CASES / VONNISSE

DEFAMATION OF SCHOOL TEACHERS BY LEARNERS

Le Roux v Dey 2011 3 SA 274 (CC)

1 Facts

In *Le Roux v Dey* a vice-principal at a well-known secondary school in Pretoria instituted two separate claims for sentimental damages under the *actio iniuriarum* for insult (infringement of dignity) and defamation (infringement of reputation) against three school learners. The defendants published manipulated pictures of the plaintiff and the principal of the school depicting them both naked and sitting alongside each other with their hands indicative of sexual activity or stimulation. The school crests were super-imposed over their genital areas. The plaintiff succeeded with both claims in the High Court (*Dey v Le Roux* 2008-10-28 case no 21377/06 (GNP)) but the Supreme Court of Appeal (*Le Roux v Dey* 2010 4 SA 210 (SCA)) held that the separate claim for insult was ill-founded because in assessing damages for defamation, the court should also take the plaintiff's humiliation into account. The Supreme Court of Appeal nevertheless confirmed the trial court's award of R45 000. The defendants appealed to the Constitutional Court.

2 Judgment

In the following discussion we focus mainly on the majority judgment of Brand AJ and only to a lesser extent on the judgments of Jacoob J, Skweyiya J and Froneman and Cameron JJ.

2 1 Applicable basic principles of the law of defamation

The court (304A-307A) confirmed *inter alia* the following basic principles of defamation law: defamation consists of the wrongful and intentional publication of a defamatory statement concerning the plaintiff; the plaintiff has to prove the publication of defamatory matter concerning himself; a presumption of wrongfulness and intent then arises which can be rebutted by the defendant by proving a ground of justification or a ground excluding fault; this is a full *onus* which must be discharged on a preponderance of probabilities; publication means the communication of the defamatory matter

to at least one person other than the plaintiff; statements may have a primary or secondary meaning (*innuendo*), or, even a third meaning (*quasi innuendo*) where a plaintiff wishes to point out the sting of a statement which is alleged to be defamatory *per se*; a two-staged enquiry is brought to bear where the plaintiff alleges that the statement is defamatory *per se*: the first is to establish the ordinary meaning of the statement by applying the objective test of the reasonable observer, and the second whether that meaning is defamatory, and that will be the case if it is likely to injure the good esteem in which the plaintiff is held by the reasonable or average person to whom it had been published: it is therefore not necessary to prove that the actual observer in fact thought less of the plaintiff. In this regard Harms DP in the Supreme Court of Appeal (214) referred with approval to the following statement in Neethling, Potgieter and Visser (*Neethling's Law of Personality* (2005) 136):

> "It is notable that the question of a factual injury to personality, that is, whether the good name of the person concerned was actually injured, is almost completely ignored in the evaluation of wrongfulness of defamation. In fact, generally a witness may not even be asked how he understood the words or behaviour. In addition, it is required only that the words or behaviour *was calculated* or *had the tendency or propensity* to defame, and not that the defamation actually occurred. In short, *probability of injury* rather than actual injury is at issue. It can be concluded, therefore, that the courts are not at all interested in whether others' esteem for the person concerned was in fact lowered, but only, seen *objectively*, in whether, in the opinion of the reasonable person, the esteem which the person enjoyed was adversely affected. If so, it is simply accepted 'that those to whom it is addressed, being persons of ordinary intelligence and experience, will have understood the statement in its proper sense'."

Brand AJ (307A) opined that "[t]he view of Neethling 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". But this is not what Neethling *et al* meant since they emphasized and concluded that, "[i]n short, *probability of injury* rather than actual injury is at issue". Our view is therefore in line with Brand AJ's approach (*cf* also Froneman and Cameron JJ 327B-F 328E-329A.)

2 2 Defamatory nature of the picture

Next Brand AJ (308A ff) investigated and applied the two-stage enquiry referred to above (par 2 1) to establish the ordinary meaning of the statement as well as whether this meaning was defamatory. As to the first, he (310D-H) endorsed the findings of the High Court and the Supreme Court of Appeal that the reasonable observer "would ... understand the image or statement conveyed by the picture as associating or connecting [the plaintiff] and the principal with the indecent situation that the picture portrays". In considering the second stage of the enquiry, Brand AJ (311C-D), also agreeing with the evaluation of the picture by the lower courts, opined as follows:

> "[T]he 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 [the plaintiff]."

In this regard the court (311I-314E) also addressed the contention that the reasonable observer would not have taken the picture seriously because he would have regarded it as a joke. Brand AJ (312C-G) referred to Harms DP's viewpoint in the Supreme Court of Appeal (215) 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". In this regard a distinction should be made between legitimate jest and jest that is not legitimate. Jest which is not legitimate is a joke which would be insulting, offensive or degrading of another. The reasonable observer would accept that jokes about teachers by their learners must not be taken too seriously, but there is a line that may not be crossed because teachers are also entitled to the protection of their dignity and reputation. *In casu* Brand AJ (314D-E) shared the value judgment of the lower courts that the defendants had crossed this line and that the picture was therefore defamatory of the plaintiff.

This conclusion calls for comment. First of all, courts should be cautious when investigating whether statements or depictions are defamatory not to take the purpose or aim of such publications as being indicative of its defamatory nature, as Brand AJ appeared to have done (see *eg*, 311C, 311G, 311I and 313D). The court should only be concerned with whether the effect of the publication was defamatory in the eyes of the reasonable observer. The aim or purpose of the publication fits more comfortably in determining, first, whether the limits of a ground of justification have been exceeded by malice or an improper motive and, second, whether the intention to defame (*animus iniuriandi*) was present (see *Neethling's Law of Personality* 149, 151, 152, 156 and 158 as to improper motive and 163-164 as to intention to defame). Secondly, there is a clamour of voices in the minority judgments and from academic writers questioning whether the finding by Brand AJ that the depiction of the two men was defamatory, was sufficiently informed by certain constitutional values underpinning the Bill of Rights, especially the right to freedom of expression, the rights of children and the right not be unfairly discriminated against (see *eg*, the minority judgments of Yacoob J, Skweyiya J, Froneman and Cameron JJ and De Vos "Is the Reasonable Person a Homophobic Prude?" 11 March 2011 *Constitutionally Speaking*). They all concluded that the picture was not defamatory of the plaintiff. In this regard it should be emphasized that the reasonable observer is someone who subscribes to the norms and values of the Constitution, which must inform all law (see *Sokhulu v New Africa Publications Ltd* 2001 4 SA 1357 (W) 1359; and Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 334). The principles of the Constitution must thus be seen as essential to the determination of the

values and views held by reasonable members of society (see *Rivett-Carnac v Wiggins* 1997 3 SA 80 (C) 89). Because the Constitution also prohibits unfair discrimination on the ground of sexual orientation, a reasonable observer will not think less of a person where an allegation has been made that that person is a homosexual (see also Froneman and Cameron JJ 330G-331H). Be that as it may, it appears that the reasonable observer will nevertheless think less of a person (homo- or heterosexual) who would allow himself to be photographed in a position such as in the photo – even if the partner is of the opposite sex. Seen thus, it is not the allegation that a person is a homosexual that seems to be defamatory but the allegation of inappropriate sexual behaviour.

2 3 Wrongfulness

Since the plaintiff had established the publication of defamatory matter concerning himself, the presumption that the publication was wrongful, arose. The *onus* was then on the defendants to rebut the presumption of wrongfulness (see above par 2 1). In this regard Brand AJ (315D-316F) confirmed that grounds of justification are not a *numerus clausus* and that new grounds of justification may be created if the publication was reasonable by striking a proper balance between the right to freedom of speech and the right to dignity, including reputation, to give effect to considerations of legal policy and constitutional norms. Although mention was made of the defence of reasonable publication as a ground of justification, no grounds of justification were pleaded or relied upon. Wrongfulness had thus been established (314H-I 316G-317E).

With regard to wrongfulness, Brand AJ (315A-D) made the following statement:

> "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; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. 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."

It is regrettable that the court introduced into the law of defamation the so-called new variation of the test for wrongfulness, namely that wrongfulness depends on whether – assuming that all the other elements of delictual liability are present – it would be reasonable to impose liability on the defendant. This test, which was introduced by the Supreme Court of Appeal in the area of liability for omissions and pure economic loss, is controversial and questionable on several grounds (see Neethling and Potgieter *Delict* 78-81). The legal principles of the law of defamation are directed at the protection of the personality right to reputation and in any case bear no

relation to liability for omissions and pure economic loss. The law of defamation has been developed over a long period of time and a great deal of certainty as to its interpretation and application has been attained. It is therefore difficult to understand why Brand AJ found it necessary to bring the confusing new variation of the wrongfulness test into the sphere of defamation, particularly because it does not even appear that he applied it himself in determining wrongfulness *in casu*. Fortunately the minority judgments did not mention the new variation but applied the time-tested principles of the law of defamation with regard to wrongfulness.

Furthermore, Brand AJ's assertion that "what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct", is incorrect. Firstly, this statement is not representative of the Supreme Court of Appeal's position in this regard. For example, in *Hirschowitz Flionis v Bartlett* (2006 3 SA 575 (SCA) 589, where Brand JA concurred with the judgment of Howie P) the expertise and trustworthiness of the defendant "to deal with trust money reasonably and responsibly", the fact that it required minimum management on the defendant's part to transfer the money involved into a trust account, and "unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary", were three (of the four) factors clearly indicative of the unreasonableness and therefore wrongfulness of the defendant's conduct. Secondly, the reasonableness of the defendant's conduct generally plays an important part in determining wrongfulness in our law. Particularly in establishing certain grounds of justification, for example, private defence, necessity, provocation, statutory authority, official command and power to discipline, wrongfulness depends on whether the conduct concerned was reasonable in the circumstances and whether the limits of the defence were not exceeded in an unreasonable manner (Neethling and Potgieter *Delict* 89, 93, 101, 110, 113-114 and 115; and Visser "Delict" in Du Bois (ed) *Wille's Principles of South African Law* (2007) ch 40 par I(2)(a)). The reasonableness of the defendant's conduct is also especially important to determine wrongfulness in the area of abuse of right and neighbour law (Neethling and Potgieter *Delict* 116ff). (For a detailed discussion, see Neethling and Potgieter "Wrongfulness and Negligence in the Law of Delict: A Babylonian Confusion?" 2007 *THRHR* 127-128.)

2 4 Animus iniuriandi

Next Brand AJ (317F-H) dealt with the question whether the defendants had *animus iniuriandi* or the subjective intent to defame. It is according to him the equivalent of *dolus* in criminal law. *Animus iniuriandi* does not require that the defendant was motivated by malice or ill-will and it includes *dolus directus* as well as *dolus eventualis*. The defendant bears the *onus* of rebutting the presumption of *animus iniurandi* on a preponderance of probabilities. *In casu* the defendants relied on two grounds in this regard, first that they intended the picture as a joke and therefore had no intention to

defame, and secondly that they did not appreciate the wrongfulness of their conduct.

Brand AJ (317H-318B) held that the defendants had *dolus eventualis* because they foresaw the possibility that their attempt at humour might be defamatory towards the plaintiff but nevertheless proceeded with the attempt. He also found that the defendants were conscious of the wrongfulness of the act, concurring with the factual finding of the lower courts. Although Harms DP (225) had some difficulty with this conclusion because "it could confuse moral and legal blameworthiness", Brand AJ failed to share the difficulty. He said:

> "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."

In the Supreme Court of Appeal Harms DP (219ff) enquired into whether knowledge of wrongfulness should still be part of our law. He concluded that it should not and that so-called colourless intent is enough to establish *animus iniuriandi*. In the light of Brand AJ's decision that *animus iniuriandi* (including knowledge of wrongfulness) was present *in casu*, he considered the Supreme Court of Appeal's enquiry as to whether consciousness of wrongfulness is a necessary component of *animus iniuriandi* as unnecessary, and he also did not find it necessary for him to do so.

This finding is commendable and in our opinion the *status quo* in respect of *animus iniuriandi* should therefore be maintained. Since *Dey* dealt with defamation not involving the media, many aspects of Harms DP's judgment in this regard were *obiter* and thus not binding on the courts in future. Judges may accordingly still reflect on controversial issues regarding other forms of *iniuria*. It is submitted that it should be accepted that *animus iniuriandi* (including consciousness of wrongfulness) is still a requirement for these forms and that the courts may only disregard consciousness of wrongfulness where policy considerations so demand. This already happened with regard to wrongful deprivation of liberty, wrongful attachment of property, the unlawful infringement of the personality rights of inmates, and the liability of the media for defamation. Harms DP's contrary *obiter* view that *animus iniuriandi* generally does not require consciousness of wrongfulness is not supported by the weight of authority. Accordingly, all that the Supreme Court of Appeal in *Dey* should have done, was to determine whether policy considerations require a deviation of the requirement of coloured intent with regard to defamation not involving the media; and here it seems that the fact that the requirement can lead to unfair results and moreover frustrate the development of this part of our law under the Constitution, can indeed provide such justification. But it is unfortunate that

the Supreme Court of Appeal did not, as in *Marais v Groenewald* (2001 1 SA 634 (T) 646), consider negligence liability since such liability would have advanced the protection of the right to the good name as fundamental right far better than the (colourless) intention to injure required by that court (see for a full discussion Neethling "Onregmatigheidsbewussyn as Element van *Animus Iniuriandi* by *Iniuria*" 2010 *Obiter* 702ff).

2 5 Dignity claim

With regard to the claim of the plaintiff that his dignity had been infringed, Brand AJ (319F-H) distinguished between the concept of dignity which has a very wide meaning in the Constitutional context and its narrower common-law meaning which is confined to a person's feeling of self-worth or self-respect (see also Neethling "Die Betekenis en Beskerming van die Eer, *Dignitas* en Menswaardigheid in Gemeenregtelike en Grondwetlike Sin" in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 85 ff). He also distinguished between reputation which concerns itself with the respect of others enjoyed by an individual and dignity which relates to the individual's own feelings of self-respect (see also *Neethling's Law of Personality* 27-28). *In casu* only the common-law meaning was relevant. It was therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation. Brand AJ (319H-321A) agreed with the Supreme Court of Appeal that the same conduct causing insult and defamation cannot give rise to two actions under the *actio iniuriarum*, but that the award for defamation should compensate the victim for both loss of reputation and wounded feelings. The plaintiff's separate claim based on dignity therefore failed.

Brand AJ (321A-E) nevertheless expressed an *obiter* opinion that if the defamation claim were to fail, the plaintiff should have succeeded in his dignity claim because the plaintiff not only felt subjectively insulted, but the reasonable person would also have been insulted by the same conduct. However, in his subsequent argumentation it seems that he equated the test of the reasonable observer for defamation and the test of the reasonable person for the infringement of dignity (321D-322B). He concluded (322B-C):

> "In short, if a reasonable observer would agree with [the plaintiff] that he had been humiliated, infringement of dignity has been established. But by the same token [the plaintiff] 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 [the plaintiff], 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."

This argumentation and *dictum* are subject to criticism. To our mind, the tests for defamation and insult cannot be the same, as Brand AJ seemed to intimate, but differ principally because, as was also correctly pointed out by Brand AJ (319G), two completely different personality interests, reputation and dignity, are involved. Accordingly, the test for defamation is whether the

message conveyed by the picture would probably undermine the esteem in which the plaintiff was held by others, or whether the reasonable person would regard the picture as likely to undermine the respect enjoyed by the plaintiff (see Brand AJ 311A). It is thus concerned with the infringement of the plaintiff's reputation, that is, whether the image was, in the eyes of the reasonable person, calculated to cause disrespect or ridicule of other people towards the plaintiff. In contradistinction, the test for infringement of dignity is whether the plaintiff felt insulted or humiliated under circumstances where the reasonable person would also have felt insulted. Defamation is therefore not concerned, as Brand AJ stated, with whether the plaintiff "would have been humiliated in the eyes of a reasonable observer to whom the statement had been communicated", as this is rather the test for infringement of dignity. There is a marked difference between whether the reasonable person would have felt humiliated and whether, because of the plaintiff's humiliation, the reasonable person would think less of him. This means that if the image was not defamatory of the plaintiff because his esteem was not likely to be lowered in the eyes of the reasonable person, his dignity could still have been infringed if a reasonable person would have shared his feelings of humiliation by the image. It appears that Brand AJ's use of the term "humiliation" in connection with both defamation and insult (whereas this term is more indicative of infringement of dignity) may have caused his difficulty to distinguish clearly between the reasonable-person test for defamation and that for insult in the present matter, and drew him into his "never-ending circle of logic". Because the tests for defamation and insult differ fundamentally, it was quite possible to find, as was done by Froneman and Cameron JJ (324ff 329ff), that even if the image was not defamatory of the plaintiff, his dignity could still have been infringed.

2 6 Quantum and apology

Brand AJ (322E-F) stated that, according to established principle, an award of damages for defamation should compensate the plaintiff for both wounded feelings (insult) and loss of reputation and that in some cases the former may outweigh the latter, as, in his view, has happened in this case. That is why he was in agreement with Froneman and Cameron JJ, who only recognized insult as a cause of action, that the award for damages of R45 000 in the lower courts should be reduced to R25 000. Another reason why Brand AJ interfered with the award of the lower courts was because too little was made of the fact that the defendants were schoolchildren, as well as of the fact that they had already been subjected to other forms of punishment.

Brand AJ (322D-E) also agreed with Froneman and Cameron JJ (333ff) that, in addition to damages, the defendants should tender an unconditional apology to the plaintiff for the injury they caused him. As to apology, Froneman and Cameron JJ (333B-D) purported to set out current law as follows:

> "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. 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. This is an unacceptable state of affairs, illustrated by what happened in this case."

This is not a completely accurate reflection of the legal position (but see 334D-E of their judgment). It seems that the Roman-Dutch *amende honorable* or a similar remedy has indeed been (re-)introduced into our law. In terms of this remedy a plaintiff in a defamation case could demand that the defendant retract the allegations and publish an apology. It was accepted that the *amende* had been abrogated in South Africa by disuse for 150 years. The remedy – or a similar one – was nevertheless recognized again in *Mineworkers Investment Co (Pty) Ltd v Modibane* (2002 6 SA 512 (W) 521 *et seq*; cf *NM v Smith* 2005-05-13 case no 02/24948 (W); *Young v Shaikh* 2004 3 SA 46 (C) 57; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 258-261 and 274-276; and see further *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 3 SA 395 (O), where an apology was ordered as exclusive remedy). The *amende honorable* can take three forms: an exclusive remedy; an alternative remedy for damages (satisfaction); and a cumulative remedy with damage (see *Neethling's Law of Personality* 171; and Neethling and Potgieter *Delict* 254 fn 18). (In this regard it is disappointing Froneman and Cameron JJ used the outdated 1996 edition of *Neethling's Law of Personality* which, as far as the *amende honorable* is concerned, differed completely from its 2005 edition. This may probably be ascribed to the unfortunate state of affairs that the libraries of even our highest courts are not up to date with the latest editions of legal textbooks.) It is clear that, even if the Roman-Dutch *amende honorable* is not reinstated in our law, there seems to be general agreement that Roman-Dutch common law should be developed in accordance with its equitable principles to provide for such a remedy. This will also underpin the concept of restorative justice roots of which are also to be found in customary law and tradition (see Froneman and Cameron JJ 335A-336A; *Dikoko v Mokhatla supra* 260-261; and Mukheibir "*Ubuntu* and the *Amende Honorable* – A Marriage Between African Values and Medieval Canon Law" 2007 *Obiter* 583ff).

Neethling ("Die *Amende Honorable* (Terugtrekking en Apologie) as Remedie by Laster – Resente Ontwikkelinge in die Regspraak" 2009 *De Jure* 292-293) summarizes the legal position as regards apology and retraction as follows:

> "Enersyds, en dit is gevestigde reg, kan 'n apologie wat voldoende is en met die nodige erns gemaak word voor die verhoor – of soos Burchell *Personality rights and freedom of expression. The modern actio iniuriarum* (1998) 496 dit stel, 'a full, frank and prompt retraction and apology' – by die berekening van die *quantum* van *solatium* vergoedingsversagtend werk (sien bv die *Dikoko*-saak 260; Visser, Potgieter, Steynberg en Floyd *Visser en Potgieter Skadevergoedingsreg* (2003) 463-464). Andersyds, en dit is regtens nog in sy kinderskoene, kan terugtrekking en apologie deur 'n hofbevel afgedwing word. As sodanig kan apologie verskillende vorme aanneem … Eerstens kan dit as alleenstaande remedie dien (sien [*Van Niekerk v Jeffrey Radebe* saakno 00/21813 (W)] en [die] *University of Pretoria*-saak). Tweedens kan vergoeding

as alternatief vir 'n apologie gestel word, dit wil sê, indien die verweerder nie apologie aanteken nie, moet hy die vergoedingsbedrag betaal (soos in die *Modibane*-saak; vgl Midgley ["Retraction, apology and right to reply"] 1995 *THRHR* 293). Derdens kan benewens die apologie ook 'n vergoedingsbedrag van die verweerder geverg word [as in *Dey*]. Dit geld gevalle waar die apologie die persoonlikheidsnadeel van die eiser – veral wat sy gevoelskrenking betref - nie voldoende sal vergoed nie (sien die *Dikoko*-saak 276; vgl Midgley 1995 *THRHR* 292). Ten slotte behoort die howe aangemoedig te word – in navolging van Mokgoro en Sachs RR se betoë in die *Dikoko*-saak – waar gepaste omstandighede hulle voordoen, 'to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted' (die *Dikoko*-saak 274). Sodoende kan die ideaal van herstellende beregting, wat die begrippe *ubuntu-botho* en menswaardigheid onderlê, bevorder word" (*cf* as to restorative justice also Froneman and Cameron JJ's judgment 335A-336D).

3 Conclusion

The judgment confirms that school learners are not immune to defamation actions by their teachers and serves as a warning to learners that there are limits to the pranks and jokes directed at their teachers. In general, the court applied the principles of the law of defamation correctly. In this regard it should be noted that the court expressly confirmed that the same conduct causing insult and defamation cannot give rise to two actions under the *actio iniuriarum*, but that the award for defamation should compensate the victim for both loss of reputation and wounded feelings. Nevertheless, it is unfortunate that the court introduced into the law of defamation the so-called new variation of the test for wrongfulness, namely that wrongfulness depends on whether – assuming that all the other elements of delictual liability are present – it would be reasonable to impose liability on the defendant. This test, which was developed by the Supreme Court of Appeal in the area of liability for omissions and pure economic loss, is questionable. It also seems that the court failed to distinguish clearly between the reasonable person test for insult and the reasonable-observer test for defamation. Further it appears that the court enquired into the purpose and aim of the image to ascertain whether the reasonable observer would have regarded it as defamatory, whereas the purpose or aim thereof fits more comfortably in determining malice or the intention to injure. It is commendable that the court questioned the necessity for the Supreme Court of Appeal to have embarked upon the enquiry as to whether consciousness of wrongfulness is a necessary component of *animus iniuriandi*; the *status quo* in this respect is therefore maintained. It is also to be welcomed that the court emphasized and applied the concept of restorative justice by ordering the defendants to tender an unconditional apology to the plaintiff.

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