and retraction in restoring injured dignity, things might have turned out differently. The applicants might have convinced Dr Dey that their attempted apology was genuine, which in turn would not only have given him the personal satisfaction of assuaged feelings, but would have contributed to the restoration of mutual respect between them, something which the trial record showed had been grievously damaged on all sides. Indeed, as Ms Skelton on behalf of the second amicus rightly pointed out, the recourse to legal proceedings in these matters of feeling "deepens and steepens" the conflict. We

think it is time for our Roman Dutch common law to recognise the value of this kind of restorative justice. Moreover, we think it can be done in a manner which, at the same time, recognises the shared values of fairness that underlie both our common law and customary law, and which form the basis of the values and norms that our constitutional project enjoins us to strive for.

[198] Roman Dutch law was a "rational, enlightened system of law, motivated by considerations of fairness" which combined "the wisdom of the Roman law jurists with the idealism of the Dutch scholars."[35] This feature of it was sometimes lost from view in pursuit of doctrinal purity,[36] but in virtually every aspect of Roman Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness.[37] And this area of the law is no exception.

[199] Roman Dutch law provided two remedies for injury to what we now call personality rights, namely the *amende honorable* (honourable amends) and the *amende profitable* (profitable amends). Something akin to profitable amends for injury to dignity

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[35] Dugard "No Jurisdiction Over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus" (1991) 7 *SAJHR* 199 at 203.

[36] Dugard "Grotius, The Jurist And International Lawyer: Four Hundred Years On" (1983) 100 *SALJ* 213 at 216-7 states:

> "The true heirs of Grotius are not those who cling to antiquity and abstention, but those who seek to shape the contemporary South African legal order in accordance with the values and principles of Roman-Dutch law expounded by Grotius and his successors."

Compare Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1995) 100 *SAJHR* 169.

[37] Compare Zimmerman "Good Faith and Equity" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta, Cape Town 1996) at 218.

survives in our law as damages, or monetary compensation, for an actionable injury to dignity and reputation, albeit in the guise of the *actio iniuriarum*.[38] But to make honourable amends is said to have fallen into disuse, although it has come to the fore in academic discussion[39] and case law[40] more recently. It is not necessary for our purposes to trace its origin and history in any great detail, because we only wish to emphasise that the remedy consisted of a retraction and apology for the wrong committed. We are not proposing its reinstatement, but the development of the law in accordance with equitable principles also rooted in Roman Dutch law.

[200] Similar roots are to be found in customary law and tradition, but their interrelation with the Roman Dutch remedies, and their melding into the single system of law under the Constitution, requires mature reflection and consideration on a future occasion.[41]

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[38] Neethling et al above n 24 at 54 regards the *amende honorable* and *amende profitable* to have both "fallen into desuetude in contemporary South African law."

[39] Midgley "Retraction, Apology and Right to Reply" (1995) 58 *THRHR* 288; Mukheibir "Reincarnation or Hallucination? The Revival (or not) of the Amende Honorable" (2004) 25 *Obiter* 455 at 457 and Mukheibir "Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law" (2007) 28 *Obiter* 583. See also Burchell above n 18 at 315-9.

[40] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 24.

[41] In *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 68 and 69, Mokgoro J explained the significance of ubuntu or botho in the following terms:

> "In our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought

[201] The legal representative for the Restorative Justice Centre, Ms Skelton, urged us to develop the law to give effect to these aspects of restorative justice. She did not restrict her submissions to remedies, but in effect asked for the law to be developed in such a manner that the re-establishment of relationships ruptured by infringements of dignity should preferably occur before matters reach the court.[42]

[202] A practical difficulty with that suggestion is that we are concerned with a matter that has already ended up in court. However, the order we suggest should be made in this case flows from a general principled justification for it. We consider that justification to be this. Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society

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> together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.
>
> The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence. It is an area where courts should be proactive, encouraging apology and mutual understanding wherever possible." (Footnotes omitted.)

See also the remarks of Sachs J in his minority judgment at paras 113-8. The majority did not agree that the amount of compensation could be interfered with and thus did not express themselves on the issue.

[42] Burchell above n 18 at 318 and 340 argues for retraction and apology as a defence rather than as a remedy, but Midgley above n 39 at 292 fears that there are a number of problems in adopting that approach. The principled justification for the acceptance of retraction and apology as part of restorative justice that we suggest should be adopted will mean that its application will depend on the facts of each case.

we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.

[203] The applicants' depiction of Dr Dey in the image is an actionable injury to his dignity. He is entitled to an apology from them. That apology should be ordered in addition to the sum of compensation the applicants must pay to him.

Costs

[204] The appeal thus succeeds to the extent that the order made in the High Court and confirmed in the Supreme Court of Appeal must be set aside in relation to the damages awarded. The costs of the action must also be considered. The High Court, in upholding Dr Dey's action but granting him far less than he claimed in damages, awarded him costs only on the magistrate's court scale. The Supreme Court of Appeal set this order aside. Its principal reason for doing so was that both parties agreed that the matter involved complicated issues necessitating the employment of two counsel. That Court affirmed

this approach, concluding that the High Court's award of lower-court costs was incongruous. It therefore granted Dr Dey trial court costs on the High Court scale. We agree with that order and the reasons for it. The order as to trial court costs granted in the Supreme Court of Appeal should therefore stand.

[205] The costs on appeal however stand on a different footing. We have set aside the order of the Supreme Court of Appeal, which upheld the amount of damages the High Court awarded. In its place, we have substituted a lesser sum of damages. The applicants have to this extent succeeded on appeal. Nevertheless, Dr Dey has succeeded in vindicating his claim, and in defending a damages award when the applicants sought to leave him empty-handed. In these circumstances, we consider that the most just award would be for the parties to pay their own costs in this Court and the Supreme Court of Appeal.

Order

[206] The following order issues:

1. The application to lead further evidence is dismissed.
2. The orders granted in the High Court and Supreme Court of Appeal are both set aside and replaced with the following:
    a. The defendants are ordered, jointly and severally, to pay the plaintiff R25 000 as compensation.

b. In addition, the defendants are ordered to tender an unconditional apology to the plaintiff for the injury they caused him.

c. The defendants are ordered, jointly and severally, to pay the plaintiff's costs in the High Court.

d. There is no order as to costs in this Court and in the Supreme Court of Appeal.

SKWEYIYA J:

[207] This is a case concerning children. In and amongst all the other considerations relevant to this matter, this is the inescapable and overarching fact of this case. The judgments prepared by my colleagues are all well-reasoned, but it is with the judgment of my colleague Yacoob J that I concur. There are, however, a few observations I wish to make. I do not intend to traverse the legal issues pertinent to claims of defamation or an infringement of dignity, as these have already been eloquently and comprehensively addressed in the other judgments. Instead, my remarks are limited to the relevance of the consideration that the challenged conduct was committed by children, and the emphasis that should be placed on this aspect.

[208] It is a well-recognised principle of our law that adjudication must occur within context. In my view, this is all the more important when there are children concerned. The applicants, to whom I refer as the learners, were all under the age of 18 years at the

pertinent time. Their actions were directed at the principal and the deputy principal of the school, although only the deputy principal, Dr Dey, has opted to litigate against the learners.

[209] The principal and deputy principal represent the two most senior figures of authority at the school; to my mind, this is one of the most relevant considerations in this matter, and immediately changes the nature of the action to little more than a school prank. Regardless of whether we believe it to be right or wrong, one element that is often present in the school environment is rebellion against authority. That is how I would categorise this. However, simply because this rebellion is commonplace does not position it beyond reproach, and it can be taken too far given the sensitivities of a particular situation or the relevant prevailing norms.

[210] Our constitutional order mandates special protection to be afforded to children. The exact scope of application of section 28 of the Constitution[1] has been the subject of

[1] Section 28 of the Constitution states:

> "(1) Every child has the right—
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> (a) to a name and a nationality from birth;
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> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or

some debate in this Court's jurisprudence, although it is by now clear that the implication of this is not to render the "best interests" consideration absolute.[2] Whilst section 28(2) of the Constitution requires that "[a] child's best interests are of paramount importance in every matter concerning the child", none of the rights listed in section 28(1) have direct bearing here. However, in *Minister of Welfare and Population Development v Fitzpatrick and Others*,[3] this Court stated that:

> "Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."[4]

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[2] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72; *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

[3] [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).

[4] Id at para 17.

[211] There certainly can be no doubt that this is a unique matter, unlike anything that this Court has had to determine in its jurisprudence: here we have a civil claim of a substantial value, targeted directly at children, arising from a scenario that occurred in the school environment. How should the "best interests" standard come into play in a matter such as this? To this end, I find the construction of Article 3 of the Convention on the Rights of the Child[5] appealing. Article 3 is similar to our section 28 of the Constitution. However, there is one interesting difference: instead of using the words "paramount importance", Article 3(1) states that "the best interests of the child shall be *a primary consideration*."[6] Read with the provisions of section 28(2) of the Constitution, what it would mean is that the best interests of the child consideration is not artificially elevated above all others; rather, it forms the basis and starting point from which the matter is to be considered. Once the considerations relevant to this foundation are clearly cemented, one can then begin to examine the other rights that enter the balance, without losing sight of the fact that the best interests of the child remain "of paramount importance".

[212] Children are treated differently in our legal and social structures. In effect, we seek to create different "worlds" for our children in an effort to protect them, to help them develop, and to give them a forum to make mistakes and then learn from these mistakes. One is not hard-pressed to find examples of ways in which we treat children differently, or offer them greater protection. We give children a measure of leeway, and

[5] (1989) 28 *ILM* 1448. The Convention on the Rights of the Child entered into force on 2 September 1990. South Africa ratified the Convention on the Rights of the Child on 16 June 1995.

[6] Emphasis added.

in many instances hold them to a lower standard of account, as we accept that they lack the emotional maturity and wisdom to clearly distinguish right from wrong when there is a grey area. In my view, the facts of this case present such a grey area. As this Court stated in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[7] regarding this distinction between adults and children (albeit in the context of criminal proceedings):

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.
>
> . . . .
>
> We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."[8]

[213] Elsewhere in the same judgment, it is stated that "[n]ot only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others."[9] In my view, that well sums up the way in which the case before us played out. The picture was spawned from an episode of a popular, somewhat

[7] [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

[8] Id at paras 26 and 28.

[9] Id at para 27.

controversial, television series, and snowballed from that point into the matter that is before us today. One can only imagine how the interchange amongst the learners played out, with each one spurring the others on in their bad behaviour. And, indeed, there certainly can be no doubt that this was an instance of bad behaviour. However, given all of the above, I cannot agree with the High Court or the Supreme Court of Appeal that a severe award of damages is the appropriate sanction under the circumstances.

[214] I do not condone what the learners did, and I certainly would not suggest that the learners should not be punished for their actions. It is important that children are made to face the consequences of their actions – how else can we expect them to learn? – but this must be done in a manner that is commensurate with the alleged offence. A judicial officer would be remiss if consideration were not properly given to the effect of one's decision on the rights of the child. In this matter, precisely because they were children, the learners have been subjected to an additional round of punishment through the school disciplinary measures. It is common cause that they have been formally disciplined at the school, and that they have served community service as a result of the criminal charges laid against them by Dr Dey. The learners have also expressed their willingness to apologise to Dr Dey. If this additional legal wrangle were to result in an award of damages made against the learners, it would seem to me to be a step too far.[10]

[10] Compare, in the criminal context, the prohibition on double jeopardy, discussed in *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at paras 248-59.

[215] A school environment is not just one of academic study; it is also a place for growth and development. We institutionalise the learning environment in an effort to guarantee that, regardless of social circumstances, every child has the opportunity to mature emotionally and intellectually. In our efforts to teach right from wrong, we also want to encourage freedom of speech amongst our children, and we certainly do not want to instil in them fear of the law or the legal process. Measures are put in place, within the learning environment, to ensure that when children transgress the rules they will be appropriately and commensurately dealt with. Although in appropriate cases children may be held criminally and civilly liable, in my view it is unnecessary in this case for the children to be subjected to litigious court proceedings as well.[11] In addition to my concern about the potential treble-punishment that the learners will face,[12] I also have grave doubts regarding the efficacy of monetary awards being made against children. I return to the first statement that I made: this is a case concerning *children.*[13] In the result, I must concur in the judgment of Yacoob J that the civil claim against the learners, for an action of defamation, or, in the alternative, an infringement of dignity, must fail.

[11] See the comments of my colleague, Yacoob J at [76] above.

[12] The first instance of punishment is the community service served by the learners as a consequence of the criminal charges laid against them; the second instance is the disciplinary procedures imposed by the school and the third instance is this litigation and an award of damages.

[13] See Corinthians 13:11 (King James Version) where the following is stated: "When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things."

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