IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 03/2015

In the matter between:

MERVYN DENDY — Plaintiff (Respondent on Exception)

and

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG — First Defendant (First Excipient)

NEIL GARROD — Second Defendant (Second Excipient)

ANDREW ST QUINTIN SKEEN — Third Defendant (Third Excipient)

J U D G M E N T

BORUCHOWITZ, J:

INTRODUCTION

[1] The plaintiff, a former associate professor of law, has issued summons against three defendants (the University of the Witwatersrand, Professor

Garrod and Professor Skeen) in which he claims general damages totalling R7 600 000,00 for injury to his dignity and reputation. The defendants have raised an exception against the plaintiff's particulars of claim. A key issue that arises for consideration is whether an award of damages is an appropriate remedy for the violation of a fundamental constitutional right.

[2] The damages allegedly flow from five separate causes of action identified as Claims A, B, C, D and E in the particulars of claim. The claims are not directed against all three defendants. Claims A and B are against the first defendant only. Claims C and D are against the first and second defendants, and Claim E is against the first and third defendants.

[3] The causes of action are based upon separate and distinct events. Claim A concerns an alleged injury to the plaintiff's dignity by reason of various procedural irregularities in the consideration of the plaintiff's application for appointment to a Chair of Law of the first defendant. For this the plaintiff claims R2 250 000,00. Claim B is based upon an alleged failure by the first defendant or its employees to furnish the plaintiff with reasons why his application for a Chair of Law was unsuccessful. For this a sum of R2 million is claimed. Claim C relates to the publication of an allegedly defamatory e-mail by the second defendant to two people (the third defendant and the third defendant's secretary) on 4 March 2002. The amount claimed in respect of this cause of action is R500 000,00. Claim D is based on the publication of an allegedly defamatory letter by the second defendant on 25

March 2002 in respect whereof the plaintiff claims R1,6 million. Claim E concerns the publication of an allegedly defamatory letter by the third defendant on 17 April 2002 for which a sum of R1 250 000,00 is claimed.

[4] The defendants have taken ten exceptions which may conveniently be divided into two groups. The first group, comprising the third to seventh exceptions, are based upon misjoinder ("*the misjoinder exception*"). The submission is that it is not competent to join the three defendants in one summons relating to five separate causes of action in respect of which none of the causes of action is directed against all three defendants and in relation to which there is no suggestion that the five causes of action depend upon substantially the same questions of law and fact. And, nor is there any principle of convenience that would justify the joinder. The second group, comprising the eighth to tenth exceptions, are aimed at the validity of Claims A, B and C.

CLAIM A

[5] Claim A is entirely novel in South African law. Damages are claimed for loss of dignity arising from the alleged violation of certain of the plaintiff's fundamental constitutional rights. Under the common law, protection of an individual's right to dignity is provided by the Roman Law *actio injuriarum*. In its present undeveloped state the *actio injuriarum* does not afford the plaintiff a remedy sounding in damages because it has never been held up to now

that the concept of dignity (or *dignitas* as it is referred to) includes the right to have one's rights entrenched by Chapter 2 of the Constitution respected. The meaning and determinacy of *dignitas* is dealt with more fully hereafter.

[6] The salient facts alleged in support of the claim are the following: On 11 October 1999 the plaintiff, who was at the time eligible for appointment to a Chair of Law of the first defendant, applied in writing to the first defendant for promotion to one of the Chairs of Law which had at that time recently been advertised by the first defendant. On 29 November 1999 the plaintiff was advised that he had been short-listed for the position and as such would be required to submit for assessment by members of the Selection Committee for Chairs of Law (the Selection Committee), several of his publications, present a guest seminar on a topic of his choice in his field of legal expertise and present himself for an interview by the Committee. The plaintiff duly complied with these requirements. On 3 February 2000 the Selection Committee took a decision not to appoint the plaintiff to a Chair of Law of the first defendant but to appoint three rival candidates. No reason for the refusal to appoint the plaintiff was furnished.

[7] It is alleged that the Selection Committee was required to assess candidates against various criteria and that the plaintiff had a right or legitimate expectation that the members of the Committee would, only, take the stipulated criteria into account in their assessment; that they would not act partially or pre-judge his application and that they would assess the

application in accordance with the applicable provisions of the Constitution and the common law.

[8] The essence of the plaintiff's claim is to be found in the following paragraphs of the particulars of claim:

> "*2.12 In deciding not to appoint the plaintiff to a Chair of Law, alternatively in deciding to appoint the rival candidates to Chairs of Law in preference to the plaintiff, one or more or all of the members of the Selection Committee for Chairs of Law of the first defendant acted in breach of the rights of the plaintiff, alternatively frustrated and/or violated the legitimate expectations of the plaintiff, by:*
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> *2.12.1 failing to take into consideration one or more or all of the criteria adumbrated in subparagraphs 2.10.1 to 2.10.9, and in particular the criteria of:*
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> *2.12.1.1 scholarship;*
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> *2.12.1.2 teaching ability;*
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> *2.12.1.3 research ability;*
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> *2.12.1.4 leadership qualities;*
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> *2.12.1.5 experience; and/or*
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> *2.12.1.6 reputation and standing in the profession or discipline;*
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> *2.12.2 taking into account against the plaintiff:*
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> *2.12.2.1 a perception that the plaintiff had improperly and/or unreasonably involved himself in factionalism within the School of Law of the first defendant;*
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> *2.12.2.2 adverse criticism expressed by the plaintiff in the past of the conduct of individual members of the academic*

staff in relation to the management of the School of Law of the first defendant, and in particular past and present members of the Governing Committee of the School of Law;

2.12.3 *acting towards the plaintiff in a biased or partial manner;*

2.12.4 *allowing themselves to be influenced against the plaintiff by personal dislike and antipathy on the part of former senior members of the academic staff of the Faculty of Law of the first defendant (as it then was), towards the plaintiff;*

2.12.5 *prejudging the plaintiff's application, by deciding prior to the conclusion of the series of guest seminars and the series of interviews by the Selection Committee for Chairs of Law that the plaintiff should not be appointed to a Chair of Law of the first defendant, alternatively that one or more or all of the rival candidates should be appointed to a Chair, or Chairs, of Law of the first defendant in preference to the plaintiff;*

2.12.6 *having no legally valid reason or reasons for failing, alternatively refusing, to appoint the plaintiff to a Chair of Law in preference to one or more of all of the rival candidates;*

2.12.7 *appointing different referees to assess and to report to the Selection Committee on the six publications submitted for assessment by the plaintiff and the six publications submitted by each of the rival candidates, with the result that no one person assessed the publications of the plaintiff and of each of the rival candidates, and no one person was therefore in a position to furnish the Selection Committee for Chairs of Law with a comparative assessment of the merits of the plaintiff's six publications against the merits of the six publications submitted by each of the rival candidates.*

2.13 *The conduct of one or more or all of the members of the Selection Committee for Chairs of Law of the first defendant as set out in paragraph 2.12 constituted a wrongful violation of one or more or all of the plaintiff's rights:*

2.13.1 to equality in terms of section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.2 to dignity in terms of section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.3 to freedom of conscience, thought, belief and/or opinion in terms of section 15 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.4 to freedom of expression in terms of section 16 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.5 to freedom of association in terms of section 18 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.6 to fair labour practices in terms of section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996;

2.13.7 to just administrative action in terms of section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996, alternatively in terms of common law;

and consequently constituted a wrongful injury to the plaintiff's right to dignity in terms of section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996, alternatively a wrongful injury to the plaintiff's right to dignity at common law, further alternatively a wrongful injury to the plaintiff's right to dignity both in terms of section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and at common law.

2.14 The plaintiff felt insulted and humiliated by the conduct of one or more or all of the members of the Selection Committee for Chairs of Law as described in paragraph 2.12, and a reasonable person in the position of the plaintiff would have felt so insulted and humiliated.

2.15 The conduct of one or more or all of members of the Selection Committee for Chairs of Law of the first defendant adumbrated in paragraph 2.12 was intended to injure the plaintiff in his right to dignity in terms of section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), alternatively to injure the plaintiff in his right to dignity at common law, further alternatively to injury the plaintiff in his right to dignity both in

terms of section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and in terms of common law.

2.16 *Alternatively to paragraph 2.15*

The conduct of one or more or all of the members of the Selection Committee for Chairs of Law of the first defendant adumbrated in paragraph 2.12 was unreasonable and therefore negligent."

[9] The defendants except to the particulars of claim on the ground that the facts pleaded in support of the claim and its alternative are insufficient to disclose a cause of action. Their submission is that the conduct complained of is not reasonably capable of injuring the plaintiff's dignity or causing him insult or humiliation, and is therefore not sufficient to justify a remedy in damages.

[10] For the sake of conceptual clarity it is necessary to understand the meaning that the plaintiff ascribes to the term "*dignity*". He avers (in paragraph 2.13 of the particulars of claim) that the conduct of the Selection Committee constituted a violation of his constitutional rights and consequently amounted to an injury to his dignity in terms of section 10 of the Constitution or at common law.

[11] There is a difference in scope and content between the concept of dignity under the Constitution and the common law. Under the *actio injuriarum* the concept of *dignitas* has a well defined meaning. In its narrow sense the term encompasses only the subjective feeling of dignity, self-

respect or a person's sense of self-worth and is not concerned with personality rights such as the right to physical integrity (*corpus*) and the right to a good name (*fama*). When used in this sense it is infringed by conduct that is insulting, humiliating or degrading.[1] In certain cases *dignitas* has been interpreted more broadly, treating it as a collective term for all personality rights and interests with the exception of the right to a good name (*fama*) and bodily integrity (*corpus*).[2]

[12] Under the Constitution no sharp lines are drawn between the trilogy of *fama*, *corpus* and *dignitas*.[3] Section 10 of the Constitution provides that "*everyone has inherent dignity and the right to have their dignity respected and protected*". The section provides no definition of dignity, however its role and importance as a foundational constitutional value has been emphasised in a number of cases. In *S v Makwanyane*[4] O'Regan J stated:

> "*The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3.*"

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1 See *R v Umfaan* 1908 TS 62 at 68; *Walker v Van Wezel* 1940 WLD 66 at 69-70; *Minister of Police v Mbilini* 1983 (3) SA 705 (A) at 715G-716A; *Sokhulu v New Africa Publications Ltd and Others* 2001 (4) SA 1357 (W) in para [10]. Also see Neethling's *Law of Personality* 2nd ed at 28 and 192. Some writers suggest that *dignitas* is not confined to cases involving insult but any impairment of subjective feelings of dignity. Burchell *Personality Rights and Freedom of Expression – The Modern Actio Injuriarum* at 331-332.

2 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247D. Also Neethling's *Law of Personality* at 50-51.

3 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) in para [27].

4 1995 (3) SA 391 (CC) in para [328].

[13] In *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs*[5] O'Regan J drew attention to the centrality of human dignity as a constitutional value:

> "*Human dignity … informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.*"

[14] Whatever its exact scope, there is consensus that the protection of human dignity under section 10 of the Constitution encompasses something broader than the Roman Law concept of *dignitas*.[6] For present purposes however, there is little difference between the right to dignity as it is comprehended under the Constitution and its common law counterpart. What the plaintiff claims are damages of a compensatory nature for breach of his fundamental rights. Their purpose is to assuage his wounded feelings. He describes the damages claimed as being of a non-patrimonial nature in respect of "*… hurt, insult and humiliation suffered by him through his non-*

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5 2000 (3) SA 936 (CC) in para [35].

6 *Gardener v Whitaker* 1995 (2) SA 672 (E) at 690G-H; Cachalia *et al Fundamental Rights in the New Constitution* at 33-34. See also *National Coalition for Gay and Lesbian Equality and Ano v Minister of Justice* 1999 (1) SA 6 (CC) in paras [120] and [124].

appointment to a Chair of Law".[7] The plaintiff clearly uses the term "*dignity*" in its narrow sense referred to above.[8]

[15] The plaintiff submits that the common law in its present undeveloped state, is deficient in promoting constitutional objectives and is in need of development. He accordingly asks that the court, in the exercise of its inherent powers and constitutional duty, develop the common law so as to afford him a remedy sounding in damages. First, by extending the common law right to dignity, so as to include within its ambit not only the right to be protected against those forms of insulting conduct which have already been recognised as legally actionable but also the right to be protected against violations of entrenched constitutional (Chapter 2) rights.[9] Second, by recognising a new personality right under the *actio injuriarum* standing alongside the traditional trilogy of *corpus*, *fama* and *dignitas*. (He suggests that such a new personality right be described as "*the right to respect for constitutionality entrenched rights*".)[10] A third approach advocated by the plaintiff is that the court recognise all violations of constitutional rights as actionable infringements of dignity.

[16] As the damages claimed by the plaintiff are said to be derived from an infringement of rights entrenched in the Bill of Rights the position is regulated by section 38 of the Constitution. The section provides that where a right in

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7 Plaintiff's supplementary heads of argument para 13.1.
8 See para 11 *supra*.
9 For examples of recognised categories of impairments to dignity see Burchell "*Personality Rights*" Chapter 27.
10 Plaintiff's main heads of argument para 51.

the Bill of Rights has been infringed or threatened "*the court may grant appropriate relief*". With the exception of a declaration of rights, the section is silent as to the specific remedies that are available. What this court must determine is whether the conduct complained of is capable of amounting to a wrongful violation of the plaintiff's constitutional rights and, if so, whether an award of damages is an appropriate remedy.

[17] The meaning of "*appropriate relief*" was discussed by the Constitutional Court in *Fose v Minister of Safety and Security*[11] and more recently in *Hoffmann v South African Airways*.[12] In *Fose*, Ackermann J writing for the majority stated:

> "*Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.*"[13]

[18] In a concurring judgment Kriegler J explained:

> "*Once the object of the relief in s 7(4)(a) has been determined, the meaning of 'appropriate relief' follows as a matter of course. When something is appropriate it is 'specially fitted or suitable'. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further*

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11 1997 (3) SA 786 (CC).
12 2001 (1) SA 1 (CC).
13 *Fose* para [19].

> *violation of rights enshrined in chap 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate..*"[14]

[19] And in *Hoffmann* Ngcobo J summarised the position thus:

> "*The determination of appropriate relief, …, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'.*"[15]

[20] It is apparent from the above *dicta* that the nature of an appropriate remedy is determined by its object and its ability effectively to deal with the wrong occasioned by the infringement of the constitutional right. This immediately brings into focus the distinction between delictual and constitutional remedies. In delict, an award of damages is the primary remedy, its aim being to afford compensation in respect of the legal right or interest that has been infringed. The purpose of a constitutional remedy is to vindicate guaranteed rights and prevent or deter future infringements. In this

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14 *Id* para [97].

15 *Hoffmann* para [45].

context an award of damages is a secondary remedy to be made in only the most appropriate cases.[16]

[21] In *Fose* the Constitutional Court did not exclude the possibility of "*appropriate relief*" including damages where such an award was necessary to protect and enforce fundamental rights, but expressed doubt as to the appropriateness of constitutional damages especially where other effective remedies would be sufficient to vindicate the infringed rights.[17] The court emphasised however that common law remedies, and particularly delictual remedies would in certain cases be sufficient to redress constitutional wrongs; the primary purpose of constitutional relief which is to vindicate the Constitution and deter its further infringement could effectively be achieved by invoking delictual remedies and particularly those that had been specifically designed to protect personality interests, such as dignity.[18]

[22] Academic writers are also of the view that the expansion of the right to dignity under the *actio injuriarum* is an appropriate method of granting a remedy sounding in damages to victims of violations of constitutionally entrenched rights which do not fall within the ambit of the rights of *corpus*

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16 See Van der Walt and Midgley *Delict Principles and Cases* Volume 1 2nd ed para 5; Marilyn L Pilkington "*Damages as a remedy for infringement of the Canadian Charter of Rights and Freedom*" (1984) 62 The Canadian Bar Review 517 at 535. An award of compensatory damages may be considered in exceptional circumstances when other remedies would not be effective and if there is no other compensatory remedy available in law. For an example where damages were awarded see *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (AGRI SA and Legal Resources Centre, Amici Curiae*. 2004 (6) SA 40 (SCA) at 62B-D. See further De Waal *et al The Bill of Rights Handbook* 4th ed at 188-189.

17 *Fose* para [68]; see also De Waal *et al The Bill of Rights Handbook* 4th ed at 191; Van der Walt and Midgley paragraph 5 at 7.

18 *Fose* paras [98] and [100] (per Kriegler J).

(bodily integrity) and/or *fama* (reputation). The *actio injuriarum* appears to be flexible enough to accommodate new claims for damages including, where appropriate, claims arising from violations of fundamental constitutional rights.[19]

[23] The plaintiff has proposed three methods whereby the common law should be developed in order to afford him the remedy that he seeks. It is as well to immediately dispose of the third approach advocated by the plaintiff, namely, that the court recognise all violations of constitutional rights as actionable infringements of dignity. In effect, what is contended for is the creation of a constitutional delict.[20] There are substantial reasons not to afford recognition to such a delict. It is desirable that a clear distinction be drawn between delictual and constitutional wrongs.[21] Conceptual difficulties are bound to arise if one were to equate all infringements of fundamental rights with an ordinary delict. There is the problem of overlapping and possible conflict between fundamental rights entrenched in the Constitution and private subjective rights protected by, or legal duties imposed by, the law of delict. Where the infringement of a fundamental right overlaps with generally recognised areas of delictual liability, an ordinary delictual claim will lie at the instance of an aggrieved person. The problem lies with those

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[19] See Burchell "*Beyond the Glass Bead Game: Human Dignity in the Law of Delict*" (1988) 4 S A Journal on Human Rights 1; "*Principles of Delict*" at 13-14; "*Personality Rights*" at 343; Neethling's *Law of Personality* at 73-78; De Waal *et al The Bill of Rights Handbook* at 188-191.

[20] The possibility of a constitutional delict or tort has been mooted by certain academic writers. See Burchell "*Delict in a Bill-of-Rights Era*" (1991) 20 Businessman's Law 155 and 175; "*Principles of Delict*" (1993) 13-14 Pilkington "*Damages as a remedy for infringement of the Canadian Charter of Rights and Freedom*" (1984) 62 The Canadian Bar Review 517. Compare Neethling at 76*ff* 415.

[21] Van der Walt and Midgley *supra* at para 5.

infringements of fundamental rights that extend beyond the recognised ambit of the law of delict and which do not meet the requirements of delictual liability.[22] These difficulties are highlighted by Annél van Aswegen in an article entitled *The Implications of a Bill of Rights for the Law of Contract and Delict.*[23] To recognise all constitutional violations as infringements of dignity as suggested by the plaintiff would be to confuse the wider concept of dignity under the Constitution with the narrower concept of *dignitas*.

[24] Yet a further reason why all violations of fundamental rights ought not to be regarded as actionable infringements of dignity, is that in many instances where the violation of human dignity is offended the primary constitutional breach may be of a more specific right in respect of which the Constitution affords a particular remedy or specific protection.[24] In these circumstances dignity serves merely as a flexible and residual right.[25]

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[22] Such as for example the rights to equality, religion, belief and opinion, assembly, demonstration, freedom of expression, association and movement, access to information and administrative justice rights.

[23] (1995) 11 S A Journal of Human Rights 61-65.

[24] See in this regard the *dictum* of O'Regan J in *Dawood supra* para 14.

[25] The residual nature of the right to dignity is emphasised by Susie Cowen in an article entitled *Can "dignity" guide South Africa's equality jurisprudence?* 2001 (17) S A Journal of Human Rights 34 where the following is stated at 47:

"*Dignity as a right is 'elevated' in relation to other rights, but only in the sense that it is seen to embrace and inform other rights. Other rights may be seen as incidences of dignity itself, or, put less strongly, the meaning of other rights can also be located in the idea of protecting human worth. The implication of this is that one would see the protection of bodily and psychological integrity, for example, as a component of protecting human worth – or dignity – and thus embraced also in the right to dignity. But a legal claim that fits the right to bodily and psychological integrity would more likely be dealt with under that right, even though it is also embraced by the broader right to dignity. Sometimes the choice of right will be determined by whether there are internal limitations on those rights. The dignity right then for practical purposes serves as a flexible and residual right.*"

[25] The manner in which the common law is to be developed received attention in the seminal decision of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*.[26] It was held there that courts are under a general obligation to develop the common law appropriately, where the law, as it stands is deficient in promoting section 39(2) objectives.[27] (Section 39(2) of the Constitution provides that when developing the common law, every court must promote the "*spirit, purport and objects*" of the Bill of Rights. This must be read with section 173 of the Constitution which gives to all higher courts, the inherent power to develop the common law, taking into account the interests of justice.) The deficiency enquiry should take place in two stages. The first, is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. If this enquiry leads to a positive answer, the second stage is to consider how such development is to take place in order to meet section 39(2) objectives.[28] In *Carmichele t*he court cautioned against "*overzealous judicial reform*" and repeated the *dictum* of Iacobucci J in *R v Salituro*, (which was cited by Kentridge AJ in *Du Plessis v De Klerk*) to the effect that: "*The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*"[29]

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26 2001 (4) SA 938 (CC).
27 *Id p*ara [39].
28 *Id p*ara [40].
29 *Id p*ara [36].

[26] Delictual remedies are particularly well suited to constitutional development. The lens of wrongfulness that is central to any delictual action provides an appropriate mechanism for giving expression to the section 39(2) objectives to the Constitution. The common law test for determining wrongfulness is a proportionality exercise that depends upon the interplay of various factors.[30] It was held in *Carmichele* that proportionality is consistent with the Bill of Rights but that exercise must now be carried out in accordance with the "*spirit, purport and objects*" of the Bill of Rights.[31] The court also stressed that not only must the common law be developed in a way which meets section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law, within its own paradigm.[32]

[27] The common law position has been authoritatively laid down by Melius de Villiers in The Roman and Roman-Dutch Law of Injuries (1899) 27. A person may recover compensation for injury to his dignity only if three elements are present: (1) An intention on the part of the offender to produce the effect of his act (*animus injuriandi*); (2) an overt act which the person doing it, is not legally competent to do; 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. These requirements were affirmed by the Appellate Division in *De Lange v Costa*.[33]

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30 *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-H.
31 *Carmichele* para [43].
32 *Id* para [55].
33 1989 (2) SA 857 (A) at 860I-861A.

[28] Prior to *De Lange* there was judicial controversy as to whether injury to dignity must be tested subjectively or objectively. Compare *Walker v Van Wiesel*[34] and *Jackson v S A National Institute for Crime Prevention and Rehabilitation of Offenders.*[35] In *De Lange* the court recognised the need for objective limits to be placed on the action for injury to dignity in order to keep it within manageable proportions. It accepted that an entirely subjective test of dignity had the potential for opening the floodgates to successful actions by hypersensitive persons who felt insulted by statements or conduct which would not insult a person of ordinary sensibilities. And so it fashioned what is in effect a hybrid test, one that is both subjective and objective in nature. To be considered a wrongful infringement of dignity, the objectionable behaviour must be insulting from both a subjective and objective point of view, that is, not only must the plaintiff feel subjectively insulted but the behaviour, seen objectively, must also be of an insulting nature. In the assessment of the latter, the legal convictions of the community (*boni mores*) or the notional understanding and reaction of a person of ordinary intelligence and sensibilities are of importance.[36] In *De Lange* Smalberger JA summarised the position as follows:[37]

> *[B]ecause proof that the subjective feelings of an individual have been wounded, and his dignitas thereby impaired, is necessary before an action for damages for injuria can succeed, the concept of dignitas is a subjective one. But before that stage is reached it is necessary to establish that there was a wrongful act. Unless there was such an act intention becomes irrelevant as does the question whether subjectively the aggrieved person's dignity was impaired. I do not understand the*

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34 1940 (WLD) 66 at 71.
35 1976 (3) SA 1 (A) 12.
36 Neethling's *Law of Personality* at 194-195.
37 At 862A-G.

judgment of Jansen JA to suggest that all that is required for a successful action for damages for injuria are words uttered animo injuriandi towards another which offend such person's subjective sensitivities, and in that sense impair his dignitas. If this were so it could lead to the courts being inundated with a multiplicity of trivial actions by hypersensitive persons. (See Burchell 1977 SALJ at 7-8; Neethling Persoonlikheidsreg 2nd ed at 193.) According to Melius de Villiers op cit at 37),

> *'(s)o long as an act is outwardly lawful it cannot be an injury, with whatever intention or motive it may have been committed. Even when a person entertaining an injurious intention believes an act which he commits to be injurious when it really is not such, his intention will not affect the character of the act.'*

Likewise the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.

In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the 'algemene redelikheidsmaatstaf' (Marais v Richard en 'n Ander 1981 (1) SA 1157 (A) at 1168C). 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. (Walker v Van Wezel (supra at 68)."

[29] The test enunciated in *De Lange* is, in my view, consistent with the Constitution. The objective test of wrongfulness (the criterion of reasonableness) provides a natural point of entry for giving expression to the "*spirit, purport and objects*" of the Constitution which reflect, as it were, the new *boni mores*. It is sufficiently flexible to permit recognition of new forms of injury to dignity including those that arise from violations of fundamental rights. The test strikes the balance that is necessary to ensure that objective bounds are set to the action for injury to dignity, in order to keep it within manageable

proportions.[38] *De Lange* needs no adaptation to bring it into harmony with the Constitution.

[30] Although the plaintiff complains of a number of constitutional violations the core of his complaint relates to defects of a procedural nature. Section 33(1) of the Constitution provides that "*everyone has the right to administrative action that is lawful, reasonable and procedurally fair*". Lawful administrative action entails, *inter alia*, the absence of a failure of the wielder of public power to apply his or her mind, the taking into account of irrelevant considerations, the leaving out of account of relevant considerations, and the absence of arbitrary and capricious decision-making.[39] In the present case lawful, reasonable and procedurally fair administrative action cannot have taken place if the Selection Committee failed to take into consideration one or more relevant criteria; or improperly took into consideration factors beyond the relevant criteria, or acted in a manner which was biased or partial or allowed itself to be influenced against the plaintiff by personal dislike and antipathy, or prejudged the issue as to who would be appointed to Chairs of Law prior to the completion of the selection process.

[31] It is settled law that for the purpose of deciding an exception the court takes the facts alleged in the pleading excepted to as being correct. This court must therefore assume as correct, the allegation in paragraph 2.12 of

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[38] Burchell "*Beyond the Glass Bead Game: Human Dignity in the Law of Delict*" *supra* at 3 and 18; Dendy *Criticism without contumely – injuria and the hypersensitive employee* (1990) 19 Businessman's Law 123.

[39] Cora Hoexter *The New Constitutional and Administrative Law* Volume 2 (2002) at 161.

the particulars of claim that the plaintiff's subjective feelings were violated by the conduct of the Selection Committee. What cannot be assumed as correct is the plaintiff's allegation that a reasonable person in his position would have felt insulted and humiliated; the enquiry that must be made is whether the conduct complained of can be characterised as offensive when tested against the objective criterion of reasonableness.[40]

[32] Following the approach laid down in *De Lange*, an analysis of the cause of action as pleaded reveals the following: The only "*overt*" act complained of is the decision not to appoint the plaintiff to a Chair of Law. There is no suggestion that during the interview (or at any other stage) any member of the Selection Committee conducted him or herself in an offensive manner or that the plaintiff was subject to degrading, insulting or ignominious treatment.[41] There is in my view nothing inherent in the decision not to appoint the plaintiff which could conceivably be characterised as being of an offensive or insulting character. Objectively considered the defects of a procedural nature about which he complains cannot be characterised as offensive or insulting when tested against the objective criterion of reasonableness. Moreover, the decision in question was "*outwardly lawful*". The very task of the Selection Committee was to decide whether or not to appoint the plaintiff to a Chair of Law. Accordingly, their motivation for not appointing the plaintiff is irrelevant.

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[40] This question can be decided on exception as the facts on which the plaintiff relies have been fully pleaded. See in this regard the reasoning of Hefer JA in *Minister of Law and Order v Kadir supra* at 318H-319A.

[41] See cases cited in para [11] *supra* fn 1.

(See in this regard the passage from Melius de Villiers quoted in *De Lange supra*.)

[33] The plaintiff contends that if the above reasoning were correct, it would mean that violations of constitutional rights, no matter how numerous or how flagrant, could not constitute actionable invasions of the right to dignity as long as the violations occur in a non-offensive manner. In short, what this means is that polite violations of constitutional rights cannot amount to breaches of a victim's right to dignity, whereas rude or offensive violations can. The plaintiff's argument overlooks the principle which has been affirmed in *De Lange* that only conduct that is offensive or insulting can form the basis of an action for *injuria.*

[34] A further argument advanced is that it is the violation of the constitutional right itself which amounts to the overt wrongful act and not any gratuitous rudeness or offensiveness accompanying the violation. Here too, I do not agree with the plaintiff's submission. The only "*overt act*" complained of is the decision not to appoint the plaintiff to a Chair of Law. Whilst the constitutional violations contended for may be wrongful, the conduct upon which such violations are premised is not of an overt character.

[35] A critical factor militating against an award of damages is the fact that the plaintiff had at his disposal the remedy of review. The conduct of the Selection Committee, if proved, would have been reviewable under the

common law and the Constitution.[42] The setting aside of the decision of the Selection Committee would in my view have constituted sufficient vindication of the rights that had been infringed, and would in large measure have assuaged the plaintiff's wounded feelings.

[36] Issues analogous to the present have been considered by the Supreme Court of Appeal in *Knop v Johannesburg City Council;*[43] *Olitzki Property Holdings v State Tender Board and Ano*[44] and *The Premier, Western Cape v Faircape Property Developers (Pty) Ltd.*[45]

[37] In *Knop* the appellant had claimed damages from the Johannesburg City Council on the grounds that the latter had been negligent in approving his application for the sub-division of an erf where the sub-division was in conflict with the provisions of the respondent's town-planning scheme. The appellant had incurred expenditure in proceeding with the development after the application for sub-division had been approved and sought to recover the loss resulting therefrom. An exception to the particulars of claim as disclosing no cause of action was upheld. In holding that an action for damages would not lie, the court was particularly influenced by the fact that a party aggrieved at the local authority's decision had a right to appeal to the Townships Board in

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42 See *Lunt v University of Cape Town and Ano* 1989 (2) SA 438 (C); *Toerien en 'n Ander v De Villiers NO en 'n Ander* 1995 (2) SA 879 (C); *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (BSC); *Van der Merwe v Smith NO en 'n Ander* 1999 (1) SA 926 (C); *Mathipa v Vista University and Others* 2000 (1) SA 396 (T); *Governing Body, Tafelberg School v Head, Western Cape Education Department* 2000 (1) SA 1209 (C).

43 1995 (2) SA 1 (A).

44 2001 (3) SA 1247 (SCA).

45 2003 (6) SA 13 (SCA).

terms of section 139 of the Town-Planning and Townships Ordinance 15 of 1986. In this regard Botha JA made the following observation:[46]

> "*If the application is refused, the applicant is entitled in terms of s 139(1)(a) to appeal to the Townships Board within a period of 28 days. He thus has available and at his disposal the procedure of an appeal in terms of ss (4) and (5) and the opportunity of a full hearing for the consideration of any representations he might wish to make. In my judgment it could not have been in the contemplation of the legislature that, apart from the appeal procedure, the refusal of the application was to be regarded as a wrong to the applicant entitling him to bring an action for damages against the local authority.*"

Botha JA also referred[47] to certain policy considerations which in his view militated against allowing a claim for damages:

> "*As to the broader considerations of policy, on the one hand an aggrieved applicant does not need an action for damages to protect his interests; he has readily at hand the appeal procedure provided within the legislative framework. On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the local authority in the first instance. That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community.*"

[38] In *Olitzki* the plaintiff claimed constitutional damages for loss of profit from the State Tender Board in the Province of Gauteng. The plaintiff which

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46 *Knop* at 31G-H.

47 *Id* 33B-E.

had an option to purchase a building tendered to provide office space in it to the Provincial Government. When its tender was not accepted it instituted a claim for damages in which it alleged that the defendants had misconducted themselves during the tender process. The court was not prepared to recognise an award of damages for loss of profit as an appropriate remedy for breach of the administrative justice provisions of the interim Constitution. In so holding, the court was influenced by the fact that the plaintiff had another remedy in the form of an interdict available to it. Cameron JA reasoned thus:[48]

> "*Counsel correctly conceded that in these circumstances and on the assumptions made the plaintiff would have been entitled to an interdict prohibiting the defendants from continuing the tender process and indeed from allocating the award elsewhere at all.*
>
> *This in my view has acute consequences for the plaintiff's task in seeking to convince the Court that an award of the profit lost through the non-award of the tender could constitute 'appropriate relief'. An interdict would not only have eliminated the source of loss the plaintiff invokes. This no doubt reflects the wisdom of hindsight, and offers stony comfort to a plaintiff who, as Mr Ginsburg was at pains to emphasise, has never manifested an intention an intention to abandon its rights. Yet, as Ngcobo J emphasised on behalf of the Constitutional Court in Hoffmann v South African Airways, what constitutes 'appropriate relief' depends on the facts of each case. The plaintiff relies on its special circumstances to found a constitutional entitlement. Fair scrutiny must encompass all aspects of its position, and the alternative remedies available to it, at all stages of the dispute, must be a critical factor in that assessment.*"

[39] A factor that also militated against an award of damages in *Olitzki* was, what Cameron JA described as, the "*conceptual and practical difficulties*" flowing from the omission to challenge the decision in question by means of

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[48] At paras [37] and [38].

judicial review. These are outlined in the following quotation from De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5th ed (1995) at para 19-033:[49]

> "*The causation of damage also creates particular problems in respect of the imposition of tortuous liability on public authorities for unlawful administrative action. It is trite law that judicial review is not concerned with the merits of administrative decisions and the court should ordinarily avoid substituting its own opinion for that of the public body as to how precisely a discretion should be exercised. How, then, is a court to approach a case where, for example, a plaintiff alleges that a breach of natural justice activated by malice has caused him loss (such as the refusal of a licence to trade) or the decision-maker negligently falls to take into account a relevant consideration? The court may avoid second-guessing what decision the public authority would have reached had the decision not been tainted by illegality by saying that the plaintiff has at most lost an opportunity to obtain a benefit. Probability will be defined by among other facts, the degree of discretion possessed by the decision-maker. As Harlow points out, whilst in most cases a court may attempt to place a value on a lost chance, special difficulties arise in relation to damages claims associated with judicial review because this exercise would necessarily involve the court substituting its own discretion for that of the decision-maker. A solution is to defer the action for damages until the outcome of the application for judicial review is known and the public body has complied with the decision. However, even if the court considering the damages claim waits for the decision-maker to reconsider the decision in accordance with law, conceptual problems may still arise if a decision is characterised as void (rather than voidable); in these circumstances what will have caused the plaintiff's loss?*"

[40] The problems alluded to in the abovementioned quotation are well-illustrated by the present case. The complaints levelled against the Selection Committee are essentially of a procedural nature. Had the plaintiff pursued his obvious remedy of judicial review, the matter would have gone back to the

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[49] *Olitzki* fn 39 in para [41].

Selection Committee for reconsideration. The Selection Committee may then have either confirmed its original decision or appointed the plaintiff to a Chair of Law. Where judicial review is bypassed and a remedy in damages is sought, the decision-maker is not given an opportunity to consider the matter afresh and its designated function is effectively usurped. Damages are also difficult to assess as the court would have to second-guess the outcome of a possible review. Whether, and to what extent, the decision of the Selection Committee would have been vitiated by the procedural irregularities contended for has an important bearing on the plaintiff's entitlement to damages and the extent of any award that may be made.

[41] *Faircape* concerned an action for damages against a provincial government flowing from the allegedly improper consideration of an application for planning permission. The conduct complained of was considered not to be actionable. The court (per Lewis JA) after considering the *dictum* in *Knop* at 33A-F made the following observation:[50]

> "*This dictum must be qualified in the light, now, of the duties imposed on all organs of government by the Constitution, and in particular in the light of the positive obligations imposed by section 7 (the State must 'respect, protect, promote and fulfil the rights in the Bill of Rights'); and section 41(1) (all spheres of government and organs of State must provide 'effective, transparent, accountable and coherent government'). In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. It will seldom be that the merely incorrect exercise of a discretion will be considered to be wrongful. The enquiry as to wrongfulness should also include a consideration of whether the legislation in question,*

[50] *Faircape* para [37].

expressly or by implication, precludes an action for damages against an official or member of government, since the conclusion that accountability may take the form of an award in damages may be negatived by a construction of the legislation in question. This approach is in my view consonant with the Promotion of Administrative Justice Act 3 of 2000 (of no application to this matter because it was passed and promulgated after the events giving rise to the dispute had occurred) which confers on a court the power, in exceptional circumstances, to order an administrator or any other party to the proceedings to pay compensation where administrative action is set aside. It must be emphasised that each case should be considered in its own context. And of course, the other elements of the delict must still be proved in order for any act or omission to be actionable."

[42] In *Faircape* the court cited with approval[51] the following passage from *Minister of Safety and Security v Van Duivenboden*:[52]

"*When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiate between matters of policy and matters that fall within what is called the 'operational' sphere of government though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an*

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51 *Id* para [40].

52 2002 (6) SA 431 (SCA) (per Nugent JA).

> *action for damages. However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.*"

[43] The approach of the South African courts in the above-mentioned cases is consistent with that adopted in commonwealth jurisdictions. See in this regard *X and Others (Minors) v Bedfordshire Country Council*[53] and *Dunlop v Woollahra Municipal Council*.[54]

[44] The plaintiff has sought to distinguish the facts in *Knop, Olitzki* and *Faircape* from those in the present matter. Whilst they are indeed distinguishable, the underlying principle enunciated therein is not. In each of these decision the court considered the existence of an alternative remedy and public policy considerations as militating against an award of damages.

[45] A point forcefully made by the plaintiff is that none of the alternative remedies suggested would eliminate entirely the harm suffered by him. Even if he were somehow to be appointed to a Chair of Law of the first defendant that could never wipe out the past hurt, insult and humiliation meted out to him by the Selection Committee in violating his constitutional rights, and in not furnishing him with reasons for his non-appointment after he had asked for such reasons. The remedy of review would do no more than eliminate, from the time when the relief afforded by that remedy became operational, the

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53 (1995) 3 All ER 353 (HL).
54 (1981) 1 All ER 163 (PC).

effect of the decision of the Selection Committee but could not erase the hurt, humiliation and insult. Damages are the only possible remedy that would assuage the plaintiff's wounded feelings. I do not agree with the plaintiff's submission. A successful review or the grant of interdictory relief obliging the first defendant to furnish reasons would go a long way to assuage his wounded feelings and at the same time serve to vindicate the infringement of his fundamental rights. It should not be forgotten that the primary object of constitutional relief is not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test at the end of the day is not what will alleviate the hurt which plaintiff contends for but what is appropriate relief required to protect the rights that have been infringed.

[46] Public policy considerations also play a significant role. It is not only the interests of the plaintiff, but the interests of society as a whole that ought, as far as possible, to be served when considering an appropriate remedy.[55] This aspect is emphasised by Pilkington in her article entitled *Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms*[56] where the following observation is made:

> "*… The governing standard in providing remedies ought to be three-fold: What remedy or combination of remedies will (1) most effectively redress the wrong suffered by the plaintiff, (2) foster the implementation of the Constitution by deterring future infringements and ensuring future compliance, and (3) interfere as little as possible with the exercise of legislative and executive responsibilities.*" (my emphasis)

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55 *Fose* at para [38] (per Ackermann J).

56 (1984) 62 The Canadian Bar Review 517 at 519

[47] State officials are everyday involved in thousands of discretionary decisions. It may safely be assumed that a substantial number of these will be attended by one or other form of procedural irregularity. The consequence of these irregularities is that persons will be refused licences or dispensations for which they have applied. The legal convictions of the community do not demand that disappointed applicants be afforded a right of action in damages by reason of such irregularities. The administration would be potentially paralysed if actions for damages were permitted. It is for this reason, that actions of the sort presently under consideration are not generally recognised save in exceptional circumstances.

[48] And so, it is my conclusion that the facts pleaded are not sufficient to justify a remedy in damages. There is nothing in the Constitution that would require the development of the common law to recognise the cause of action contended for by the plaintiff. The exception to Claim A (the eighth exception) must accordingly succeed.

CLAIM B

[49] This claim is also novel in South African law. The plaintiff claims damages for the loss of dignity based upon the contention that he had a right or legitimate expectation to be furnished with the reasons for the decision of the Selection Committee not to appoint him to a Chair of Law and to appoint rival candidates in preference to him.

[50] The particulars of claim detail the attempts by the plaintiff to obtain the reasons and certain minutes. The plaintiff avers that on 11 February 2000 he requested the third defendant, in his then capacity as Dean of the Faculty of Law of the first defendant to furnish him with *inter alia*: detailed reasons in writing why his application for a Chair of Law of the first defendant dated 11 October 1999 was unsuccessful; detailed reasons in writing why the applications of each of the rival candidates was considered by the Selection Committee for Chairs of Law of the first defendant to be more meritorious than his. And a copy of the minutes of the meeting of the Selection Committee for Chairs of Law held on 2 and 3 February 2000. The third defendant failed or declined to furnish the plaintiff with the information specified. The plaintiff renewed his attempts to obtain reasons by addressing letters to the then Vice-Chancellor of the first defendant Prof Bundy and to his successor Prof Norma Reid, however the information requested was not forthcoming.

[51] The plaintiff's allegation is that the refusal to furnish him with the reasons and the minutes constitutes a wrongful violation of his rights in terms of section 9, 10, 23, 32 and 33 of the Constitution and consequently amounted to an injury to his dignity. The manner in which this is pleaded is as follows:

> "*3.24 The aforesaid conduct of the third defendant, Professor Bundy, Professor Reid and/or any other person on behalf of the first defendant in failing and/or declining to furnish the plaintiff with the information specified in subparagraphs 3.3.1 and 3.3.2 above and/or a copy of the minutes referred to in subparagraph 3.3.3 above constituted a wrongful violation of one or more or all of the plaintiff's rights:*

3.24.1 to dignity in terms of section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996;

3.24.2 to equality in terms of section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996;

3.24.3 to fair labour practices in terms of section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996;

3.24.4 to access to information in terms of section 32 of the Constitution of the Republic of South Africa, Act 108 of 1996, <u>further alternatively</u> in terms of common law;

3.24.5 to just administrative action in terms of section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996, <u>alternatively</u> in terms of common law;

and consequently constituted a wrongful injury to the plaintiff's right to dignity in terms of section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996, <u>alternatively</u> a wrongful injury to the plaintiff's right to dignity at common law, <u>further alternatively</u> a wrongful injury to the plaintiff's right to dignity both in terms of section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and at common law.

3.25 The plaintiff felt insulted and humiliated by the conduct of the third defendant, of Professor Bundy, of Professor Reid, and/or of any other member of staff (<u>alternatively</u> agent), of the first defendant who was responsible in law for furnishing to the plaintiff the information specified in subparagraphs 3.3.1 and 3.3.2 above and/or a copy of the minutes referred to in subparagraph 3.3.3 above, in failing to furnish such information and/or a copy of the aforesaid minutes, and a reasonable person in the position of the plaintiff would have felt so insulted and humiliated.

3.26 The aforesaid conduct of one or more or all of the employees, <u>alternatively</u> agents, of the first defendant referred to in paragraph 3.24 above was intended to injure the plaintiff in his right to dignity both in terms of section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and in terms of common law.

3.27 Alternatively to paragraph 3.26:

The aforesaid conduct of one or more or all of the employees, alternatively agents, of the first defendant referred to in paragraph 3.24 above was unreasonable and therefore negligent.

3.28 As a result of the aforesaid conduct of one or more or all of the persons referred to in paragraph 3.24 above, all of whom acted within the course and scope of their employment as members of staff of the first defendant, alternatively in their capacity as agents of the first defendant, the plaintiff has been injured in his dignity, and has suffered damage in the amount of R2 000 000 (TWO MILLION RAND)."

[52] The defendants except to Claim B on the ground that the conduct complained of is not reasonably capable of injuring the plaintiff's dignity and that the facts pleaded are not sufficient to justify a remedy in damages.

[53] Section 33(2) of the Constitution provides that "*everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*". It is well established that the failure to give written reasons has an important bearing on the question whether the decision-maker or makers acted in good faith or had been influenced by ulterior or improper motives. In *Judes v District Registrar of Mining Rights, Krugersdorp*[57] Innes CJ said: "*(A) refusal to give reasons might be an important element in deciding whether the decision had been bona fide, or whether it had not been influenced by ulterior or improper motives*". Similar sentiments were expressed in *Mafuya and Others v Mutare City Council*[58] where it was said

[57] 1907 TS 1046 at 1052.
[58] 1984 (2) SA 124 (ZH) (per Dumbutshena JP).

'*The refusal to give reasons is in itself evidence of bad faith*". See also *Transnet Ltd v Goodman Brothers (Pty) Ltd*.[59]

[54] Whether the conduct complained of is reasonably capable of injuring the plaintiff's dignity must be assessed in the light of the principles enunciated in *De Lange*. Applying that test the cause of action reveals the following: The only "*overt act(s)*" complained of is the refusal to furnish the plaintiff with the reasons for his non-appointment and copies of the minutes. There is no suggestion that any of the letters of refusal contained any language of an offensive or insulting nature. So far as the failure to respond to the plaintiff's letters constitutes an "*overt act*" there is no suggestion that such failure was accompanied by any other conduct of an insulting or offensive character. Objectively viewed, (that is applying the criterion of reasonableness) there is nothing inherent in the mere refusal to capitulate to the plaintiff's demands or the failure to answer his demands which could be characterised as being of an offensive or insulting character.

[55] The legal convictions of the community do not demand that the plaintiff be afforded a right of action in damages by reason of the irregularity complained of. To recognise such claim would open the floodgates to litigation. The likelihood is that state officials and those who exercise public power will be faced with a deluge of unmeritorious claims. The plaintiff submits that the fear of an adverse costs order, the application of *de minimis*

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[59] 2001 (1) SA 853 (SCA) at 867D-G.

principle and the placing of the onus of proof upon the plaintiff or applicant would serve to deter those who seek to institute trivial and unmeritorious claims. Regrettably, I do not share the plaintiff's optimism. One's experience sitting in this court proves otherwise.

[56] The plaintiff had several effective alternative remedies at his disposal. The plaintiff's request for reasons for his non-appointment to a Chair of Law was initially made on 11 February 2000. At that date the plaintiff's right of access to information was governed by sections 32(1) and 33(2) of the Constitution[60]. He could have applied under the Constitution for reasons for the decision. Moreover, had the plaintiff sought to review the decision not to appoint him to a Chair of Law he had the special procedure of rule 53 at his disposal which would have required the first defendant to furnish the record of the decision in question, as well as reasons.[61]

[57] My views in relation to Claim B are essentially the same as those expressed in relation to Claim A. The authorities to which I have referred in relation to the question of the availability of a remedy in damages in relation to Claim A are of equal application to the exception to Claim B, and do not bear repeating.

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[60] These provisions must be read subject to the transitional arrangements set out in Schedule 6. On 11 February 2000 neither the Promotion of access to information act 2 of 2000 nor the Promotion of Administrative Justice Act 3 of 2000 had come into effect.

[61] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660E-H.

[58] Given these considerations, I remain unpersuaded that anything in the Constitution would require the development of the common law to recognise a cause of action on the facts pleaded. I do not consider an award of damages to be an appropriate remedy in respect of the alleged infringement of the plaintiff's constitutional right or legitimate expectation to be furnished with the reasons for the decision of the Selection Committee not to appoint him to a Chair of Law. And nor, do I consider the first defendant's conduct to be unreasonable and negligent.

[59] In the result I hold that no cause of action is disclosed. The exception to Claim B (the ninth exception) must accordingly be upheld.

CLAIM C

[60] Claim C is based upon the publication of a letter by the second defendant and two others on 4 March 2002. The letter, written by way of e-mail, reads:

> "*Dear Andrew, I have just had a Professor Boraine from the University of Pretoria who has been trying to trace Mervyn Dendy. He claims to have asked in the Law School for telephone numbers etc. but not had much success. He claims that Dendy never answers his Wits number. Could we place supply him with a contact number/address? His cell number is 082 7748 960.*
>
> *On a related issue I have still received nothing from Dendy re the research report for the School of Law 7 yet. I am concerned that I have not received it because of failure of my email. If however, it is due to his non provision then I must tell you, and thereby him, that I find this a*

most unsatisfactory state of affairs for a senior member of the School's staff and that I would like the report by the end of the week.

Thanks,
Neil"

[61] The plaintiff alleges that this letter is defamatory in that, among other things, it implies that he was generally culpably neglectful of his duties as a member of the academic staff of the first defendant, and of the legitimate needs of academic colleagues at other universities to liaise or interact with him in relation to academic matters. It is further alleged that the passage implies that the plaintiff was in breach of his contract of employment in not spending a sufficient amount of his working time in his university office and that he neglected his duties by not submitting a research report for the School of Law timeously. It is also to be implied therefrom that the plaintiff acted in breach of his contract of employment in neglecting his administrative duties generally.[62]

[62] The defendant's submission is that the letter in question is simply not reasonably capable of bearing out the defamatory meanings alleged.

[63] The test on exception is whether a reasonable person of ordinary intelligence might reasonably understand the words of the letter to convey a meaning defamatory of the plaintiff.[63] A defamatory statement is one which

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62 Particulars of claim para 4.5.

63 *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) at 20F.

tends to lower the plaintiff in the estimation of right-thinking members of society generally.[64]

[64] No innuendo or secondary defamatory meaning is alleged. Accordingly, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning; this would include not only what the words expressly say, but also what they imply. The test is an objective one.[65]

[65] What constitutes the ordinary reasonable reader has been variously described in the cases. In *Johnson v Rand Daily Mails*[66] it was held that a reasonable reader is not "*an astute lawyer or a supercritical reader*". In *Die Suid-Afrikaanse Uitsaaikorporasie v O'Malley*[67] the reasonable reader was described as the fictitious, normal, balanced, right-thinking and reasonable person who is neither hyper-critical nor over-sensitive. More recently is has been held that the Constitution now also informs the characterisation of the reasonable person and the manner in which defamatory matter must be assessed. This is because the Constitution protects freedom of expression as well as dignity. See in this regard *Rivett-Carnac v Wiggins*.[68]

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64 *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A) at 703H-I.
65 *Demmers v Wyllie and Others* 1980 (1) SA 835 (A) at 842A-B; *Argus supra* at 20F-G.
66 1928 (AD) 190 at 204.
67 1977 (3) SA 394 (A) at 408D-E.
68 1997 (3) SA 80 (C) at 89H-90B; see also *Sokhulu v New Africa Publications supra* in para [7].

[66] It is submitted on behalf of the defendants that only a hypersensitive person, not willing to attribute to words their ordinary meaning, could attach a defamatory meaning to the letter. The hypothetical reasonable reader would view the letter as conveying no more than a request to assist a Pretoria colleague to get in touch with the plaintiff and an enquiry about the submission of a research report. I do not agree with this contention. The letter clearly implies that the plaintiff may have been neglectful of his duties by not submitting a research report for the School of Law. The letter was addressed to the third defendant, who was then the plaintiff's superior and attributes to the plaintiff an egregious breach of duty. That the allegation must be viewed in a serious light emerges from the letter itself in which the third defendant states: "*If however, it is due to his non-provision then I must tell you, and thereby him, that I find this a most unsatisfactory state of affairs for a senior member of the School's staff …*" The attribution to the plaintiff that he was neglectful of his duties is a statement which tends to lower him in the estimation of right-thinking members of society generally and is defamatory.

[67] Counsel for the defendants drew my attention to cases that emphasise the right to freedom of expression.[69] These cases are distinguishable. In each instance the party defamed was a politician and the right to freedom of expression arose in the context of ensuring open, responsive and accountable government. No public purpose is served by denigrating the plaintiff in the eyes of his peers as is been done in the present case.

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[69] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608G-609A; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) in para [21].

[68] I consider the offending letter to be *prima facie* defamatory of the plaintiff and would accordingly dismiss the exception to Claim C (the tenth exception).

MISJOINDER

[69] This exception can be readily disposed of. What falls to be considered is whether it is competent for the plaintiff to join Claims C, D and E.

[70] The matter is regulated by Rule 10, the relevant portion of which provides:

> "*10(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or any alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.*"

[71] An objection of misjoinder of causes of action will be well-founded only where all three of the following requirements are satisfied: (1) The defendants are separate and distinct (meaning that there are no common defendants); (2) each cause of action is separate and distinct and (3) there is no question of law or fact that is common to the separate causes of action.[70] Rule 10(3) requires that the questions of law and fact upon which the right to relief depends must be "*substantially*" the same. This means that the questions of

[70] Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 4th ed at 189 and the reference therein to *Ackermann v Pasquali and Montagu Divisional Council* 1913 CPD 296.

law and fact must "*in the main*" or in their "*principal essentials*" be "*essentially*" the same.[71]

[72] All of the claims have a common defendant in the fourth and fist defendant.[72] The first defendant is alleged to be vicariously liable for the actions of the second and third defendants. There can be no objection to the joinder of Claims C and D, which are against the same defendant. Although each of the causes of action is separate and distinct, there may be common questions of law or fact. The third defendant features in both Claims C and E. The allegation in Claim C is that on 4 March 2002 the second defendant published the e-mail message annexed marked "*MD1*" to the third defendant who was at the time the Head of the School of Law of the first defendant and to Mrs Moshina Cassim who was at the time the secretary to the third defendant. The question whether the defamatory e-mail was published to the third defendant is a matter that will probably arise for consideration at a trial in due course. A further aspect which according to the plaintiff might arise is whether there was a similarity between the malicious motives ascribed to the second defendant and those that are ascribed to the third defendant.[73] There is also a suggestion that the second and third defendants might have been acting in cahoots or might have been part of a conspiracy against the plaintiff.

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[71] *Dreyer and Others v Tucker's Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1224F-1225B.

[72] Particulars of claim paras 5.11.2 and 6.11.2.

[73] Particulars of claim paras 5.11.2 and 6.11.2.

[73] Convenience is a further relevant consideration. At common law a number of defendants may be joined whenever convenience so requires.[74] There is a reasonable prospect of an overlap of factual issues. Convenience dictates that it would be inappropriate to run the risk of conflicting judgments by different judges in different trials on issues that are common to all three actions.

[74] For these reasons there can be no objection to the joinder of Claims C, D and E. The misjoinder exception (the third to seventh exceptions) must accordingly be dismissed.

COSTS

[75] The general rule is that where the issues are separate and distinct each carries its own costs however, the rule is not invariably applied.[75] The following considerations compel me to depart from the general rule. Each of the parties has achieved a measure of success. Although the defendants raised ten exceptions to the plaintiff's particulars of claim, they have only succeeded in respect of two. In the circumstances it would be fair that each party be directed to pay its own costs.

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[74] *Morgan and Another v Salisbury Municipality* 1935 AD 167 at 171; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* 1980 (3) SA 415 (W) at 419E-F.

[75] See the discussion in A C Cilliers *Law of Costs* 3rd ed at paras 2.14-2.16.

ORDER

[76] It is ordered as follows:

76.1 The exception to Claims A and B is upheld. These claims are set aside. The plaintiff is given leave, if so advised, to file amended particulars of claim within one month.

76.2 The exception to Claims C, D and E is dismissed.

76.3 Each party is to pay its own costs.

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P BORUCHOWITZ
JUDGE OF THE HIGH COURT

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INSTRUCTED BY	WEBBER WENTZEL BOWENS
DATE OF HEARING	26 AUGUST 2003 AND 15 SEPTEMBER 2003
DATE OF JUDGMENT	5 APRIL 2005