IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:_____

In the matter between:

HENDRICK PIETER LE ROUX First Applicant

BURGERT CHRISTIAAN GILDENHUYS Second Applicant

REINARDT JANSE VAN RENSBURG Third Applicant

and

LOUIS DEY Respondent

AFFIDAVIT

I, the undersigned,

BURGERT CHRISTIAAN GILDENHUYS

do hereby make oath and say as follows:

1 I am a 21 year old male university student. I am the second applicant in this application for leave to appeal. I am duly authorised to depose to this affidavit on behalf of the first and third applicants.

2 The facts contained in this affidavit are, save where the contrary appears, within my personal knowledge and are to the best of my belief both true and correct.

3 Of necessity, a large part of this affidavit consists of legal submissions. Where I make these legal submissions, I do so on the advice of the applicants' legal representatives. I refer to the parties by their names or by their descriptions in the High Court.

INTRODUCTION

4 This matter arises out of a defamation claim brought by the respondent, Mr Dey, against the three defendants. The alleged defamation entailed the publication of an obviously manipulated photograph ("the picture"), more fully described below. A copy of the picture is attached as **Annexure A**.

5 The High Court found in favour of Mr Dey. It awarded him damages in the amount of R45 000, but ordered costs on the basis of the scale applicable in the Magistrates Court. A copy of the High Court judgment is attached as **Annexure B**.

6 The applicants, with the leave of the court *a quo*, were granted leave to appeal to the SCA. Mr Dey was granted leave to appeal the costs order.

6.1 In its judgment, the majority of the SCA upheld the claim of Mr Dey, for defamation and ordered the other two defendants and me to pay

damages in the amount of R45 000 and costs, including the costs of two counsel.

6.2 Griesel AJA dissented from the majority on the defamation claim, holding that the picture in question was not defamatory. He held, however, that the plaintiff had established a claim based on the impairment of his dignity.

7 A copy of the SCA judgment is attached as **Annexure C**.

8 At the time of the incident giving rise to Mr Dey's claim, the three defendants – Hendrick, Reinardt and I – were all pupils at a Pretoria high school. Hendrick was 15 at the time and in grade 9. Reinardt and I were each 17 at the time and in grade 11. Mr Dey was the Deputy Principal of the school.

SCA judgment at para 1

9 Mr Dey's claim arose from the picture which Hendrick created by copying and pasting photographs of Mr Dey's head and the Principal's head onto an existing picture.

10 Hendrick sent the picture by cell phone to his friend, who then sent it to me. A few days later, I printed out the picture in colour and showed it around on the playground. Reinardt placed it on a school notice board and it consequently came to the attention of Mr Dey.

SCA judgment at paras 2 - 3

11 The picture was patently a crude and obvious manipulation. It was immediately apparent to anyone who looked at the picture that it was not a true picture of Mr Dey or the Principal, but merely pictures of their heads cut out and pasted on top of another image. Indeed, the Principal chose not to sue for defamation and instead accepted our apology.

12 Despite recognising that anyone who looked at the picture would know immediately that it was not a true depiction of Mr Dey, the majority of the SCA found:

12.1 that the picture was defamatory of Mr Dey; and

12.2 that Hendrick, Reinardt and I had the requisite intention to defame Mr Dey.

13 These conclusions were based largely on the majority's finding that the picture was not objectively funny and that it consequently ridiculed Mr Dey.

14 In reaching these conclusions and in relying on the fact that it did not find the picture in question humorous, the majority of the SCA deviated from established South African case law dealing with the law of defamation. Its findings are also contrary to relevant foreign and international case law on this score – including decisions of the House of Lords and European Court of Human Rights in closely analogous situations.

15 Moreover, in upholding Mr Dey's claim the majority of the SCA developed the common law of defamation to provide, for the first time, that an individual defendant could have the required *animus inuriandi* (intention to injure) without any "*consciousness of wrongfulness*" of the conduct in question. This development overturned more than fifty years of well-established jurisprudence, including statements by this Court, to the opposite effect. In developing the common law in this way, the majority of the SCA relied only on the "*constitutional emphasis on the protection of personality rights*", without any reference whatsoever to the constitutional protection of freedom of expression.

16 This application therefore raises important constitutional issues concerning the manner in which the rights to dignity and freedom of expression should be balanced concerning the law of defamation, especially where the claim for defamation relates to an image or text that is quite obviously not a true depiction of the person concerned. Amongst the issues raised in this regard is the appropriate role to be played by the defence of "*jest*", a defence which has been recognised in our common law for close on a hundred years.

17 The SCA's judgment thus has far reaching implications beyond the scope of the present case. If its decision and reasoning were to stand, it would constitute a significant threat to all forms of satirical expression, whether pictorial or written.

18 In addition, it would result in an injustice in this case. For the reasons that follow, the defendants submit that the conclusion of the majority of the SCA that we defamed Mr Dey's was incorrect. In addition and in any event, however, we submit that the damages award upheld by the SCA involved a series of misdirections and violated our constitutional rights in light of three factors.

18.1 First, we attempted to apologise to Mr Dey, but were rebuffed on the basis that Mr Dey's legal advice was that he should not talk to us.

18.2 Second, we had already been subjected to significant punishment for the incident.

18.2.1 We had been subjected to disciplinary proceedings at school, in terms of which we were charged and found guilty. We each attended five Friday afternoon detentions and were forbidden from holding leadership positions and wearing honours colours.

SCA Record of Appeal at pp. 4, 62-63, 317

18.2.2 In addition, Mr Dey had, before instituting his action for defamation, instituted a criminal charge of *crimen iniuria* against us. As a consequence of this charge and in view of out ages, we were each subjected to correctional supervision in terms of section 72(1)(b) of the Criminal Procedure Act 51 of 1977. In this regard, we each carried

out 56 hours of community service, which we fulfilled by cleaning cages at the Pretoria Zoological Gardens.

SCA Record of Appeal at pp. 4, 6-8, 317

18.3 Third, at the time of the incident we were all children, aged between 15 and 17.

19 The SCA regarded this third factor as irrelevant to the question of damages. In respect of the first and second factors, the SCA rejected the argument that this should reduce damages. It concluded instead that "*all this was aggravating*".

SCA judgment at paras 42 – 46

20 In what follows, I deal first with the respects in which the SCA erred in upholding Mr Dey's claim and thereafter deal with the question of damages.

THE SCA ERRED IN UPHOLDING MR DEY'S CLAIM

21 I submit that the majority of the SCA erred in three main respects in upholding the claim for defamation.

21.1 First, it erred in holding that the picture was defamatory of Mr Dey.

21.2 Second, it erred in concluding that we had the necessary *animus inuriandi* in respect of any defamation.

21.3 Third, it erred in failing properly to consider the role played by the right to freedom of expression.

22 As I demonstrate, each of these issues involve constitutional issues or matters connected with constitutional issues.

The picture was not defamatory of Mr Dey

23 When it referred to the applicable law, the majority of the SCA set out the test for defamation correctly. It held in this regard as follows:

> *"It is well established that the determination of whether a publication is defamatory and therefore prima facie wrongful involves a two stage inquiry...The first is to determine the meaning of the publication as a matter of interpretation and the second whether that meaning is defamatory. To answer the first question a court has to determine the natural and ordinary meaning of the publication: how would a reasonable person of ordinary intelligence have understood it? The test is objective... A publication is defamatory if it has the 'tendency' or is calculated to undermine the status, good name or reputation of the plaintiff."*
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> **SCA judgment at paras 5-6 and 8**
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> ***Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at p.20-21**
>
> ***Mohammed v Jassiem* 1996 (1) SA 673 (A) at p.706-707**

24 However, in concluding that the picture was defamatory, the majority of the SCA did not apply this test. It did not consider or at any stage explain how, in the eyes of the reasonable viewer, the picture could tend to lower

the reputation of Mr Dey when it was obvious to any viewer that Mr Dey's head had simply been pasted onto a body that was not his.

25 Rather than focus on this question, as it ought to have done, the majority of the SCA wrongly tended to focus on whether the picture was an objectively funny or legitimate joke. It held that it was not and that consequently it was defamatory.

25.1 The majority of the SCA held in this regard as follows:

> *"There is nothing that, objectively speaking, indicates that the photo was perceived as a joke, let alone a legitimate one. Counsel could not explain the joke. People may have laughed, just as they laughed at someone being pilloried – not because it was funny but because of the humiliation of the victim. [The judgment goes on to quote Freud, Stern and the Encyclopedia Britannica on the nature of jokes.] In fairness to counsel, his ultimate submission was that although the photo was not objectively funny, it would have been for scholars who would have enjoyed the photo because it held the plaintiff up to ridicule, something I would have thought means that they would have interpreted the photo as being defamatory. As the learned judge said, even adolescents know where to draw the line between jest and ridicule. I therefore conclude that the photo was defamatory of the plaintiff and that its publication was wrongful."*
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> **SCA judgment at para 18**

25.2 Whether humour is something that can be objectively judged and the wisdom of courts attempting to do so has been questioned by our courts and others. Thus, as Sachs J held in ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB International*** **2006 (1) SA 144 (CC) ("*Laugh It Off*") at para 88**:

> *"At the same time it has frequently been emphasised that the courts should be extremely reluctant to evaluate a parody on the basis of whether they consider it to be funny. As the US Supreme Court said in Campbell:*
>
> > *'Whether, going beyond that, parody is in good taste or bad does not matter to fair use. As Justice Holmes explained, '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke...First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.'"*

25.3 Griesel AJA, in his separate judgment in the SCA in this case, dissented from the finding that the picture was defamatory. In doing so, he made reference to the judgment of Sachs J in ***Laugh It Off*** and held as follows:

> *"Trying to explain to others why we find certain jokes or situations humorous can be problematic. As it was graphically put by E B White: 'Humour can be dissected a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind.'*
>
> *...*
>
> *The fact that the court – and the plaintiff – may find the defendants' attempt at humour banal or in bad taste or unamusing is neither here nor there. This does not transform a bad joke into a defamatory statement."*
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> **SCA judgment at paras 53 and 58**

25.4 The concerns expressed by Sachs J and Griesel AJA are borne out in this case. The majority of the SCA appears to have found that the picture was not objectively funny on the basis that it and Mr Dey did

not consider the picture humorous. The following findings demonstrate this:

25.4.1 At paragraph 9 the majority of the SCA held that "*Jest is not legitimate...when in order to amuse yourself or to show off your wit, you say or do things which, considering the occasion or personal circumstances of another, would be insulting, offensive or degrading.*"

25.4.2 At paragraph 10 of its judgement, the majority of the SCA held that "*...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."*

25.4.3 Despite the evidence of the applicants, another pupil and a teacher from the school that they had considered the picture humorous, the majority of the SCA found that "*There is nothing that, objectively speaking, indicates that the picture was perceived as a joke, let alone a legitimate one. Counsel could not explain the joke."*

26 In any event, even if humour is capable of objective determination, whether or not something is objectively funny is not the test for defamation. The test for defamation is whether a publication would, in the eyes of the reasonable person, tend to lower the reputation of the plaintiff. As already indicated, the majority of the SCA at no stage explained how

this could be the case when it was obvious to any viewer that Mr Dey's head had simply been pasted onto a body that was not his.

27 By contrast, Griesel AJA emphasised, I submit correctly, that:

> *"As rightly observed by the trial judge, any person who looks at the picture would immediately observe that it is not in fact a photograph of the plaintiff and the principal, but rather the product of amateurish manipulation. One is also struck by the fact that the principal (who, incidentally, accepted the apologies of the defendants and did not take legal action against them) is depicted in the picture with a broad smile on his face, as if recognising the humour in the situation."*
>
> **SCA judgment at para 59**

28 The judgment of the majority of the SCA is inconsistent with the general principles of our law, foreign law and international law. Where it is obvious from the nature of a publication itself that it is not a true depiction of facts, then the publication does not give rise to a claim for defamation. This is either because, at the level of wrongfulness, the expression cannot be considered to bear a defamatory meaning or because the requisite intention is lacking. Thus, the SCA's conclusions run contrary to both our law and foreign law.

29 Whether relevant in relation to wrongfulness or intent, our courts have held that words which are spoken in jest are not defamatory. A publication will be considered to have been made in jest where the reasonable person would understand it not to have been meant seriously and consequently not to be a true statement of fact.

29.1 Thus ***Marsch v Leask*****,** which the SCA referred to in its judgment, concerned an action by one auctioneer against another. The plaintiff issued a public notice to the effect that he was going to hold sales on future occasions and that the details of the sales would be found on yellow print paper. The defendant stated in public "*Dit lieg Jij. Daardie geel papier beteken niks*."

29.2 Wessels J set forth the test as follows:

> *"If, therefore [the defendant] was to excuse himself that he merely spoke in jest, he must prove to the Court that it was in jest, and that the words must have been accepted as such by the bystanders. If, of course, it is as patent to the Court that the words could have been used in no sense other than as a joke, then the Court will not give damages. If, however, the Court comes to the conclusion that the words may have been used as a joke, but that it was not taken as such by the general public, and if the words by themselves can injure another person, then I do not think that the Court would be justified in holding, because a man utters dangerous words as he intends in a joke, that for this reason he is not liable in damages...It seems to me if the man says the words were used in jest he must prove that it could be taken up in no other light by a reasonable person."* (emphasis added)
>
> ***Marsch v Leask*** **1916 TPD 114 at 116**

29.3 Curlewis J concurred with Wessels J and held that if the defendant intended his comments to be a joke:

> *"[h]e must clearly establish it to the satisfaction of the Court. He must show that the circumstances were of such a nature that no reasonable man could look upon it as anything else than a joke."* (emphasis added)
>
> ***Marsch v Leask*** **1916 TPD 114 at 117**

29.4 Similarly, in ***Glass v Pearl* 1928 TPD 264 at 26**, the Court held, in an *obiter dictum*, that "*It is perfectly true, for example, that when words which, on the face of them are defamatory, are spoken in obvious jest the person uttering them will not be liable.*"

29.5 In ***Peck v Katz*** the Court held, in relation to a defence of provocation, that:

> *"It is conceivable that a defamatory statement may be made in such an obvious rage, that is, obvious to all bystanders, that none of them would attach the slightest value to the import of the statement. They would discount the allegations made as meaningless abuse uttered by a man who has lost his self-control or who does not want anyone to believe that what he is saying is intended to be a statement of fact... Defamation is defined as the lowering of the regard or fama of the complainant. No such result can be achieved all the bystanders dismiss the 'defamatory' words as nonsense...Similarly, I think, no delict can be attributed to a defendant who has uttered defamatory words about another but who was understood by the entire audience to have been merely joking. Many a true word may be spoken in jest, but if all the hearers fail to notice it, that must be the end of the matter."*
>
> (emphasis added)
>
> ***Peck v Katz* 1957 (2) SA 567 (T) at pp.572-573**

29.6 Thus, in our law, a defence of jest is dependent on whether the joke was perceived by the audience as not being a true statement of fact because it was not meant seriously. In circumstances where it was obvious to all viewers that the picture was not real, it is difficult to understand how the picture could be considered to be defamatory of Mr Dey and how the defence of jest could not succeed.

30 In foreign and international law, the position is also that a publication will not be considered to be defamatory if it is understood by readers or viewers not to convey a true depiction of fact.

30.1 In ***Charleston and Another v News Group Newspapers Ltd*** **[1995] 2 A.C. 65**, the House of Lords dealt with facts which are strikingly analogous to the facts of this case.

30.1.1 A newspaper reported on two actors whose faces had been superimposed onto on the near-naked bodies of models in pornographic poses for the purposes of a pornographic computer game. The newspaper report included a large photograph of one of the relevant scenes from the game and a headline which was capable of bearing a defamatory meaning if read on its own.

30.1.2 The House of Lords rejected the claim for defamation on the basis that the article as a whole made it clear that it was <u>not</u> the actors who were depicted in the photograph and that they had <u>not</u> consented to the use of their faces in the computer programme. The House of Lords held in this regard as follows:

> *"The ordinary reader could not have failed to read the captions accompanying the pictures. These made clear that the plaintiffs' faces had been superimposed on the actors' bodies. The plaintiffs had not themselves been indulging in the activities shown in the pictures. The ordinary reader would see at once that the headlines and pictures could not be taken at their face value and the reader's eye*

> *needed to travel no further than the 'victims' caption to smaller photographs, and to the second sentence, at the top of the article, to find the confirmation that the plaintiffs were 'unwitting' stars in the sordid computer game."*
>
> ***Charleston and Another v News Group Newspapers Ltd*** **[1995] 2 A.C. 65 at p.74**

30.1.3 This case makes clear that where, as in this case, a photograph is clearly not a real depiction of the person/s portrayed in it, it cannot be considered to be defamatory of the person/s concerned.

30.2 In ***Nikowitz and Verlagsgruppe News GmbH v Austria*****, [2007] E.M.L.R 8**, the European Court of Human Rights ("ECHR") was concerned with a criminal conviction for defamation in relation to a satirical and humorous article commenting on the injury of a national ski racing champion.

30.2.1 The article contained fictitious statements which were comically exaggerated to the effect that one of the champion's competitors was pleased about the accident and hoped that the champion might break his other leg.

30.2.2 The ECHR held that the article only speculated about the competitor's true feelings. The Court acknowledged that <u>if true</u> such feelings would seriously affect and damage the competitor's reputation, <u>but since it was clear from the article that the statements were not uttered at all</u>, the article remained within acceptable limits.

***Nikowitz and Verlagsgruppe News GmbH v Austria,* [2007] E.M.L.R 8 at paras 17, 25-26**

30.3 There is also other analogous case-law from foreign jurisdictions in which it was held that, where it is obvious from a publication that it does not convey true facts about a person, it cannot be considered to bear a defamatory meaning.

***Macleod v Newsquest (Sunday Herald) Ltd* 2007 Rep L.R. 5**

***Sheffield Wednesday Football Club Ltd v Neil Hargreaves* [2007] EWCH 2375 (QB)**

***Hustler Magazine v Falwell* 485 US 46 (1988)**

***New York Times, Inc v Isaacs* 146 S.W.3d 144 (Tex.2004)**

30.4 These cases support the conclusion that, where it would be obvious to anyone who looked at a publication that it is not a real depiction of the person portrayed in it, it cannot be considered to be defamatory of the person concerned.

31 Applying the case law referred to above, because the picture was obviously not a real depiction of Mr Dey, it would not be considered by the reasonable person to be likely to lower his reputation. Consequently it could not be said to defame him. The conclusion of the SCA majority to the contrary was therefore in error. For the same reason its conclusion that the picture was defamatory because it ridiculed Mr Dey was incorrect.

32 In the event that the judgment of the majority of the SCA were to stand, it would constitute, with respect, an extraordinary and far-reaching development of our defamation law. It would mean, at least in respect of images that were obviously not true, the bench-mark for whether such an image is defamatory is no longer whether the image would tend to lower the reputation of the plaintiff. Such a development would patently be at odds with the right to freedom of expression enshrined by section 16(1) of the Constitution, especially given the likely effects on cartoons and other satirical works.

33 In the circumstances and on this basis alone, this matter raises a constitutional issue worthy of this Court's attention.

The defendants lacked the necessary animus inuriandi

34 At common law, until the present decision of the SCA, the legal position regarding the requirement of intention in respect of defamation claims was clear.

34.1 Cases such as ***Pakendorf*** initially made clear that media defendants could not escape liability on the grounds that the publication was not intentionally injurious – that is there was strict liability. This was later overturned in ***Bogoshi*** where a reasonableness defence was introduced for media defendants.

Pakendorf en Andere v De Flamingh **1982 (3) SA 146 (A)**

National Media Ltd and Others v Bogoshi **1998 (4) SA 1196 (SCA)**

34.2 However, both ***Pakendorf*** and ***Bogoshi*** concerned only media defendants and their reasoning explicitly addresses itself to the position and effect of media defendants – not individual defendants. They therefore left unchanged the position that individual defendants who do not have the requisite *animus iniuriandi* are not liable for defamation.

Maisel v Van Naeren **1960 (4) SA 836 (C)**

Suid-Afrikaanse Uitsaaikorporasie v O'Malley **1977 (3) SA 394 (A)**

34.3 The position is the same in respect of actions based on the *actio iniuriarum* for breaches of privacy rather than defamation.

34.4 Moreover, at all times it was clear that to have *animus inuriandi*, the defendant had to have "*consciousness of unlawfulness*" or "*coloured intent*". As this Court explained in ***Khumalo v Holomisa:***

> *"one of the aspects of animus injuriandi (the intention to cause injury) is subjective intent which, amongst other things, requires the person who made the defamatory statement to have been 'conscious of the wrongful character of his act'.*
>
> ***Khumalo and Others v Holomisa*** **2002 (5) SA 401 (CC) at para 20**
>
> **See also:** ***Suid-Afrikaanse Uitsaaikorporasie v O'Malley*** **1977 (3) SA 394 (A) at 403C-D**
>
> **Neethling's Law of Personality (2nd ed, 2005) at 163**

35 The judgment of the majority of the SCA in the present matter has fundamentally altered this position. After making reference to various common law cases on the issue, the SCA concluded:

> "*I therefore conclude, especially in view of precedent and the constitutional emphasis on the protection of personality rights, that the animus iniuriandi requirement generally does not require consciousness of wrongfulness (wederregtelikheidsbewussyn*)."
>
> **SCA judgment at para 39**

36 This development of the common law by the SCA is startling for two reasons.

36.1 First, because it alters an important component of defamation law that has been accepted by our courts (including this Court) for well over fifty years.

36.2 Second, and critically, because the SCA makes reference to and relies on the "*constitutional emphasis on the protection of personality rights*" in its development of the common law. Yet it makes no reference at all to the constitutional protection of freedom of expression and the need to consider this too in developing the common law.

37 This is plainly inconsistent with this Court's jurisprudence. It has held that it is not permissible, in developing the common law in accordance with section 39(2) of the Constitution, simply to carve out those provisions that

are favourable to one right-holder. Rather, the interests of other holders of rights – such as the right to freedom of expression – must be taken into account in the balancing exercise.

***Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) at para 37**

38 The SCA's development of the common law on *animus inuriandi* went further. It overturned its own obiter dictum in ***Herselman NO v Botha* 1994 SA 28 (A)** that jest on the part of the defendant excluded *animus inuriandi*. It went so far as to hold that the jest went only to motive and "*if a joke is degrading the defendant's motive does not matter*" (at 40). In this regard too, it made no reference at all to the constitutional protection of freedom of expression and the need to consider this in developing the common law.

39 It is notable that both of these developments were necessary for the SCA to conclude that the defendants had the necessary *animus inuriandi* to be liable to Mr Dey. This is because the SCA had "*some difficulty*" with the High Court's conclusion that the defendants had the necessary "*coloured intent in the sense of consciousness of wrongfulness*".

SCA judgment at para 41

40 I submit that the SCA erred in both of these developments and that, at the very least, such developments warrant re-consideration by this Court.

41 This is particularly because of the far-reaching consequences of the first of these developments. These consequences flow from the fact that an action under the *actio iniuriarum* is fundamentally different to other delictual claims, in that the lawfulness or unlawfulness of a particular action will not always be obvious to an individual. It will often require a detailed and nuanced understanding of the relevant legal principles involved.

41.1 For example, an individual can easily and legitimately be expected to recognise when it is unlawful for him or her to damage another's property or person. However, it is much more difficult for that individual to realise precisely when and under what circumstances a joke or legitimate robust criticism crosses the line and becomes unlawful defamation.

41.2 This is because our law relating to defamation is complicated and nuanced. In particular, debates over when particular defences might be available are complex and sophisticated. Indeed, issues of unlawfulness in this area are often the subject of lengthy debate between legal practitioners before our courts and even between courts. This case demonstrates precisely the difficulties in drawing the lines in this regard.

41.3 What this means, in practical terms, is that the abolition by the SCA of the "*consciousness of unlawfulness*" requirement may well ultimately lead to individuals engaging in self-censorship, deciding

not to speak even in circumstances when, objectively considered after the fact, it might have been reasonable and lawful for them to do so. This raises an obvious chilling effect for legitimate expression.

42 In the circumstances and again on this basis alone, this matter raises a constitutional issue worthy of this Court's attention.

The failure to take account of the right to freedom of expression

43 The right to freedom of expression is guaranteed by section 16(1) of the Constitution. This Court has repeatedly emphasised the critical importance of this right. It has also stressed that expression which is not specifically excluded from protection under section 16(2) of the Constitution is protected under section 16(1) and can only be limited to the extent that such limitation is justifiable under section 36 of the Constitution or to the extent proportional to the limitation of another right. The closer expression is to the core of the right to freedom of expression, for example expression that is in the public interest, the more pressing must be the reason for its limitation.

> ***Islamic Unity Convention v Independent Broadcasting Authority and Others*** **2002 (4) SA 294 (CC) at para 33**
>
> ***De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*** **2004 (1) SA 406 (CC) at paras 47-48**

44 The expression which is at issue in this case, the picture, clearly does not fall within the categories of expression excluded from protection under section 16(2) of the Constitution. At the same time it cannot be said to be at the very core of the protection afforded under section 16(1). Therefore, whilst it can more easily be limited than expression which is closer to the core of the right to freedom of expression, its limitation must still be proportional and justifiable.

45 It is also trite that the law of defamation involves a balancing of the right to dignity and the right to freedom of expression.

> ***Khumalo and Others v Holomisa*** **2002 (5) SA 401 (CC) at para 28**

46 Despite this, the majority of the SCA paid scant attention to the right of freedom of expression. Its approach in this regard was reminiscent of its approach in the ***Laugh It Off*** case.

46.1 In ***Laugh It Off***, the SCA found that the relevant statutory provision had to be viewed through the prism of the Constitution. Yet, in deciding whether the expression was in contravention of the relevant statutory provision, the SCA wrongly first enquired into whether the expression was unfair and materially harmful and then found that freedom of expression did not afford it any protection.

> ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB International*** **2006 (1) SA 144 (CC) at para 43**

46.2 In the present case the SCA paid even less heed to the right to freedom of expression. It at no point referred to our right to freedom of expression, save for a brief reference in the context of debating quantum, while it dealt at length on Mr Dey's right to dignity. This was presumably because, as in ***Laugh It Off***, it found the expression to be so inappropriate that it felt it unnecessary to consider the applicants' rights to freedom of expression. Yet a constitutional application of the law of defamation requires a weighing of the applicants' rights to freedom of expression with Mr Dey's right to dignity.

> ***Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a SABMARK International*** **2005 (2) SA 46 (SCA) at para 26**

47 Thus the majority of the SCA committed the same error as in ***Laugh It Off***. It censured expression which it found unsavoury and morally reprehensible without a legal basis for doing so. This Court warned against such an approach as follows:

> *"It is appropriate to observe that the mere fact that the expressive act may indeed stir discomfort in some and appear to be morally reprobate or unsavoury to others is not ordinarily indicative of a breach of [the relevant statutory provision.] Such a moral or other censure is an irrelevant consideration if the expression enjoys protection under the Constitution. Of course freedom of expression is not boundless but may not be limited in a manner other than authorised by the Constitution itself such as by the law of defamation. The constitutional guarantee of free expression is available to all under the sway of the Constitution, even where others may deem the expression unsavoury, unwholesome or degrading."*
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> ***Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB International*** **2006 (1) SA 144 (CC) at para 55**

The reliance by Griesel AJA on the impairment of the plaintiff's dignity

48 As already indicated, Griesel AJA dissented from the majority's finding that the picture was defamatory and would have dismissed that aspect of Mr Dey's claim (para 63). I submit that his judgment was correct on that score.

49 However, Griesel AJA went on to find, in a single paragraph, that Mr Dey ought to have succeeded in his claim based on the impairment of his dignity (at para 65). While it is not necessary to deal with this issue in any detail given that it forms part of a minority judgment, for the sake of completeness I deal with how Griesel AJA erred in this part of his judgment.

49.1 Griesel AJA stated, relying on ***Delange v Costa* 1989 (2) SA 857 (A)**, that "*essentially, the concept of dignitas is a subjective one*" and relied on how Mr Dey "*subjectively experienced the picture*". This led to his conclusion that Mr Dey's dignity had been impaired.

49.2 However, in doing so, Griesel AJA misstated the law, including the effect of ***Delange v Costa*.** Since that decision it has been clear that for an impairment of dignity to take place, not only must the plaintiff feel subjectively insulted, but the behaviour seen <u>objectively</u> must also be of an insulting nature. As the Appellate Division made clear in ***Delange***:

> "*Because 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 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.

…

In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness … 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."

***Delange v Costa* 1989 (2) SA 857 (A) at 862A-I (emphasis added)**

See also: *Dendy v University of Witwatersrand and Others* 2007 (5) SA 382 (SCA) at paras 6, 16 and 24

Neethling's Law of Personality (2nd ed, 2005) at 194 - 195

49.3 The conclusions of Griesel AJA on impairment of dignity therefore stand to be rejected. There is, I submit, no basis for a conclusion that, objectively speaking, the picture impaired Mr Dey's dignity.

49.4 The evidence itself indicates that Mr Dey's reaction to picture was not reasonable.

49.4.1 Mr Dey testified that the school viewed the picture less seriously than he did. Thus, the school charged us with "*bad behaviour*" which is not a particularly serious offence under the school's code of conduct.

SCA record pp.68-73

49.4.2 Moreover, the Principal chose not to sue for defamation and instead accepted our apology.

49.4.3 Furthermore, it appears that the aspect of the picture that Mr Dey found most upsetting was that, in his view, it implied that he was gay. This appears from different aspects of his testimony, in particular his testimony that when he found out previously that someone had circulated a pamphlet with the words "*Dey is Gay*", he also responded to that incident by laying a criminal charge against the perpetrators who were never subsequently identified.

SCA record pp.135-137

49.4.4 I submit that this is not a reasonable response under the Constitution in view of the fact that it prohibits discrimination on the basis of sexual orientation.

See: ***Sokhulu v New Africa Publications Ltd and Others*** **2001 (4) SA 1357 (W) at para 6**

NM and Others v Smith and Others (Freedom Of Expression Institute as Amicus Curiae) **2007 (5) SA 250 (CC) at para 48**

THE SCA ERRED IN UPHOLDING THE DAMAGES AWARDED TO MR DEY

50 Even if this Court were to find that the SCA did not err in finding that the picture was defamatory of Mr Dey, it should lower the damages awarded substantially and award only nominal damages.

51 Though this Court has not finally decided the issue, it has given a strong indication that the assessment of damages in a defamation suit is a constitutional issue.

> ***Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paras 53-54 and 92-94**

52 I submit that that SCA misdirected itself in three respects regarding the quantum of damages. Those respects are as follows:

52.1 First, we attempted to apologise to Mr Dey.

52.2 Second, we had already been subjected to significant punishment for the incident.

52.2.1 We had been subjected to disciplinary proceedings at school, in terms of which we were charged and found guilty. We each attended five Friday afternoon detentions and were forbidden from holding leadership positions and wearing honours colours.

SCA Record of Appeal at pp. 4, 62-63, 317

52.2.2 In addition, Mr Dey had, before instituting his action for defamation, instituted a criminal charge of *crimen iniuria* against us. As a consequence of this charge and in view of out ages, we were each subjected to correctional supervision in terms of section 72(1)(b) of the Criminal Procedure Act 51 of 1977. In this regard, we each carried out 56 hours of community service, which we fulfilled by cleaning cages at the Pretoria Zoological Gardens.

SCA Record of Appeal at pp. 4, 6-8, 317

52.3 Third, at the time of the incident we were all children, aged between 15 and 17.

53 In respect of the first and second factors, the SCA rejected the argument that this should reduce damages. It concluded instead that "*all this was aggravating*". I submit that, in this regard, the SCA erred and misdirected itself.

SCA judgment at paras 42 – 46

53.1 The SCA considered our attempt to apologise to Mr Dey to be an aggravating factor because the attempt was made "*long after the event and on the advice of a third party*" and because, in its view, the manner in which we gave evidence indicated that we were "*disrespectful towards the plaintiff, had no remorse and did not wish to apologise*" and were consequently "*arrogant*".

SCA judgment at para 45

53.2 The SCA's conclusion that our apology was insincere was not justified on the facts.

53.3 It is correct that we attempted to apologise on the advice of a social worker, in the context of the criminal proceedings against us that had been instigated by Mr Dey. It is not at all clear why this renders our attempted apology insincere.

53.4 When we apologised, Mr Dey refused to talk to us, apparently on the basis of legal advice not to do so. We were consequently not afforded a proper opportunity to apologise. We could only offer our hurried apologies and leave. To find that we were arrogant for doing so is to punish us for Mr Dey's unwillingness to address the situation in a non-litigious manner.

SCA record pp. 293-294, 236, 318

53.5 The SCA's finding that the manner in which we conducted our defence showed that our apology was insincere was also not justified on the facts. Quite apart from the fact that we had already been punished at school-level and pursuant to the criminal justice system (as I have explained above), the fact was that Mr Dey's defamation claim sought a damages award of R300 000 against us. In the circumstances, we had no option but to defend the action vigorously and, in doing so, to exercise our right of access to courts.

53.6 In ***Dikoko***, Mokgoro J and Sachs J recognised the restorative potential of an apology in a defamation case and the constitutional value of such because of its ability to restore dignity without chilling freedom of expression. Whatever the SCA's views of our attempted apology, there was no basis for it to find that this was "*aggravating*" as it did.

> ***Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paras 64-66, 119-120**
>
> **See also*:*** ***Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) at paras 21-24**

53.7 Moreover, even if the attempted apology were to be regarded as insincere, I cannot understand why the punishment we had already suffered, including as part of the criminal justice system at the behest of Mr Dey, should not have been taken into account and, indeed, should have been regarded by the SCA as "*aggravating*".

54 In respect of the third factor, our ages, I cannot understand why the SCA regarded this as legally irrelevant.

54.1 Section 28(2) of the Constitution recognises that the best interests of children are paramount in all matters concerning children. Moreover, and critically, our Constitution and criminal justice system accept that youth is a mitigating factor in relation to criminal sentence, for very serious offences. Once this is so, I cannot understand why the position should be any different for civil wrongdoings of a far less serious nature. This is particular the case

given that the Constitution draws a sharp distinction between children and adults "*not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability*" and the fact that children's "*ability to make choices [is] generally more constricted, than [that] of adults.*"

***Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 26**

54.2 These considerations should apply equally in the civil context, particularly where the claim for damages is for a solatium – not actual compensation for damages suffered and losses incurred – as is the case in the defamation context.

CONCLUSION AND CONDONATION

55 In all the circumstances, I submit that the present matter raises a series of important constitutional issues. Moreover, the effect of the SCA judgment goes far beyond the present case. It will affect the extent to which satirical expression is permitted in our law in a wide range of contexts. I therefore submit that it is in the interests of justice for leave to appeal to be granted.

56 There is one remaining issue, relating to the late filing of the present application. Under, this Court's Rules, it was required to be filed within 15 days of the SCA judgment. It is in fact being filed 3 days after this period expired.

57 The reason for the late filing is that, Hendrick, Reinardt and I initially took the view that we were simply unable to pursue an appeal in this Court. This was because, in view of the damages award of the SCA, the costs order by the SCA (estimated to be in the region of R600 000) and our own legal costs to date, we simply did not have the funds to do so. If we had the funds, we would certainly have done so immediately.

58 Our situation changed approximately a week after the SCA judgment was handed down when it proved possible to find attorneys and counsel who were well-versed in this area of law and were prepared to act pro bono for us in this matter. Once this was so and after a consultation with the attorneys and counsel, we immediately opted to pursue this application.

59 However, the attorneys and counsel in question had not previously been involved in the matter. It was therefore necessary for them to consider the trial record and conduct the necessary research, including on the foreign law, to prepare this application. In view of this and given their existing professional commitments, this application is being filed three days late.

60 On behalf of the applicants, I apologise to this Court and Mr Dey for any inconvenience caused by this slight delay. I submit that a proper explanation has been given for this delay and pray that condonation be granted.

WHEREFORE the appellants pray for an order in terms of the Notice of Motion.

_____

DEPONENT

I certify that on the ___ day of April, 2010 and at _____, the above deponent appeared before me and acknowledged to me that he knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn to in my presence in accordance with the requirements of Regulation No. R1428 dated 16 November 1984, as amended, which have been fulfilled.

_____

COMMISSIONER OF OATHS