

**IN DISSENT: A CRITICAL REVIEW OF
THE MINORITY JUDGMENT OF YACOOB J*****Le Roux v Dey* 2011 (3) SA 274 (CC)****1 Introduction**

The facts of *Le Roux v Dey* (2011 (3) SA 274 (CC)) are so well-known that they have become public knowledge. In brief: The applicants were three pupils, Le Roux, Gildenhuis and Janse van Rensburg. Using his computer, Le Roux manipulated an image that showed the bodies of two naked men sitting close together on a couch and with their legs suggestively apart, while the leg of one crossed that of the other. Their hands were placed on the genital areas, but both hands and genitals were strategically covered using a school crest. Le Roux then electronically superimposed the facial images of the school principal and of Dey (the deputy principal) on the faces of the two naked men. Le Roux claimed that the idea to create the image came to him after watching an episode of an adult-cartoon series, *South Park*, on television. The image was created in about 5 minutes, and was not professionally done. Thereafter, the three learners – the applicants in the Constitutional Court – circulated the image among their peers using cellphones, and eventually placed an A4-size image on the school notice board (par [17]). At the time Le Roux was about 15½ years old, while Gildenhuis and Janse van Rensburg were about 17 years old (par [12]; and see par [12]–[20] and [155]).

All three learners were disciplined by the school authorities for their conduct (par [18]) and were criminally charged and sentenced to do community service (par [19]). Gildenhuis and Janse van Rensburg also tendered an apology to the principal, whereas Dey, acting on legal advice, would not enter into any negotiations with the two applicants (par [20]). Dey went on to institute legal proceedings against the three learners in the High Court, for defamation and injured feelings or *iniuria* (par [4]). The High Court upheld both claims and awarded R45 000 in damages as a composite award (par [4]). The learners, however, appealed to the SCA, which upheld, by the majority, the defamation claim, while regarding the finding of the High Court as “an impermissible accumulation of actions” (par [4]). Nevertheless, the SCA upheld the amount awarded by the High Court against the learners (par [4]). The present case then dealt with the application for appeal to the Constitutional Court brought by the three learners against this decision of the SCA, which found them liable for damages for publication of an alleged defamatory image bearing Dey’s face. Six members of the Constitutional Court, as *per* Brand AJ, affirmed the finding of the SCA that the image was defamatory of Dey, whereas they were also amenable to the view that the image amounted to an injury to his feelings, even if it were not defamatory of him (par [5]). Meanwhile, two members of the court, Froneman J and Cameron J, held that the image amounted to injury to Dey’s feelings, but

were not defamatory of him (par [6]). The other two members of the court, Yacoob J and Skweyiya J, held that the image was neither defamatory nor injurious to Dey's feelings (par [6]).

According to Campbell, the Constitutional Court judgments give rise to a number of concerns that may become a subject for comments over time (Campbell "Pleading the Meaning in Defamation Cases: *Le Roux v Dey*" 2011 128 *SALJ* 419). This note highlights a few of the concerns evident from the dissenting minority judgment of Yacoob J, which was supported by Skweyiya J. Primarily, the note provides a critique of the main findings of this minority judgment with regard to both claims brought by Dey, namely the defamation claim and the claim based on *iniuria* or the impairment of his dignity. It particularly takes issue with the minority's application of the wrongfulness test in their judgment. Furthermore, the note explores the role of minority and the principle of the paramountcy of the best interests of the child, applying the principles of the *actio iniuriarum*.

2 Action based on defamation

It is trite law that for a successful claim based on defamation, the plaintiff needs to prove three elements, one of which is that the material published was defamatory of the plaintiff. This element comprises two material aspects (par [38]). First, a meaning must be attributed to the alleged defamatory material (Campbell 2011 *SALJ* 423). Secondly, the meaning must be defamatory (par [106]). Among issues of difference between the judgment of Yacoob J and the majority, was the approach to the interpretation of the image and the meaning attributable to it. Yacoob J (Skweyiya J concurring) considered that: (1) words needed to be imputed to the image; (2) the image needed to be interpreted in the light of a reasonable observer; and (3) it needed to be ascertained whether such meaning was defamatory – all within the context of the image publication (par [30]–[43]). I agree in general with Yacoob J that one needs to consider the context in one way or another when interpreting the material (par [40]). I also concur with him that the circumstances of the publication should be considered (par [41]). However, I disagree with the technical nature of his approach regarding the context, especially the portrayal of a "reasonable observer" in a manner that represented him or her as an over-analytical person who assumed the role of the court (par [49.3] and [57]).

In this case, the plaintiff, as a general rule, simply needed to allege the meaning that a reasonable observer would have attributed to the image in question (*Demmers v Wyllie* 1980 (1) SA 835 (A) 845D–H; and Campbell 2011 *SALJ* 423). Thereafter, the court was called upon to interpret the image from the view of a reasonable observer, in accord with the meaning alleged by Dey, as the majority *per* Brand AJ correctly held (par [97]). See also *Demmers v Wyllie supra* 845E–G). Once the meaning had been established, the court needed to decide whether that meaning was defamatory (par [106]). Dey averred that the picture was defamatory *per se*, that is, the image (words or material) was *prima facie* defamatory of him (par [23] and [96]; see also *Argus Printing & Publishing Company v Esselen's Estate* 1994 (2) SA 1 (A) 20C–21B and Campbell (2011) *SALJ* 419–420, who criticizes the averment that the image was defamatory *per se*, as vague and

embarrassing). Be that as it may, the image did in fact associate Dey with the obscenity or indecency as pleaded by him in the alternative. Moreover, as Dey alleged in an alternative, the picture would have been understood reasonably to mean that he masturbated either in public, or in the presence of another person, or was prone to indecent exposure, or was of low moral character, or that he was in a homosexual relationship with the other person depicted and was homosexual (par [23] and [96]). I submit that, while these were pleaded in the alternative, the main averment and the alternative meanings are mutually constructive. The alternative averment inadvertently helped the plaintiff to know what claim to respond to, contrary to Campbell's contention.

Both the High Court and the majority in the SCA, as well as the majority in the Constitutional Court (per Brand AJ), agreed that the image was indeed defamatory of Dey (par [103] and [107]). In particular, the majority of the Constitutional Court judges considered that the image associated Dey with the obscene act of the original image (par [103] and [107]). Notably, however, Yacoob J disputed such a conclusion (par [60], [61] and [64]–[65]). Instead, the judge over-stressed the view that the image was intended as defiance against school authority (par [65] and [71]). I do not agree with this view of Yacoob J. Rather, I submit that the contrary interpretation is true of the image, and that the majority were correct in their finding. Any attack on authority related mainly to the motive of creating and distributing the image, rather than operating to excuse the learners from liability. Hence, I submit that the view of Brand AJ and the majority is sound and preferable. Furthermore, I disagree with Yacoob J in the view that there is a “fundamental distinction between describing the image on the one hand and determining its meaning” on the other (par [60]). Since the material complained about was an image, such meaning would have been an implied meaning (see the view of the SCA in par [6]). If there was any difference, it would have been irrelevant, as the important factor is what the image conveyed to an ordinary, reasonable observer (see par [97] and [101]), and whether that was defamatory (see par [106] of the CC decision). It is also submitted that, for purposes of interpreting the image, it should not make much difference if the manipulated image was created by children or an adult. Instead, the factors that Yacoob J regarded as relevant would be more pertinent for rebutting wrongfulness and intention, than in interpreting the image.

I therefore submit that in the eyes of an ordinary, reasonable observer, the image associated both the deputy principal and the principal with the obscene act of the persons in the original image. This would be defamatory of them or it lowered their standing in the estimation of an ordinary, reasonable observer, by imputing immorality to them by suggesting that they were of a very low moral fibre (see par [103] and [105]). Alternatively, given that the image was not professionally prepared, it still subjected Dey and the principal to ridicule. In that case, the image would have been defamatory, as their joke went to the extreme (par [106]). Furthermore, the image may be construed to imply that Dey and the principal were in a homosexual relationship, and would indulge in sexual activity whilst at work. Even though section 9 of the Constitution guarantees equality and homosexuality is no longer taboo in South Africa, the imputation would have been defamatory, as

it would cast suspicions on their professional reputation (see the minority judgment of Corbett CJ in *Johnson v Beckett* 1992 (1) SA 762 (A) 782D–F). In other words, whether heterosexual or homosexual, it would be unprofessional of them to indulge in sexual acts instead of running the school. Therefore I submit that on the balance of probabilities, the image could be defamatory, regardless of the fact that it was crafted by children.

Moreover, the analysis of Yacoob J suggest that the presumed elements of intention and wrongfulness were also central in disposing of the issues in this case. I therefore deal with these in detail.

2.1 Intention

Generally, intention may be in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis* (Burchell *Personality Rights and Freedom of Expression* (1998)). However, for purposes of liability, intention, regardless of its form, is intention nonetheless. For purposes of *actio iniuriarum*, intention or *animus iniuriandi* comprises of two aspects: (1) a subjective intent to defame or lower the reputation of the other person (the defendant) in the eyes of other right-thinking persons, and (2) knowledge of wrongfulness (Burchell *Personality Rights and Freedom of Expression* 303; and see also *National Media Ltd v Bogoshi* 1996 (3) SA 78 (W) 1202F–G). Yacoob J asserted that the manipulated image of the school principal and Dey was intended as a protest against school authority, with the two teachers being viewed by the learners as symbols of such authority (par [70]). I do not entirely agree with this view. However, even if one were to accept this view as correct, it is submitted that the learners primarily intended to belittle the school principal and Dey, by subjecting them to ridicule. They created an offensive manipulated image and circulated it among themselves and their peers. Eventually they placed it on the school notice board, for all others to see it, including other teachers. Hence it is safe to conclude from the facts that the applicants had acted with *animus iniuriandi* – subjecting Dey to ridicule, which impaired his reputation.

Knowledge of wrongfulness, on the other hand, may also be inferred from the facts of the case. First, Le Roux issued a stern instruction to his friend while at the church not to distribute the image (par [15]), and secondly, they used the school's crest to cover the genitalia in the image. Lastly, the learners' view was that they would not subject their parents to that kind of abuse (par [116]). One conclusion from these is that the learners knew that their conduct of creating and distributing an offensive image about their headmaster and his deputy was wrongful. Therefore, intention on the part of the learners was present. I submit that intention *in casu* may have taken any of the three forms.

The only question remaining is whether the applicants should have escaped liability using the defence of jest to exclude intention if one considers that the image was intended to subject the two teachers involved to ridicule. For the defence of jest to succeed, the defendant must prove to the court that the words or material amounted to a joke (*Masch v Leask* 1916 TPD 114 116–117). The audience must also have understood the defendant to have been merely joking (*Peck v Katz* 1957 (2) SA 567 (T)

572–573). It is submitted that, *in casu*, it is possible that the material would have been understood as a jest. However, I consider that, contrary to the view of Yacoob J, the material was serious (par [71] and [73]). Hence, in my opinion, the majority judges of the Constitutional Court correctly dismissed this defence (par [110]–[119]).

2 2 Wrongfulness

The second element that Yacoob J alluded to in his attempt to interpret the image is the element of unlawfulness or wrongfulness (par [44]–[51]). Therein, the judge weighed up different competing rights; namely freedom of expression, human dignity (of both Dey and the child-learners) and the right to privacy. In my view, the justice over-emphasized freedom of expression and the children's rights, especially the principle of paramountcy of the best interests of the child in matters involving a child, at the expense of human dignity (par [46] and [48]). It is true that under the South African Constitution, 1996, there is no hierarchy of rights. However, Yacoob J disregarded the important fact that South Africa's constitutional democracy is founded, not on freedom of expression or the paramountcy of the best interests of the child, but on the value of human dignity (*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) par 223; and *Khumalo v Holomisa* 2002 5 SA 401 CC par [25]–[28]). Therefore "human dignity is all-encompassing and permeates every other right in the Constitution" (*The Citizen v McBride supra* par [147]). Granted, freedom of expression is an important fundamental right, but it does not pre-eminently rank above all other rights (*S v Mamabolo (ETV Intervening)* 2001 (3) SA 409 (CC) par [41]; and see also Mogoeng J in *The Citizen v McBride supra* par [148]). Therefore the judge ought to have struck an equitable balance between protecting the dignity of Dey and the rights of the learners. In my opinion, Yacoob J failed in this regard. Instead, he was misdirected by his unwarranted bias towards the children's rights. He continuously portrayed them as powerless and vulnerable victims who needed to express themselves (par [47]). Yet, the justice did not identify any reason as to why the learners would have been frustrated and in need of expressing themselves. In my view, the matter was never about the learners' human dignity, but about Dey (par [46]–[47]). I submit that power relations between the parties *in casu* were immaterial to the exercise of the duty to strike a balance between protecting the right to human dignity and protecting children's rights. With regard to dignity, it was held in *The Citizen v McBride (supra)*:

"[i]t underscores the proposition that in us inheres the inalienable right to be treated with dignity regardless of our position in society, and to have that right respected and protected" (par [147]).

Thus, the minority over-emphasized the applicants' (children's) rights at the expense of individual's rights to unimpaired reputation and inherent human dignity. In so doing, they erred in disregarding Dey's fundamental rights of equality and equal protection before the law, guaranteed under Constitution. I concede that children are more vulnerable; however, it is also in their best interests that they must learn to be respectful of individual rights of others enshrined in the Constitution. Such fact ought to have been considered by the minority in their judgment.

3 Action based on dignity

The test and the procedure to establish liability for impairment of dignity have long been settled in South African law by the case of *Delange v Costa* (1989 (2) SA 857 (A)). These have also been recently affirmed by Boruchowitz J of the South Gauteng High Court in *Kumalo v Cycle Lab Pty Ltd* (31871/2008 SGH). Accordingly, there are three elements that need to be satisfied, namely: (1) an intention on the part of the offender to predict the effect of his act (*dolus, animus iniuriandi*); (2) an overt act in which the person doing it is not legally competent to do so, and which at the same time is (3) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other. The first element is self-explanatory: it deals with an intention to injure the dignity of another (as discussed above in relation to defamation). On the other hand, the second element deals with wrongfulness of the one defendant's act, whereas the third deals with the actual infringement of the dignity of another.

In *Delange v Costa*, Smalberger JA considered that, logically, the inquiry should begin with the second requirement, that is, "an overt act which the person doing it is not legally competent to do" (860I–J). This element interrogates wrongfulness of the defendant's conduct. According to Smalberger JA, once wrongfulness of the defendant's act has been established, the *animus iniuriandi* requirement follows and this element will be presumed (861B–C). Thereafter, according to the judge, the defendant would be required to justify his act by producing any relevant ground of justification (861D–E). As authority for this last proposition, Smalberger JA used *Whittaker v Roos and Bateman* (1912 AD 92 124) and *Walker v Van Wezel* (1940 W LD 66 67). Should the defendant fail to justify his conduct, according to *Delange v Costa*, the plaintiff must then establish a further requirement, the third requisite, to the effect that his dignity was impaired (861D–E). However, it is submitted that the most logical approach to establish liability for *iniuria* is to begin with the third of three requisites mentioned by Smalberger JA in *Delange v Costa* above, and then delve into the second and, lastly, the first in the same order mentioned. I am alert to the fact that these requirements were developed from the case of *R v Umfaan* (*R v Umfaan* 1908 TS 62 66), where the sequence of the requirements is similar to the one followed by Smalberger JA. Therein Innes CJ held, in part, that the three essential requirements for *iniuria* are that "[t]he act complained of must be wrongful; it must be intentional; and it must violate one of those real rights, those rights *in rem*, related to personality, [such as dignity] which every free man is entitled to enjoy" (*R v Umfaan supra* 66).

I do not take issue with the general approach of Yacoob J regarding the element which should come first, as he acted in harmony with this precedent above, which also guided the court in *Delange v Costa*. What I question, in particular, is his actual application of the inquiry into the element of wrongfulness in respect of the learners' conduct (par [70]–[71]). In my view, the approach of Yacoob J conflated the second and third requirements for an action for impairment of dignity. I am conscious, though, that the element of wrongfulness in this respect is somewhat controversial, as even reputable

authors such as Neethling *et al* have difficulty in putting wrongfulness in perspective (see Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 194–197). I shall revert to wrongfulness later. First, it is necessary to discuss the third element in detail, and the second to some extent, in the order that I proposed above.

Ultimately, impairment of one's dignity is a question of fact, and is determinable in the light of the circumstances of each case, while taking into consideration legal policy and the convictions of the community or *boni mores* (*Kumalo v Cycle Lab Pty Ltd* (31871/2008) [2011] ZAGPJHC 56 par [20]). However, the procedure to determine the impairment of dignity is two-fold. It is both subjective and objective (*Le Roux v Dey supra* par [143]). Hence, in *Delange v Costa* the court held that the subjective aspect of the test:

“involves a consideration of whether the plaintiff's subjective feelings have been violated, for the very essence of an *iniuria* is that the aggrieved person's dignity must actually have been impaired” (*Delange v Costa supra* 261E–F).

In other words, the plaintiff must have felt abused, insulted or that his or her sense of self-worth or dignity had been impaired, due to the defendant's allegedly offensive conduct (*Kumalo v Cycle Lab Pty Ltd supra* par [24]). As Smalberger JA put it, it would “not be sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities” (*Delange v Costa supra* 261E–F). Therefore there should be an *actual* infringement of the plaintiff's dignity, judged subjectively. Such impairment of dignity may take a number of forms, such as insults, interference with parental authority and breach of promise to marry (Neethling, Potgieter and Visser *Law of Personality* 192–193; and see also Neethling, Potgieter and Visser *Law of Delict* (2010) 346). On the other hand, the test is also objective in the sense that it seeks to establish if a person of ordinary sensibilities would have regarded the conduct as offensive (*Delange v Costa supra* 261E–F; and see also *Kumalo v Cycle Lab Pty Ltd supra* par [24]). This part of the test is a controversial one, as even Froneman J and Cameron J, while they classified the subjective part of the test under the infringement element, regarded it as part of the wrongfulness element (par [175] and [177]–[178]; and see also Neethling, Potgieter and Visser *Law of Delict* 194–197). It is remarkable that Froneman J and Cameron J still found that there was a wrongful infringement of Dey's dignity (par [188] and [190]). Two reasons may account for this. First, unlike Yacoob J, they started on the correct premise that the image was potentially damaging to Dey's human dignity, despite not being defamatory in their view (par [157] and [174]). Moreover, even though they regarded the objective part of the inquiry as part of wrongfulness, they began their assessment with the last of *Delange v Costa's* (*supra* 861A) requisites for impairment claim and inquired into the subjective infringement of Dey's dignity (par [174]). Brand AJ (and the majority), on the other hand, did not deal with the element of wrongfulness. Instead, he limited himself to infringement of dignity and treated this objective part of the element as part of the two-fold assessment of injury to dignity (par [144]–[145]). The sharp divisions between the approaches adopted by the court in this case raise a vital question regarding the place of the objective inquiry into the infringement of the plaintiff's

dignity. A proper consideration of the judgment of Smalberger JA in *Delange v Costa* may suggest that the controversy arises as a result of interpretation and misinterpretation of the requisites for impairment of dignity. Hence it is necessary to revisit the test within its context.

Firstly, Smalberger JA set out the three requirements for impairment already enumerated above, as inherited from the Roman and Roman-Dutch Law of Injuries (*Delange v Costa supra* 260I–261A). Then he proceeded to state that wrongfulness, that is, “whether there has been a wrongful overt act” should logically be dealt with first (*Delange v Costa supra* 261B–C). Thereafter, Smalberger JA expressed the following:

“Once the wrongfulness of such act has been determined *animus iniuriandi* will be presumed (*Whittaker v Roos and Bateman (supra)* 124; *Walker v Van Wezel* 1940 W L D 66 67). It would be open to the defendant to rebut such presumption by establishing one of the recognised grounds of justification. If the defendant fails to do so the plaintiff, in order to succeed, would have to establish the further requirement that he suffered an impairment of his dignity. This involves a consideration of whether the plaintiff’s subjective feelings have been violated, for the very essence of an *iniuria* is that the aggrieved person’s dignity must actually have been impaired. It is not sufficient to show that the wrongful act was such that it would have impaired the dignity of a person of ordinary sensitivities. Once all three requisites have been established the aggrieved person would be entitled to succeed in an action for damages subject to the principle *de minimis non curat lex*” (*Delange v Costa supra* 261D–F).

Hence, from this passage, it is apparent that after dealing systematically with the wrongfulness requirement, Smalberger JA embarked on the last of his three requirements for a successful *iniuria* claim, namely intention. I concede that it is not far-fetched to consider that the objective aspect of the inquiry might have been mentioned with regard to wrongfulness. However, I submit that, in view of the fact that Smalberger JA was dealing with the requirement for infringement, such probability is remote. It is also submitted that for practical reasons the objective aspect of impairment forms part of establishing injury to one’s dignity. This can be illustrated by the difficulty that Froneman J and Cameron J had in fitting the objective part of the test within the wrongfulness requirement (par [179]). Even their reasoning as to why application of an objective test was necessary, namely, “to avoid the courts ‘being inundated with a multiplicity of trivial actions by hypersensitive persons’” is testimony that my proposition is more probable (par [179]). Be that as it may, the issue is controversial and is likely to remain so for some time. Perhaps this is further compounded by the manner in which Smalberger JA introduced this objective element of the inquiry, and the manner in which the requisites for *iniuria* are couched in *Delange v Costa*.

I now revert to the element of wrongfulness in an action for impairment of dignity, that is, “an overt act which the person doing it is not legally competent to do”, according to *Delange v Costa*. It is trite law that wrongfulness is objectively assessed against the prevailing norms of society (*Kumalo v Cycle Lab Pty Ltd supra* par [20]). Whether the defendant’s conduct is wrongfulness (or offensive) or not, has to be “tested by the general criterion of unlawfulness – objective reasonableness” (*Kumalo v Cycle Lab Pty Ltd supra* par [24]). This general criterion of unlawfulness has been canvassed time and again by courts, such that it has become

commonplace. For instance, Vivier ADP described the legal convictions of the community as “the legal convictions of the legal policy makers of the community, such as the Legislature and Judges”, which are concerned with whether the community would regard a particular conduct as wrongful or not (*Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, As Amicus Curiae)* 2003 (1) SA 389 (SCA) par [10]). Vivier ADP then went on to state further that legal convictions would, as of necessity, incorporate the norms, values and principles contained in the Constitution, which recognizes fundamental values such as “human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism” (*Van Eeden v Minister of Safety and Security supra* par [12]–[13]; and see also Froneman J and Cameron J par [180]). It is submitted that this criterion would obviously be adjusted, depending on the area of law under consideration.

In the present case, Yacoob J correctly encapsulated the test for wrongfulness (par [70]). Thus, in terms of the law, he was asked to consider the learners’ conduct in terms of the general criterion of unlawfulness or prevailing norms or the *boni mores* of society. However, in my view Yacoob J failed in this regard. The justice committed a serious mistake in his application of the test for wrongfulness to the situation at hand. He asked if a reasonable deputy principal with 13 years’ experience would have found the conduct of the learners offensive or not (par [71]). Yacoob J should rather have asked if society, in terms of its legal convictions, would regard the conduct of the learners as delictually wrongful. Instead, I submit, Yacoob J inquired into the objective element of the last requisite for *iniuria* that assessed whether the dignity of Dey was infringed (*Delange v Costa supra* 261A–F). Hence, I submit that Yacoob J wrongly conflated the requirements of *iniuria*, namely wrongfulness and infringement of dignity. The judge failed to apply the test for wrongfulness properly. Had the justice properly applied the test for wrongfulness, he would have arrived at the conclusion that the conduct of the learners violated the dignity of Dey, and that it was therefore wrongful. The respondent was entitled to protection of his dignity in terms of the common law (see McQuoid-Mason “Invasion of Privacy: Common Law v Constitutional Delict – Does it Make a Difference?” 2000 *Acta Juridica* 227–228), as well as in terms of the Constitution (s 10), regardless of his position in society. I submit that the High Court was correct in its finding in this regard (par 73). Teachers are left powerless to deal with ill-discipline in schools (see par [128]). They should not be stripped of their dignity (see par [119]). Moreover, subjectively, Dey’s feelings were injured – even Yacoob J unwittingly alluded to this fact (par [71] and [73]–[74]).

The other question is whether, objectively, any other person in Dey’s position would have found the image insulting. As already submitted above, this part of the violation of dignity inquiry was incorrectly conflated into the wrongfulness test, instead of applying the test to ascertaining the infringement of the respondent’s dignity (par [71]). Yacoob J concluded that the respondent was being over-sensitive (par [74]). I do not agree with this view. Instead, I submit that any reasonable person would have found the image insulting in the light of its content. Furthermore, sexual orientation (s 9 of the Constitution) in South Africa is an individual choice and may not be imposed on others. Properly applying the objective element of infringement

of dignity to its rightful place, viewed objectively it would not have been unreasonable of any right-thinking person to feel aggrieved when associated with obscene conduct, regardless of the meaning attributed to the learners' image. Moreover, it is submitted that concluding that the image was insulting against Dey is also not being insensitive to those sexually-oriented otherwise, regardless of a contrary perception. However, that aside, the nature of the exposure was insulting.

Lastly, I also submit that another error Yacoob J made was on the premise from which he conducted the wrongfulness inquiry. He moved from the assertion that the image was not a personal attack on Dey (or the school principal), but that it was an attack on the authority (par [70]). This erroneous premise accounts for the error made by the justice in his conclusion. As already submitted under intention in paragraph 2 1 above, the manipulated image amounted to a personal attack on the dignity of Dey and the principal, even if what Yacoob J asserted were the case.

However, the learners could still have escaped liability through the application of the *de minimis non curat lex* rule (*Delange v Costa supra* 261F). The *de minimis non curat lex* principle entails that the courts should not be "inundated with a multiplicity of trivial actions by hypersensitive persons" (par [179]). Yacoob J did not consider the matter as "sufficiently serious" as he referred to the injury to Dey's feelings as "slightest" (par [72]–[73]). However, I submit that the injury to the respondent's dignity is not as "slightest" as suggested by Yacoob J – for two basic reasons. First and foremost, the nature of human dignity – the cornerstone upon which South Africa's constitutional democracy is founded (*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) par [223]; *Khumalo v Holomisa supra* par [25]–[28]). Secondly, Yacoob J disregarded the principle of equality before the law (s 9 of the Constitution). It is therefore submitted that whether the image was designed to challenge school authority or whether it contained heterosexual or homosexual undertones, Yacoob J (and Skweyiya J) should have found the image impairing Dey's dignity. In my view, the justice (with the concurrence of Skweyiya J) erred in concluding that the image did not impair the dignity of the respondent.

The following section explores the manner in which the two justices balanced the competing constitutional interests.

4 Human dignity versus freedom of expression

While freedom of expression is an important constitutional right, it should be borne in mind that our constitutional democracy is founded on the value of human dignity – not on the freedom of expression (*The Citizen 1978 (Pty) Ltd v McBride supra* par [223]; and *Khumalo v Holomisa supra* par [25]–[28]). Mogoeng J (as he then was) held that "freedom of expression is not so much in the vitriol as it is in the clear and logical articulation of one's viewpoint without trumping the intrinsic worth of others" (*The Citizen 1978 (Pty) Ltd v McBride supra* par [223]). Therefore, it is submitted that an unrestricted salvaging of Dey's dignity, in the name of freedom of expression by school children, should not be allowed (*Khumalo v Holomisa supra* par [26]). In my view, both Yacoob J and Skweyiya J over-emphasized freedom

of expression, at the expense of Dey's right to dignity (par [209] and [213]–[215]). I submit that the two justices failed to weigh properly the two competing interests – probably being blinded by the fact that the applicants were minors – and thereby failed to accord due regard to Dey's dignity. In particular, I do not share Yacoob J's portrayal of the applicants as helpless victims or vulnerable learners, who harboured anger against the school authority (par [64]–[65]). What is more, the dignity of a teacher is also important as a value in the environment that is educationally conducive.

5 Legal capacity and *actio iniuriarum*

This minority judgment has also raised an important question regarding the role of age (*ie*, minority or youthfulness) in cases of *actio iniuriarum*. It seems to me that inherent to this question are issues of delictual accountability, fault or *animus iniuriandi*, and the question of the best interests of the child in terms of section 28(2) of the Constitution (see also s 9 of the Children's Act 38 of 2005). These issues are discussed below, starting with minority, and concluding with the principle of the paramountcy of the best interests of the child.

5.1 Youthfulness

Central to youthfulness (or minority) is the question of accountability (*culpa capax*) on the part of the defendant and whether the learners acted with or without intention or *animus iniuriandi* in ridiculing Dey. Capacity to act (or legal capacity) must first be established before an enquiry into fault may take place. Thus, if the court (the minority) had in fact established the learners' capacity to understand subjectively the wrongfulness of their conduct, it would be wrong to apply the test for intent and then to revert to youthfulness. However, it is not often that accountability has been considered in cases of *actio iniuriarum*. Perhaps the reason is that not many cases like the case in question have come before the courts – where minor children have been sued either for defamation or for *iniuria*. It may be that the accountability as a requisite for liability is inherent in the action for *actio iniuriarum*. If that were not the case, it would appear that this case has thus introduced this requirement. Either way, I submit that *culpa capax* in cases of *actio iniuriarum* ought to be considered in the same manner as in the *actio legis Aquiliae*, since accountability is a settled aspect of *Lex Aquilia*.

As a general rule, one is accountable in law if one possessed the ability to appreciate the distinction between right and wrong, and was able to act in accordance with such appreciation at the time of the commission of the act, in terms of the *actio legis Aquiliae* (Neethling and Potgieter *Neethling – Potgieter – Visser Law of Delict* (2010) 125). However, according to *Walker v Van Wezel* (*supra*), the common-law test for accountability is conduct-specific (Walker "The Requirements for Criminal Capacity in Section 11(1) of the New Child Justice Act, 2008: A Step in the Wrong Direction?" 2011 *SACJ* 1 35–37). As the author states, the test "is not capacity in the abstract but capacity in relation to a particular duty situation" (Walker 2011 *SACJ* 37). Where a person lacked accountability at the time of the commission of the alleged wrongdoing, there can be no question of fault on his part

(*Neethling and Potgieter Neethling – Potgieter – Visser Law of Delict 125*). In the case of youthfulness, it is now trite law that an *impubes* (a person from age seven years to under the age of fourteen) is rebuttably not accountable in law (*Neethling and Potgieter Neethling – Potgieter – Visser Law of Delict 125*). In this particular case, the learners were aged 15½ to 17 and were past the age of presumed delictual incapacity. Therefore, they were accountable for their conduct. Hence, Yacoob J and Skweyiya J made an error in attempting to use age to absolve the applicants from liability. It is rather submitted that *in casu* their youthfulness only served as a mitigating factor in respect of the amount of damages to award against them, instead of exonerating the appellants.

5.2 *The best interests of the child*

Also central to the judgments of Yacoob J and Skweyiya J was the constitutional principle of paramountcy of the best interests of the child, in a matter involving children (s 28(2) of the Constitution; and s 9 of the Children's Act, 38). Both judges accorded much weight to the principle of the paramountcy of the best interests of the child (par [48]–[50], [210] and [212]). Inadvertently, Yacoob J went as far as accusing Dey of insensitivity towards the needs of the children (par [75] and [212]). I submit that while the principle of the best interests of the child is generally relevant to the whole defamation or *iniuria* inquiry, it should be more important when determining the amount of damages to be awarded where wrongdoers are children, instead of being used to deny protection of the reputation and dignity of others. Our Constitution, as already mentioned, is founded on the value of human dignity rather than on the principle of the paramountcy of the best interests of the child (*The Citizen 1978 (Pty) Ltd v McBride supra* par [143]; and *Khumalo v Holomisa supra* par [25]–[28]). In my view, the judges failed to balance properly the best interests of the child principle on one hand, with Dey's right to human dignity on the other. It is settled law that the notion of the paramountcy of the best interests of the child does not trump every other right in the Bill of Rights, let alone the value of human dignity (*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) 2004 (1) SA 406 (CC)* par [54]–[55]; and see also Skelton "Abusing Children's Rights" Monday 13 September 2010 *The Mercury*, lecture delivered at University of KwaZulu-Natal (Pietermaritzburg)). On the contrary, section 28(2) of the Constitution merely indicates that any tribunal dealing with matters involving children ought to accord more weight to the child's best interests when balancing them with other competing constitutional rights (par [211]; and see Buthelezi "A Missed Opportunity to Settle the Law on DNA Testing in Paternity Disputes – *YD (now M) v LB 2010 6 SA 338 (SCA)*" 2011 32(2) *Obiter* 484). It is also significant that in this case the competing interest is the value of human dignity, which is the foundational cornerstone of South Africa's democracy.

It should also be highlighted that the minority paid less attention to the children's best interests encompassing the learners' developmental needs to be responsible citizens who respect the constitutional rights of others. Moreover, Yacoob J and Skweyiya J disregarded the fact that the best interests of the child are child-specific rather than being applied in general

(see *YD (NOW M) v LB* 2010 (6) SA 338 (SCA) par [16]). Hence, in this case, the minority should have considered the best interests of each of the three applicants – as their ages varied – rather than considering them as a group (par [12]). In any event, I do not think that it was in the best interests of the learners to absolve them from liability for salvaging the dignity of others, as both Yacoob J and Skweyiya J seemed to suggest. Thankfully, the majority did not agree with them.

6 Conclusion

Without doubt, the issues in this case were unprecedented, as is evident from the sharp divisions among the judges of both the SCA and the Constitutional Court. In this case the Constitutional Court was called upon to weigh the competing constitutional interests of all the parties involved in the matter (par [44]). I am satisfied by the work done by the majority in this regard (par [110]–[119] and [128]). However, I disagree strongly with the approach adopted by Yacoob J and Skweyiya J, in discharge of their responsibility. In my view they overemphasized the concept of the best interests of the child and the freedom of speech in respect of the learners, at the expense of the value of human dignity. Had the justices properly weighed these constitutional imperatives, they would at least have found that the image violated Dey's dignity without violating the right of minority groups in choosing their sexual orientation (as did Froneman J and Cameron J). In my opinion, the image amounted to both defamation and injury of the dignity of Dey. It is also in the best interests of the child and society that children learn to respect the constitutional rights of others.

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